Sex/Gender Segregation: A Human Rights Violation, Not a Protection

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ABSTRACT: This Article argues that human rights law should be interpreted to prohibit sex/gender segregation in all contexts, including education, employment, bathrooms, prisons, and sports, because of the gendered harms it produces. Prohibiting sex/gender segregation would constitute a departure from the current approach of international and regional human rights mechanisms, which has been to discourage sex/gender segregation in education and employment, require it in bathrooms and prisons, and devote little attention to it in other contexts, such as sports. This departure is needed because sex/gender segregation, no matter the context, perpetuates and reinforces gender stereotypes to the detriment of everyone, especially women and LGBTI persons. Since international law requires States to modify harmful gender stereotypes and eliminate wrongful gender stereotyping, States have an international obligation to eliminate sex/gender segregation regardless of the context in which it occurs. Common arguments in favor of sex/gender segregation, arising out of protection, choice, and culture, do not prevent human rights mechanisms from finding that international law prohibits sex/gender segregation, but these concerns should be taken into consideration when proceeding toward the elimination of sex/gender segregation. Implementation of this prohibition on sex/gender segregation will need to be gradual and context-specific.

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INTRODUCTION

Caster Semenya is used to having her identity questioned.¹ Before races, opponents would often scrutinize the South African Olympic runner’s appearance—her jawline, her build—and Semenya “became accustomed,” the New Yorker reported, “to visiting the bathroom with a member of a competing team so that they could look at her private parts and then get on with the race. ‘They are doubting me,’ she would explain to her coaches, as she headed off the field toward the lavatory.”² At the World Championships in Berlin in 2009, 

speculation about Semenya’s body combined with improved performance times led the International Association of Athletics Federation (IAAF, now World Athletics) to conduct gender verification testing, revealing that Semenya had elevated testosterone levels natural to an intersex woman. The IAAF banned Semenya from competition unless she artificially altered her testosterone levels, initially telling her she needed to undergo surgery to remove the undescended testicles producing the testosterone. To comply with IAAF regulations, Semenya spent six years taking hormones, medication unnecessary to her health, and experienced side effects including headaches and nausea. Then, in 2015, she challenged the IAAF’s requirement that she alter her testosterone levels in order to compete. Semenya’s case has prompted many scholars from a variety of disciplines to question not only gender verification testing in sport as an invasive, sexist, and racist practice, but also the...


5. Semenya, supra note 1.


7. Semenya, supra note 1.

8. Id.

9. Gender verification testing is considered sexist because only athletes competing in women’s sports are subject to this testing, and racist because athletes from the Global South are disproportionately subject to the testing and disproportionately fail this testing. Madeline Burghardt, Bodies, Borders, and Caster Semenya: Geocorporeality and the Disciplinary Work of Imaginary Geographies, 29 GENDER, PLACE & CULTURE 372, 387 (2022); Krystal Batelaan & Gamal Abdel-Shehid, On the Eurocentric Nature of Sex Testing: The Case of Caster Semenya, 27 SOC. IDENTITIES 146, 146–47 (2021); Anais Bohoua, Gender Verifications in Sport: From an East/West Antagonism to a North/South Antagonism, 32 INT’L J. HIST. SPORT 965, 973–75 (2015); Katrina Karkazis & Rebecca M. Jordan-Young, The...
They have begun to imagine the possibility of organizing sport around other criteria that they consider more inclusive and fair.¹²

Mechanisms of international and regional human rights law have also addressed the harms to Semenya,¹³ but have refrained from questioning sex/gender segregation in sport or even, in the case of the European Court of Human Rights (ECtHR),¹⁴ have reinforced it. On July 11, 2023, the European Court of Human Rights (ECtHR) found that Switzerland had violated Semenya’s rights to private life, non-discrimination, and an effective remedy when it failed to provide adequate safeguards that would have ensured her ability to compete without having to artificially alter her naturally high level of testosterone.¹⁵ The ECtHR observed that Semenya had experienced

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¹⁰. For this Article’s definition of sex/gender segregation, see infra Part I.
¹². Silvia Camporesi & Mika Hämäläinen, A Local Criterion of Fairness in Sport: Comparing the Property Advantages of Caster Semenya and Eero Mänttyranta with Implications for the Construction of Categories in Sport, 35 BIOETHICS 262, 268 (2021); Silvia Camporesi & Paolo Maugeri, Caster Semenya: Sport, Categories and the Creative Role of Ethics, 36 J. MED. ETHICS 378, 379 (2010); Jaime Schultz, Caster Semenya and the "Question of Too": Sex Testing in Elite Women’s Sport and the Issue of Advantage, 63 QUEST 228, 239 (2011).
discrimination on the basis of sex, since regulations subjecting athletes to
gender verification testing and any subsequent requirements arising out of these
tests apply only to women, as well as on the basis of sex characteristics,16 since
intersex women have an increased likelihood of being targeted for gender
verification testing and of failing these tests.17 However, the ECtHR did not
question the ordering of sports along an imagined sex/gender binary. In his
concurring opinion, Judge Pavli suggested that to question the sex/gender
binary in this decision would be to step outside of the scope of the case and
perhaps also the role of the ECtHR.18 The sticking point in the majority
opinion, however, appears not to consist of concern about the appropriateness
of the court or the case for questioning the binary, but instead of a desire to
reaffirm the sex/gender binary. The majority stated that the ECtHR might rule
differently in future cases should it have the opportunity to consider measures
excluding trans women from women’s sports, because “the advantage [trans
women] enjoy is due to the inequality inherent in their birth as men,” part of
“their initial biological constitution,” and, “moreover, the treatment that they
are asked to follow in order to lower their testosterone level corresponds to an
adaptation of the treatment that is already prescribed to them.”19 The Court
found that the gender verification testing used to enforce sex/gender
segregation in sports had violated Semenya’s individual rights, but it

16. The term “sex characteristics,” as used in international human rights law, refers to “each
person’s physical features relating to sex, including genitalia and other sexual and reproductive
anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.” The
Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of
International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender
Expression, and Sex Characteristics to Complement the Yogyakarta Principles, at 6 (Nov. 10, 2017),
[https://perma.cc/4PPL-E892].

17. Semenya, supra note 15, ¶ 158. The ECtHR limited the scope of its intersecctional analysis by
deciding not to consider whether Semenya had experienced discrimination on the basis of race, ethnic
origin, or color, merely remarking as an aside that women athletes of color, including those of African
origin, “are particularly stigmatized.” Id. ¶ 159 (author’s translation) (original French: “sont particulièremenst stigmatisées”). This stands in contrast with a third-party intervention from three United
Nations (UN) special procedures, which emphasized that this is a case of intersectional discrimination
on the basis of sex, sex characteristics, race, and national origin. Submissions on behalf of U.N. Special
Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical
and Mental Health; U.N. Working Grp. on Discrimination Against Women and Girls & U.N. Special
Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note
13, ¶¶ 43–48.


19. Id. ¶ 198 (author’s translation) (original French: “avantage dont elles bénéficient est dû à
l’inégalité inhérente à leur naissance en tant qu’homme”; “leur constitution biologique initiale”; “par
ailleurs, le traitement qu’il leur est demandé de suivre afin de faire baisser leur taux de testostérone
correspond à une adaptation du traitement qui leur est déjà prescrit”).
nevertheless maintained that sex/gender segregation as a system for regulating sports was necessary and natural.

It should not come as a surprise to those familiar with international law that the ECtHR opted to reinforce sex/gender segregation in the *Semenya* decision. Not only is there a dearth of human rights law and related scholarship that is critical of sex/gender segregation in particular, but international law has also been known, in general, to reinforce the sex/gender binary. Early texts of modern international law were written from about 1300 to 1800 by European jurists who reproduced and propagated their own culture’s insistence on the sex/gender binary (based on religious notions and ignoring existing evidence of gender diversity in Europe and elsewhere) and, relatedly, hierarchical sex/gender relations, as part of colonization. These early texts and the ideas in them, including the notion of a sex/gender binary, have been foundational to the work of centuries’ worth of international law advocates and scholars, including twentieth-century feminists. Developments in feminist theory to destabilize sex and gender have generally not been reflected in international law, which has for the most part retained the “traditional” understanding of these concepts, namely that “[g]ender is the social meaning

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given to the biological differences of sex.”

Today, an alliance of conservative actors and radical feminists promote the continuation of the law’s binaristic, woman-specific approach to sex and gender while contesting the rights—and, at times, the existence—of LGBTI individuals. Trans-exclusionary radical feminists, for example, have insisted that women’s oppression is rooted in biology and, following this, have argued in support of sex/gender segregation in sports, as well as in other contexts such as bathrooms and prisons.

This Article refutes the conservative approach to sex/gender segregation exemplified in the ECtHR’s Semenya decision and in the advocacy of trans-exclusionary radical feminists, arguing instead that human rights law requires States to eliminate sex/gender segregation in all contexts in which this practice is found. It observes that, no matter the context, sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy. In so doing, the Article aligns itself with the work of many feminists, including feminist scientists, to reveal sex and gender to be socially


25. In this Article, I use the term “LGBTI,” which stands for lesbian, gay, bisexual, trans, and intersex, because this is the acronym most commonly used by the UN and regional human rights systems. I am aware that LGBTI is, on its face, not the most inclusive acronym available, but I believe it can be employed—and has been so employed by human rights mechanisms—as an umbrella term that encompasses identities beyond those it expressly names.


28. Angela P. Harris defines gender essentialism as "the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 585 (1990). For more on essentialism and feminism, see NAOMI SCHOR & ELIZABETH WEEDE (eds.), THE ESSENTIAL DIFFERENCE (1994).

constructed political, economic, and performative categories whose effects vary based on their intersection with other structures of power such as class and race. This Article posits that human rights law contains the potential to destabilize the sex/gender binary (even if efforts to date in this direction have been limited and contested) when the law adopts a transformative approach that addresses the root causes of inequality. The Article also looks at how


33. Transformative equality is one approach to the right to equality and non-discrimination under international law, alongside formal equality and substantive equality. All these approaches are complementary and are often used in conjunction with each other. Formal equality aims for equality of treatment. Substantive equality, recognizing that historical oppression means that equal treatment is insufficient, aims for equality of opportunities and outcomes. Transformative equality likewise recognizes the existence of historical oppression (and thus is sometimes subsumed into substantive equality).
sex/gender segregation affects all individuals across the spectrum of sex/gender, in accordance with scholarship demonstrating that expansive, intersectional, and relational gendered analysis results in more consistent and robust promotion and protection of the rights of equality and non-discrimination for everyone.  

Part I defines sex/gender segregation as individuals’ exclusion from spaces or activities, or the separation of individuals within spaces or activities, on the basis of sex or gender. This exclusion or separation may be de jure or de facto. It may also be voluntary or involuntary. This definition does not, however, reach all instances of sex/gender classification. For example, temporary special measures based on sex/gender classifications would not be considered sex/gender segregation where they serve the purpose of inclusion and integration, as opposed to exclusion and separation. The exclusion or separation inherent in sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy.

Part II provides an overview of the current treatment of sex/gender segregation by United Nations (UN) and regional human rights mechanisms, observing that they have yet to develop a consistent and robust approach to the phenomenon. Generally, these mechanisms discourage sex/gender segregation in education and employment, require it in bathrooms and prisons, and devote little attention to it in other contexts, such as sports. Although the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (UN Independent Expert on SOGI) and equality, but focuses instead on combating the root causes of discrimination, including cultures of stereotyping and other social and institutional practices and systems. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25 on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures, ¶¶ 7–10, U.N. Doc. A/59/38 (Part I), annex 1 (Mar. 18, 2004). See also Jarlath Clifford, Equality, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 420, 427, 429–30 (Dinah Shelton ed., 2013); Simone Cusack & Lisa Pusey, CEDAW and the Rights to Non-Discrimination and Equality, 14 MELB. J. INT’L L. 54, 63–65 (2013).

34. See Cusack & Pusey, supra note 33, at 56, 84, 86–91; Miller, supra note 26, at 870–72; Otto, supra note 21, at 300, 315–18; see also Darren Rosenblum, Unsex CEDAW, or What’s Wrong with Women’s Rights, 20 COLUM. J. GENDER & L. 98 (2011). This broader analysis need not entail a diversion of attention or resources away from women. Eichert, supra note 22, at 591; Otto, supra note 21, at 309; Tweller, supra note 20, at 277–78.

35. "Temporary special measures" is the CEDAW Committee’s preferred term for affirmative action policies. See Comm. on the Elimination of Discrimination Against Women, supra note 33, ¶ 17.

36. Human rights bodies, at the international and regional levels, have created mandates for independent experts to investigate specific human rights situations, generally focused on a country or on a theme. Antje C. Berger, Special Rapporteurs of Human Rights Bodies, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Aug. 2013). The UN Independent Expert on SOGI is one such mandate, created by the UN Human Rights Council in June 2016. Hum. Rts. Council, Res. 32/2 (July 15, 2016).
the Inter-American Commission on Human Rights (IACHR)\textsuperscript{37} have interpreted human rights law to require the inclusion of intersex, trans, and gender-diverse individuals in these sex/gender-segregated spaces and activities in accordance with their gender identities, even these mechanisms have stopped short of questioning the ordering of society by sex/gender.

Part III synthesizes analyses of sex/gender segregation conducted by scholars of law, social science, and history, to provide a foundation for understanding segregation’s causes and effects across the various contexts in which this practice is found. The Part focuses in turn on each of the contexts to which international and regional human rights mechanisms have devoted significant attention thus far (employment, education, bathrooms, and prisons) as well as one area that they have only recently begun to examine (sports). It shows that, across all of these contexts, sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy, to the detriment of everyone, especially women and LGBTI persons.

Part IV proposes that human rights mechanisms interpret States’ obligations to modify harmful gender stereotypes\textsuperscript{38} and eliminate wrongful gender stereotyping to require the prohibition of sex/gender segregation in all contexts in which the practice is found. It argues that, instead of foregrounding context-specific provisions, human rights mechanisms should use wrongful gender stereotyping as the primary framework through which they evaluate and address sex/gender segregation across all contexts. This would result in more consistent and robust approach to segregation than currently exists (as outlined in Part II), as well as a more appropriate approach in light of sex/gender segregation’s role in perpetuating and reinforcing sex/gender essentialism, stereotyping, and hierarchy (as reviewed in Part III).

Part V responds to three sets of arguments for sex/gender segregation arising out of protection, choice, and culture, by evaluating whether each of these justifications constitutes a legitimate purpose and, if so, whether sex/gender segregation is a reasonable and proportionate means of achieving that end. Overall, this Part argues that protection, choice, and culture do not


\textsuperscript{38} The OHCHR defines “gender stereotype” as “a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women.” \textit{Gender Stereotyping as a Human Rights Violation, OFF. OF THE HIGH COMM’R FOR HUM. RTS.} 8 (Oct. 2013), https://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-a-HR-Violation.docx [https://perma.cc/Q3L2-ZVGA].
justify the creation or maintenance of sex/gender segregation, but that these factors should be taken into consideration when designing and implementing measures to eliminate sex/gender segregation.

The Article concludes by acknowledging that, even if human rights mechanisms use the wrongful gender stereotyping framework to interpret international law to prohibit sex/gender segregation regardless of the context, there will be significant obstacles to eliminating this phenomenon. Although the prohibition itself should be universal, implementation of the prohibition will need to be gradual and context-specific. The conclusion also flags that everyone, including human rights mechanisms, States, academics, and activists, has a role to play in the integration process.

I. Definition of Sex/Gender Segregation

For the purposes of this Article, sex/gender segregation is defined as individuals’ exclusion from spaces or activities, or the separation of individuals within spaces and activities, on the basis of sex or gender. This exclusion or separation may be de jure or de facto. It may also be voluntary or involuntary. This definition of segregation does not, however, reach all instances of sex/gender classification.\textsuperscript{39} For example, temporary special measures based on sex/gender classifications would not be considered sex/gender segregation where they serve the purpose of inclusion and integration, as opposed to exclusion and separation. The exclusion or separation inherent in sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy.

This definition is drawn in part from that of Monika de Silva, who observed that international law does not expressly define segregation and, based on a review of various human rights mechanisms’ approaches to the phenomenon, proposed the following definition: “separation of people that lacks reasonable justification.”\textsuperscript{40} I agree with de Silva that separation is “undoubtedly, an inherent and central element” of the definition of sex/gender segregation.\textsuperscript{41} I also agree with de Silva that there can be “as many different types [of separation] as there are aspects of life,” including “spatial, biological, social, educational, residential, occupational, in access to citizenship rights and property and in use of public facilities.”\textsuperscript{42} I have fleshed out the language of de

\begin{thebibliography}{9}
\bibitem{Footnote40} de Silva, \textit{supra} note 20, at 343.
\bibitem{Footnote41} Id.
\bibitem{Footnote42} Id.
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Silva’s definition (from “separation of people” to “individuals’ exclusion from spaces or activities, or the separation of individuals within spaces and activities”) to emphasize its broad scope. I also accept, per de Silva’s definition, that in practice international law has included within the scope of its work both de jure and de facto segregation, as well as both voluntary and involuntary segregation, as her findings are consistent with my own after having conducted a review of human rights mechanisms’ work specifically on sex/gender segregation. I also include both sex and gender as potential bases of segregation, as de Silva does, to capture all relevant instances of segregation, since in my research I found that the terms “sex segregation” and “gender segregation” are both used to reference the same phenomenon in law and scholarship. I do not intend to conflate sex and gender, nor to erase either ground, by using the phrase “sex/gender segregation.” On the contrary, my intent is to signal this Article’s expansive approach, which acknowledges both sex and gender to be, as the UN Independent Expert on SOGI has established, “indispensable points of entry for discrimination analysis” that bring into view “all those who are negatively affected by the patriarchal order.”

I depart from de Silva’s approach in my exclusion of her definition’s qualifying phrase: “lack of a reasonable justification.” I do not agree with de Silva that there exist any reasonable justifications that could prevent exclusions or separations on the basis of sex/gender from rising to the level of segregation. I am also concerned that sex/gender segregation can become so deeply culturally entrenched that there is a risk it will be seen as reasonable even when it is harmful, especially when those harms are not felt as potently by the dominant group(s). Reasonableness standards tend to reproduce dominant perspectives, neglecting minority and intersectional experiences and points of view. The reasonable person standard in U.S. tort law, for example,
reproduces the perspective of the white male jurists who created and first applied the concept. 51 This is not merely due to the expressly gendered origins of this legal concept as the reasonable man standard, 52 but also due to its reliance on the notion of reasonableness itself, since reasonableness operates to maintain the status quo and to perpetuate stereotypes. 53

De Silva’s example of what might constitute a “reasonable justification” reinforces my decision to reject this aspect of her definition. De Silva suggested that a “reasonable justification” standard would permit States to maintain the status quo in cases such as sex/gender segregation (in her words, “separation”) in bathrooms, since this practice, although criticized, is “ubiquitous” and “customarily defended by arguments of safety and comfort of its users, notably women.” 54 As will be argued later in this Article, sex/gender segregation perpetuates and reinforces harmful gender stereotypes in bathrooms, as it does in other contexts, and at the same time serves, at best, as only a proxy for measures furthering privacy and safety, which could be made much more targeted and effective using an inclusive and transformative approach to sex/gender. 55

Crucial, then, to this Article’s understanding of sex/gender segregation is this practice’s perpetuations and reinforcement of sex/gender essentialism, stereotyping, and hierarchy to the detriment of everyone, especially women and LGBTI persons. The more sex/gender-segregated a society, the more the categories “women” and “men” appear to be “natural” and “oppositional,” and their structuring of society “legitimate.” 56 Norms, both legal and social, justify sex/gender segregation by claiming that there are “simple and obvious differences between the sexes” that “naturally” require separation on the basis of sex/gender in a wide variety of settings. 57

54. de Silva, supra note 20, at 343.
55. See infra Sections III.C & V.A.
At the same time, sex/gender-segregated spaces socialize individuals—including men—to do or perform gender, incentive conformity with “rigid and traditional” stereotypes that do not necessarily reflect a given individual’s identity and experience of sex/gender. For example, sex/gender segregation perpetuates and reinforces hegemonic masculinity, which is difficult to describe as it varies across time and space, but, in the United States, is generally known to be “not feminine,” “heterosexual,” and “physically aggressive.” Women, in comparison, are stereotyped as weak and in need of protection.

Not only does sex/gender segregation contribute to the social construction of sex/gender identities, but it also signals that certain constructed identities are subordinate to others. For example, sex/gender segregation contributes to the hegemony of men by creating an environment in which men tend to form negative attitudes toward women and anyone else who does not conform to male gender norms (including some men), as well as by limiting outsiders’ access to men’s in-group knowledge. Women generally internalize this sex/gender hierarchy and sometimes limit their ambitions accordingly. Sex/gender segregation thus facilitates subordination of women to men, in private life as well as public life.

Although sex/gender segregation harms everyone, the harms to intersex, trans, non-binary, and gender-diverse individuals are most visible and most severe. Sex/gender segregation negates sex/gender diversity by ordering society as though intersex, trans, non-binary, and gender-diverse identities did not exist. At the same time as these gender identities are made invisible by legal and social norms, their visibility—as their very existence challenges these norms—is heightened, exposing intersex, trans, non-binary, and gender-diverse

58. Cohen, supra note 56, at 553.
59. Levit, supra note 49, at 517.
60. Cohen, supra note 56, at 512 (defining hegemonic masculinity as “the dominant ideal of masculinity that exists within a particular culture at a particular point in time”).
61. Id. at 523–24.
62. Id. at 522.
63. Epstein, supra note 57, at 208–09.
64. Cohen, supra note 56, at 519–20, 535.
65. Id. at 513 (defining the hegemony of men as “men’s dominant position in the gender hierarchy”).
68. Epstein, supra note 57, at 207.
69. Id.
71. Cohen, supra note 56, at 538.
individuals to violence and discrimination. The fact that sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy to the detriment of everyone, especially women and LGBTI persons, will be demonstrated in greater depth in Part III and will be foundational to my argument in Part IV.

II. HUMAN RIGHTS MECHANISMS’ CURRENT APPROACH TO SEX/GENDER SEGREGATION

Currently, international and regional human rights mechanisms do not have a robust approach to sex/gender segregation that consistently observes and addresses this phenomenon’s perpetuation and reinforcement of sex/gender essentialism, stereotyping, and hierarchy. Their assessment of sex/gender segregation, instead, has depended on the context in which the practice is found. Generally, human rights mechanisms call for the elimination of sex/gender segregation in employment (Section II.A) and education (Section II.B), and require the instatement of sex/gender segregation in bathrooms (Section II.C) and prisons (Section II.D). The harmful causes and effects of sex/gender segregation, which human rights mechanisms examine and denounce in the context of employment and education, are rarely mentioned in human rights mechanisms’ analyses of bathrooms and prisons. It is generally unclear whether the entities fail to observe sex/gender segregation’s harms across all contexts, or whether they consider that, in certain contexts, sex/gender segregation is harmful but nevertheless is justified as a reasonable and proportionate means of achieving a legitimate purpose. Human rights mechanisms also, for the most part, have failed to analyze instances of sex/gender segregation involving other spaces and activities, such as sports, which lately has received increased attention and inconsistent treatment from international and regional human rights mechanisms (Section II.E).

Before beginning, I should note that human rights mechanisms have yet to put forward comprehensive analyses of sex/gender segregation that clarify or justify their approach to the phenomenon. My observations are instead based on narrowly focused products, specific to one context (e.g., employment, education, bathrooms, prisons) and/or one country. I include within the scope of my analysis the work of UN treaty bodies, which monitor and interpret the nine principal international human rights treaties; UN special procedures with

72. Cohen, supra note 70, at 177–78.
73. For a more thorough introduction to, and application of, this test, see infra Part V.
relevant thematic mandates; the Office of the UN High Commissioner for Human Rights (OHCHR), which provides support to and coordinates the work of UN human rights bodies; and the regional human rights systems found in Africa, the Americas, and Europe, which interpret human rights instruments and investigate human rights violations within their respective jurisdictions. This Part prioritizes the work of the UN and the inter-American human rights systems because they have devoted more attention to sex/gender segregation than have the European and African human rights systems; nevertheless, where I have found relevant action from the European or African regional systems, I have included it.

Due to the limitations of space, my analysis in this Part does not include the work of other regional and international mechanisms beyond those already mentioned. I will, however, briefly note that this would be a fruitful avenue for future research and collaboration, especially since some of these other mechanisms have already begun to consider sex/gender segregation’s potential implications for human rights. The International Labour Organization, the World Bank, the Inter-American Commission of Women (CIM), the Inter-American Development Bank, the European Union, and the United Nations

75. See supra note 36 and accompanying text.
79. Oether & Cano Palomares, supra note 14; Frowein, supra note 14.
Educational, Scientific and Cultural Organization (UNESCO)\(^8\) have noted and at times critiqued segregation in employment and education. UNESCO and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) have observed that sex/gender segregation in sport perpetuates notions of masculine superiority and excludes trans, non-binary, and intersex athletes.\(^8\) The UN Refugee Agency (UNHCR) has required sex/gender segregation in immigration detention, with the exception of family units,\(^8\) while the United Nations Office on Drugs and Crime (UNODC) has observed that sex/gender segregation in prisons has resulted in the imprisonment of women far away from where they live, thereby disrupting their family ties more greatly than is the case for imprisoned men.\(^8\) These mechanisms’ positions on sex/gender segregation almost certainly have been, and will continue to be, informed by those of UN treaty bodies, UN special procedures, the OHCHR, and regional human rights systems, whose work on sex/gender segregation to date is detailed in the Sections that follow.

A. Employment

The UN treaty bodies have consistently and frequently expressed concern about sex/gender segregation in employment.\(^8\) They have observed this phenomenon across sectors of employment: both public and private, formal and

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informal.⁹⁰ They have concerned themselves with both de facto and de jure segregation.⁹¹ The treaty bodies have also devoted attention to both horizontal segregation (i.e., across professions and sectors) and vertical segregation (i.e., with respect to hierarchies internal to a specific workplace or sector).⁹² Concerning horizontal segregation, the treaty bodies have noted that women are often concentrated in sectors historically dominated by women, including the informal sector, part-time work, and low-paid jobs.⁹³ For example, the


Committee on the Elimination of Discrimination Against Women (CEDAW Committee) observed, in its concluding observations about Sweden in 2009 and the Netherlands in 2010, that women were concentrated in low-wage jobs in service sectors. Similarly, in its concluding observations on Oman in 2011, the CEDAW Committee noted that women primarily worked in the education and health sectors, and, in its concluding observations on Slovenia in 2015, the Committee expressed concern that women were overrepresented in education, health, human sciences, and social work, and underrepresented in mining, quarrying, and construction. With regard to vertical segregation, the treaty bodies have expressed concern that women are underrepresented in the upper echelons of leadership in their workplaces. The treaty bodies have observed that, in some countries, occupational segregation remains constant even as women attain higher levels of education, as compared to women’s historic levels of education and also as compared to the men competing with them for positions.

94. The CEDAW Committee interprets and monitors the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the only UN treaty solely focused on discrimination against women. Tueler, supra note 20, at 259 (arguing also for the expansion of CEDAW’s mandate to include all instances of sex/gender discrimination, regardless of the victim’s sex, gender, or gender identity). Each State Party is required to submit a report on its implementation of CEDAW every four years, beginning one year from the date of ratification, at which point the CEDAW Committee responds with its observations and recommendations. Anne Helium & Ingunn Ikladhi, Committee on the Elimination of Discrimination Against Women (CEDAW), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jan. 2019).


The UN treaty bodies have characterized sex/gender segregation in employment as an example of the inequality and discrimination women face in the labor market. The CEDAW Committee, in its 2007 concluding observations on Serbia, referred to occupational segregation as an aspect of "systemic indirect discrimination" against women. The treaty bodies have also observed that sex/gender segregation in employment is a result of other forms of discrimination, such as child marriage and, especially, gender stereotypes. For example, in its concluding observations on Bosnia and Herzegovina in 2013, the Committee on Economic, Social and Cultural Rights...
explained that occupational segregation “reflect[s] the stereotypical perception of roles of men and women in the family and society.” The treaty bodies have also identified sex/gender segregation as a factor that contributes to other forms of discrimination, including the gender wage gap and inequitable division of property upon divorce.

The treaty bodies have consistently recommended that States reduce and eliminate sex/gender segregation in employment. They have specified that de facto, as well as de jure, segregation must be eliminated. They likewise have stated that both horizontal and vertical segregation should be eliminated in all

104. The CESC is the UN treaty body that monitors and interprets the International Covenant on Economic, Social and Cultural Rights. Elbe Riedel, Committee on Economic, Social and Cultural Rights (CESCR), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Nov. 2010).


sectors, both public and private. The treaty bodies often have urged States to take measures to eliminate sex/gender segregation in employment that are proactive, concrete, and effective, including temporary special measures with time-bound targets and indicators. In particular, they have recommended that States evaluate existing laws and policies for discriminatory impact and amend them appropriately; adopt and effectively enforce laws prohibiting segregation and discrimination; increase, diversify, and adequately fund women’s opportunities for education and training; encourage women to


114. See, e.g., Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Report of Bosnia and Herzegovina, ¶ 36(b), U.N. Doc. CEDAW/C/BIH/CO/6 (Nov. 12, 2019); Comm. on the Elimination of Discrimination Against Women,
work in fields traditionally dominated by men, and vice versa;\textsuperscript{115} guarantee full parental leave across sectors and for those in positions of leadership;\textsuperscript{116} facilitate the transition from part-time to full-time employment;\textsuperscript{117} and modify harmful gender stereotypes;\textsuperscript{118} among other measures.\textsuperscript{119} For example, in its

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concluding observations on the Czech Republic in 2016, the CEDAW Committee recommended that the State eliminate sex/gender segregation in employment by enhancing efforts to encourage women and girls to select non-traditional educational and vocational choices and career options, according priority to the transition of women from part-time to full-time jobs and promoting full-time employment for women that is supported by adequate high-quality childcare facilities and the promotion of equal sharing of family and domestic responsibilities between women and men.  

The treaty bodies have also recommended that States conduct surveys of sex/gender segregation in employment to determine which of these measures are most needed, as well as to monitor both general trends in occupational segregation and the specific impact of measures taken to address it. Occasionally, the treaty bodies have additionally identified a subset of women to whom States should devote particular attention in their attempts to eliminate occupational segregation due to their experiences of intersectional

CEDAW/C/VCT/CO/4-8 (July 28, 2015); Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Slovenia, ¶ 30(b), U.N. Doc. CEDAW/C/SVN/CO/5-6 (Nov. 24, 2015).


discrimination, including young women in Lithuania,\textsuperscript{122} Poland,\textsuperscript{123} and Ecuador,\textsuperscript{124} and Afro-descendant and indigenous women in Brazil\textsuperscript{125} and Colombia.\textsuperscript{126}

The IACHR likewise has expressed concern about occupational segregation, both vertical and horizontal.\textsuperscript{127} The IACHR has observed that sex/gender segregation in employment is a barrier to women’s entry into workplaces.\textsuperscript{128} The IACHR also has noted that even when women are able to secure work, they are often concentrated in the informal sector, in low-paid jobs, and in jobs requiring traditionally “feminine” skills.\textsuperscript{129} In a visit to Bolivia in 2009, for example, the IACHR noted that women were concentrated in service and care work.\textsuperscript{130} The IACHR has also received reports from States concerning occupational segregation in their countries. Panama, for example, once reported to the IACHR that work in sectors dominated by men was perceived as valuable by society, whereas work in sectors in which women were concentrated was undervalued.\textsuperscript{131}

Overall, UN and regional mechanisms have succeeded in establishing that sex/gender segregation in employment violates human rights law and in calling on States to take a wide variety of measures to eliminate it. They have also recently begun to identify instances of intersectional discrimination when making observations and recommendations concerning occupational segregation. However, these mechanisms’ analyses of the relationship between stereotyping and segregation have thus far been limited to the occasional observation of a specific country context. Human rights mechanisms have also failed to analyze the effects of sex/gender segregation in employment on intersex, trans, non-binary, and gender-diverse individuals.


\textsuperscript{127} Inter-Am. Comm’n H.R., El trabajo, la educación y los recursos de las mujeres: La ruta hacia la igualdad en la garantía de los derechos económicos, sociales y culturales, OEA/Ser.L/V/II.143, doc. 59 ¶ 122 (Nov. 3, 2011).

\textsuperscript{128} Id. ¶ 83.

\textsuperscript{129} Id. ¶ 122.

\textsuperscript{130} Id. ¶ 122.

\textsuperscript{131} Id. ¶ 124.
B. Education

The UN treaty bodies and special procedures have addressed sex/gender segregation in education with less frequency than they have sex/gender segregation in employment, but with an otherwise similar approach. These mechanisms have expressed concern about the phenomenon, whether de jure or de facto. They have also at times noted that certain levels of education or areas of study have particularly high levels of segregation. For example, in its concluding observations on Russia in 2010, the CEDAW Committee expressed concern that girls primarily chose to study the humanities and boys primarily chose to study technical subjects. Likewise, in its concluding observations on Guyana in 2012, the CEDAW Committee noted with concern that women and girls were overrepresented in “traditionally feminized areas” of study, such as cooking and sewing.

UN treaty bodies and special procedures have also discussed the causes and consequences of sex/gender segregation in schools. As in the case of


occupational segregation, they have identified gender stereotypes as the root cause of sex/gender segregation in educational systems. They have also observed that the consequences of sex/gender segregation include fewer and/or under-resourced educational institutions for women and girls, fewer and/or lower-quality professional opportunities for women, and occupational segregation. These mechanisms have also suggested that sex/gender segregation in educational systems perpetuates gender stereotyping.

UN treaty bodies and special procedures have recommended that States prevent and reduce both de jure and de facto sex/gender segregation in education. In particular, they have recommended removing sex/gender-based

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137. See supra notes 103, 105, and accompanying text.
prohibitions or limitations on enrollment in educational institutions,\textsuperscript{144} encouraging women to study subjects historically dominated by men\textsuperscript{145} and ensuring their access to the same;\textsuperscript{146} and eliminating harmful gender stereotypes,\textsuperscript{147} among other, similar measures.\textsuperscript{148}

Generally, UN human rights mechanisms have neglected LGBTI perspectives and experiences when analyzing sex/gender segregation in education. An exception is the UN Independent Expert on SOGI, who has observed that sex/gender-segregated residential schools were a means of imposing the sex/gender binary on Indigenous peoples in colonial Canada.\textsuperscript{149}

In sum, UN human rights mechanisms have established that sex/gender segregation in education, like employment segregation, violates international law, but they have not devoted as much attention to this practice, suggesting a lack of appreciation of the phenomenon’s prevalence and severity. When UN mechanisms do comment on sex/gender segregation in education, they


generally recognize that stereotyping is both a cause and a consequence of segregated schooling, although, as with their observations about employment segregation, these observations have been limited to specific country contexts. Apart from the work of the UN Independent Expert on SOGI, the UN mechanisms have not considered the effects of sex/gender segregation on intersex, trans, non-binary, and gender-diverse individuals. I did not find any work by regional human rights mechanisms on sex/gender segregation in education.

C. Bathrooms

UN human rights mechanisms have taken an altogether different approach to sex/gender segregation in school bathrooms. The treaty bodies have not expressed concern about segregation in this context, nor have they called for its elimination. On the contrary, they have expressed concern when they find a lack of sex/gender-segregated bathrooms in schools and have called for States to institute sex/gender segregation in these bathrooms. The UN treaty bodies have suggested that a lack of sex/gender-segregated bathrooms could impinge on the right to education, as well as the right to equality and non-discrimination, by creating challenges with regard to menstrual hygiene that could lead girls to miss or drop out of school. The treaty bodies have


likewise called for sex/gender-segregated bathrooms in other contexts, including camps for internally displaced persons.153 The underlying rationale in the latter case is unstated, but presumably aligns with common arguments in favor of sex/gender segregation in bathrooms, including privacy and safety.154

UN human rights mechanisms generally have failed to analyze the ways in which sex/gender segregation in bathrooms might resemble occupational and educational segregation by perpetuating and reinforcing sex/gender essentialism, stereotyping, and hierarchy. There are a few exceptions to this trend. The UN Special Rapporteur in the field of cultural rights has observed that women’s participation in sporting events held at stadiums and other aspects of public life has been impeded by inadequate bathroom facilities.155 The UN Special Rapporteur on cultural rights did not, however, identify sex/gender segregation as the root of these inadequacies. Additionally, the UN Independent Expert on SOGI has observed that sex/gender-segregated school bathrooms are a site of harassment and violence against trans and gender-diverse children, and has recommended that States review and amend their policies concerning access to sex/gender-segregated spaces, including bathrooms.156 The UN Independent Expert on SOGI’s apparent aim, however, has not been for States to eliminate sex/gender segregation, but merely to ensure the inclusion of trans and intersex women in women-only spaces.157 The IACHR also has noted that trans and gender-diverse persons encounter problems in sex/gender-segregated contexts, including school bathrooms.158 The IACHR observed that in Panama, for example, trans boys have been barred from using the bathroom that corresponds to their gender identity, with implications for their rights to health and education.159 Again, the implied solution appears to be access for trans individuals to spaces that accord with their gender identity rather than the elimination of sex/gender segregation.

Although UN human rights mechanisms have established that sex/gender segregation in employment and education violates international law, they have taken the opposite approach to bathrooms, treating sex/gender segregation in

153. Comm. on the Rts. of the Child, supra note 151, ¶ 63(b).
154. See infra Sections III.C & V.A.
159. Id. ¶ 177.
this context as a protective measure that furthers women’s rights.\textsuperscript{160} This approach overlooks the fact that sex/gender segregation in bathrooms, as in employment and education settings, is both a cause and a consequence of wrongful gender stereotyping.\textsuperscript{161} In fact, the “protection” justification itself perpetuates harmful gender stereotypes.\textsuperscript{162} Additionally, on the rare occasion in which a human rights mechanism has identified harms arising out of sex/gender-segregated bathrooms, it has failed to identify sex/gender segregation itself as the root of the harm or to call for integration.

\textit{D. Prison}

In the context of prisons, unlike workplaces, schools, or bathrooms, there exists a general statement of law concerning sex/gender segregation for human rights mechanisms to apply. Rule 11(a) of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules, or the Mandela Rules), adopted by the UN General Assembly in 2015, provides that “[m]en and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.”\textsuperscript{163} Rule 7(a) of the Mandela Rules requires that information about an individual’s gender identity be collected upon admission to prison, but retains a binaristic framing (“his or her self-perceived gender”), neglects to explain how this information should be used in individual housing determinations, and does not alter the overall requirement in Rule 11(a) that prisons be segregated by sex/gender.\textsuperscript{164} Although UN General Assembly Resolutions are soft law, making the Mandela Rules persuasive rather than binding authority, UN human rights mechanisms have relied expressly on the Mandela Rules when discussing sex/gender segregation in prisons.\textsuperscript{165} Moreover, even when these mechanisms have not mentioned the Mandela Rules, their recommendations have aligned with Rule 11(a): they have asked States to report on sex/gender segregation in prisons.\textsuperscript{166}

\textsuperscript{160} See infra Sections III.C & V.A.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} G.A. Res. 70/175, at 10 (Dec. 17, 2015).
\textsuperscript{164} Id. at 9.
\textsuperscript{165} See, e.g., U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to Denmark, ¶ 58, U.N. Doc. A/HRC/10/44/Add.2 (Feb. 18, 2009). States may also rely directly on the Mandela Rules, in addition to binding human rights instruments, when implementing sex/gender-segregated regimes in prisons. See, e.g., Sam Lynch & Lorana Bartels, Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy, 19 Flinders L.J. 185, 212–23 (2017).
they have expressed concern when prisons are not segregated by sex/gender, and they have called for the institution of sex/gender-segregation in prisons. The treaty bodies have framed sex/gender segregation in prisons as a means of preventing sexual and gender-based violence. The Committee against Torture additionally has noted that trans women placed involuntarily in men’s prisons are at a particularly high risk of assault.

Even in the case of Denmark, where detained men and women reside (often voluntarily) in mixed-sex/gender prisons and find this arrangement beneficial, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on torture), has advocated for sex/gender segregation. The UN Special Rapporteur on torture, in a report on Denmark, “recall[ed] that international standards call for the segregation of men and women” and suggested, without citing specific studies or incidents, that “in some cases [non-separation] acts to reinforce male-female


171. The Special Rapporteur on torture observed that all persons in mixed-sex/gender prisons in Denmark and Greenland benefit from a social environment that approximates that of the outside world, lessened aggression, and less fraught same-sex/gender power dynamics. U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 165, ¶ 60. For women, the benefits additionally include being able to remain in prisons located closer to their homes. Id. ¶ 60 n.49.
hierarchical relationships and carries the risk of violence against women and sexual abuse.\^{172} The Special Rapporteur did not call on Denmark to modify or eliminate its mixed-sex/gender prisons, seeing as these were widely accepted by Danish society and provided that women’s presence in these prisons was always voluntary, but emphasized that this was a limited exception to the international standard: “The Special Rapporteur wishes to stress that the Danish policy is unique and can only be justified in light of the special circumstances prevailing in Danish prisons. It cannot serve as a model for other countries where these particular conditions do not exist.”\^{173}

UN human rights mechanisms have at times observed that conditions in women’s prisons are unequal to men’s, but have not reassessed their calls for sex/gender segregation in this context in light of these observations. For example, the UN Special Rapporteur on the right to education observed that, in one Western country, vocational training in girls’ juvenile detention facilities differed from that available in boys’ facilities, and attributed the difference to gender stereotyping.\^{174} Additionally, in its report on New Zealand in 2017, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) observed that some women’s prisons had a greater shortage of places in training and rehabilitation programs required to receive parole compared to men’s prisons, lacked reintegration programs available in men’s prisons, and allowed only thirty minutes of time for exercise, whereas, in men’s prisons, exercise equipment and outdoor activities were allowed throughout the unlock period.\^{175} Similarly, in its 2019 report on Spain, the SPT observed that women deprived of liberty had less access than men to recreational, physical, and educational activities; had no access to vocational training workshops; and had fewer opportunities for paid work.\^{176} The Subcommittee also found that Spanish prisons did not allocate the space or infrastructure needed to separate women deprived of liberty according to whether they were pre-trial or convicted, or whether they were violent or non-violent.\^{177} Both are conditions that are required by international law and with which Spain had complied for men’s sections.\^{178} In none of these reports

\^{172} Id. ¶¶ 58–61.
\^{173} Id. ¶¶ 62–63.
\^{175} Subcomm. on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to New Zealand, ¶¶ 27, 50, 83, U.N. Doc. CAT/OP/NZL/1 (Feb. 10, 2017).
\^{176} Subcomm. on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Spain, ¶¶ 74–75, U.N. Doc. CAT/OP/ESP/1 (Oct. 2, 2019).
\^{177} Id. ¶¶ 78–79.
\^{178} Id.
did the UN mechanisms consider the possibility that sex/gender segregation itself perpetuates and reinforces these inequalities.

Like the Mandela Rules, the Inter-American Human Rights System’s Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas require that “[t]he different categories of persons deprived of freedom shall be kept in separate places of deprivation of liberty or in different sections within the same institution, taking account of their sex” and specifies that “[i]n particular, arrangements shall be made to separate men and women.”¹⁷⁹ Rule 18.8(b) of the Council of Europe’s European Prison Rules also emphasizes “the need to detain . . . male prisoners separately from females.”¹⁸⁰ However, Rule 18.9 of the European Prison Rules allows prison officials to exercise a degree of discretion: they may bring men and women together for organized activities, and may even permit men and women to be detained together provided that they consent and that the prison officials view this arrangement as in the best interest of all involved persons.¹⁸¹ The official commentary on the European Prison Rules explains:

It is now recognised that the separation between various categories of prisoners referred to in Rule 18.8 needs not always be rigid. However, these forms of separation were introduced to protect potentially weaker prisoners, whose vulnerability to abuse has not ceased. Rule 18.9 provides for relaxation of the strict separation requirements but limits it to cases where prisoners consent to it. In addition such relaxation must form part of a deliberate policy on the part of the authorities that is designed to benefit prisoners. It should not merely be a solution to practical problems, such as overcrowding.¹⁸²

The approach of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which like some UN human rights mechanisms has noted that women’s allegations of sexual harassment are more frequent when they are imprisoned together with men, aligns with that of the European Prison Rules:

As a matter of principle, women deprived of their liberty should be held in accommodation which is physically separate from that occupied by any men being held at the same establishment. That said, some States have begun to make arrangements for couples (both of whom are deprived of their liberty) to be accommodated

¹⁸¹. Id.
together, and/or for some degree of mixed gender association in prisons. The CPT welcomes such progressive arrangements, provided that the prisoners involved agree to participate, and are carefully selected and adequately supervised.\footnote{183}

Although, at first glance, sex/gender segregation in prisons appears to be a hard and fast rule, developments in Europe indicate that this practice is not strictly necessary for the protection of human rights.

Overall, UN and regional mechanisms tend to require that prisons follow a strict regime of sex/gender segregation as a matter of protection for women, including trans women (when housed according to their gender identity). By framing sex/gender segregation as a protective measure, these mechanisms overlook the harms that women experience in the context of women’s prisons, perpetuate harmful stereotypes about women’s victimhood and vulnerability, and obscure harms experienced by individuals other than women.\footnote{184} They also, with the exception of the European human rights system, generally dismiss evidence that integrating prisons is not only possible but desirable.

\subsection*{E. Other Spaces and Activities, including Sports}

UN human rights mechanisms seldom address sex/gender segregation beyond the contexts of employment, education, bathrooms, and prisons. In two notable exceptions, the CEDAW Committee expressed concern about sex/gender-segregated political committees in Iraq’s Council of Representatives,\footnote{185} and the UN Special Rapporteur in the field of cultural rights made note of some States’ attempts to impose sex/gender segregation in retaliation against the efforts of women’s rights defenders.\footnote{186} In general, however, UN human rights mechanisms have not identified sex/gender segregation as a cause or consequence of discrimination, or as itself constituting discrimination, in contexts unrelated to employment and education.

One exception to the general neglect of this issue is the IACHR, which has addressed sex/segregation in a broader range of contexts as part of its work to promote and protect the human rights of trans and gender-diverse persons. Often, the IACHR has interpreted human rights law as requiring that trans and

\footnote{183. Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, \textit{CPT Standards} 1, 80 (2010).}
\footnote{184. See infra Sections III.D \& V.A.}
\footnote{186. Rep. of the U.N. Special Rapporteur in the Field of Cultural Rts., \textit{supra} note 136, ¶ 78.}
gender-diverse persons be treated in accordance with their gender identities in sex/gender-segregated spaces, but has not fundamentally questioned States’ ordering of society by sex/gender. For example, the IACHR welcomed Ecuador’s assigning of polling places based on gender identity, an improvement on the State’s initial criterion of sex assigned at birth, but the IACHR did not consider whether the existence of sex/gender-segregated polling places itself might be a human rights violation.\textsuperscript{187} Nevertheless, the IACHR has observed that, in homeless shelters and foster care group homes, sex/gender segregation itself—not merely incorrect assignation within a sex/gender-segregated system—increases violence and discrimination against trans and gender-diverse persons.\textsuperscript{188} Additionally, when a handful of States and localities instituted sex/gender-segregated restrictions on movement during the COVID-19 pandemic, the IACHR “noted the discriminatory nature and effects of gender-based restrictions, particularly on the rights of trans and gender-diverse people.”\textsuperscript{189} The phrasing of this observation implies that the measures’ discriminatory effects were most visible in harms experienced by trans and gender-diverse persons, but also caused harm to other groups.\textsuperscript{190}

Another exception is sex/gender segregation in sports, a formerly unexamined area that is now receiving increased attention and somewhat inconsistent treatment from international and regional human rights mechanisms. The CEDAW Committee has mentioned sex/gender segregation when discussing Article 10(g) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), concerning equality of opportunity in sport, but did not explain whether it intended for States merely to address the effects of sex/gender segregation in sport, or to reduce or eliminate the practice.\textsuperscript{191} The African Commission on Human and Peoples’ Rights made specific mention of sports in a resolution calling on States to prohibit discrimination on the basis of intersex status or sex characteristics, but did not say whether it would consider sex/gender segregation itself to constitute a violation of this prohibition.\textsuperscript{192}


\textsuperscript{189} Inter-Am. Comm’n H.R., supra note 158, ¶¶ 401–02.

\textsuperscript{190} This aligns with the analysis of these gendered quarantine measures that Ali Miller and I have presented elsewhere. Miller & Tueller, supra note 20, at 62–65.

\textsuperscript{191} Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 36, supra note 99, ¶ 62.

ECHRR suggested in *Semenya* that it did not consider sex/gender segregation in sports a violation of human rights when it narrowly found that excluding intersex women from sports unless they artificially lower their testosterone levels is a human rights violation, but that asking trans women to do the same would not be.\textsuperscript{193}

By contrast, the UN Independent Expert on SOGI has questioned the exclusion or attempted exclusion of both trans and intersex persons from sports. For example, he observed in one report that efforts to keep trans persons out of sex/gender-segregated spaces have been based on stereotypes about trans persons, especially trans women, and have not been supported by evidence of harm against cis persons.\textsuperscript{194} He has also made a joint statement with other mandate holders that asserts:

The categoric or blanket exclusion of trans and intersex women from sport (including their segregation to trans or intersex-only categories) is a *prima facie* violation of their human right to live free from discrimination; it is also a *prima facie* violation of their right to privacy. In particular, we note that it focuses only on assumed muscular strength, ignores the wider range of factors that enable some athletes to perform better than others, and appears to rely on stereotypical notions of a woman athlete’s performance and body type.\textsuperscript{195}

The UN Independent Expert on SOGI has clarified that he “deeply respects the importance of safe spaces for all women,” but has emphasized that measures taken to create spaces in which women feel safe “cannot promote, replicate or condone stigma or stereotypes” and should be replaced with “[e]vidence-based approaches, free from prejudice and stigma.”\textsuperscript{196} The presumed result of these evidence-based approaches, however, would simply be the inclusion of trans women in women-only sporting events, indicating that the UN Independent Expert on SOGI, like other international and regional human rights mechanisms, has stopped short of questioning the underlying

\textsuperscript{193} See supra notes 15–19 and accompanying text.


scheme of ordering of sports on the basis of sex/gender. Similarly, the IACHR has expressed concern about the barriers to trans students’ participation in sports in accordance with their gender identities, but has not considered whether sex/gender segregation in sports might itself violate human rights.

The lack of a clear and consistent approach to sex/gender segregation across the contexts of employment, education, bathrooms, and prisons, could explain the dearth of analysis of sex/gender segregation in other contexts like sports, as there is no unified standard for human rights mechanisms to apply to sex/gender segregation in a new or unexamined area. In Part IV, I suggest that human rights law’s prohibition of wrongful gender stereotyping could serve as a unifying framework that would improve the approach of human rights mechanisms to sex/gender segregation in employment, education, bathrooms, and prisons, and, at the same time, enable them to address the phenomenon in other contexts. First, however, I expand on the role of sex/gender segregation in perpetuating and reinforcing sex/gender essentialism, stereotyping, and hierarchy, in each of the specific contexts that human rights mechanisms have already begun to discuss.

III. CAUSES AND EFFECTS OF SEX/GENDER SEGREGATION

Although international human rights mechanisms have not yet developed a robust approach to sex/gender segregation, analyses of the phenomenon conducted by scholars of law, social science, and history, can be read together to provide a foundation for understanding segregation’s causes and effects across the various contexts in which this practice is found. In this Part, I focus in turn on each of the contexts to which international and regional human rights mechanisms have devoted significant attention thus far (employment in Section III.A, education in Section III.B, bathrooms in Section III.C, and prisons in Section III.D) as well as one area that they have only recently begun to examine (sports, in Section III.E). Each Section demonstrates, in line with the overall definition and theory of sex/gender segregation provided in Part I, that sex/gender segregation consistently perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy to the detriment of everyone, especially women and LGBTI persons. This understanding will form the basis

197. Id. ¶ 46.
of my argument, in Part IV, that human rights law should develop a unified approach to sex/gender segregation across all contexts using the framework of wrongful gender stereotyping.

A. Employment

Sex/gender essentialism is at the root of sex/gender segregation in employment, whether de jure or de facto. When mandated by law, sex/gender segregation may be based on ostensibly legitimate concerns, such as the protection of employee health and safety. Russia, for example, has banned women from 456 professions, including some forms of public transit operation and engineering, in the name of protecting reproductive health. Prohibiting women from entering certain professions in order to further reproductive health is essentializing, however, as it equates women with reproduction, disregarding those women who do not want or cannot have children. Russia’s list also overlooked evidence linking certain professions to harms to male reproductive health. Employers likewise may attempt to justify their role in creating and maintaining sex/gender-segregated workforces through ostensibly legitimate concerns that are nevertheless based on sex/gender essentialism. For example, employers sometimes treat sex/gender segregation as a solution to workplace harassment. In addition to being empirically unfounded, this view reproduces stereotypes by equating women with victims and men with perpetrators. It overlooks not only the fact that anyone may be harassed on the basis of their sex/gender, but also the fact that harassment occurs frequently in men-only workplaces as cis straight men compete against other cis straight men in “a perpetual, and often futile, quest to maintain their position in the male hierarchy.”

199. Rahul Garg, Russia’s Sexist List of Banned Professions for Women Must End, LSE BLOG (Jan. 18, 2021), https://blogs.lse.ac.uk/socialpolicy/2021/01/18/russias-sexist-list-of-banned-professions-for-women-must-end [https://perma.cc/E4L4-N8NA].
200. Id.
201. Id.
203. Sex/gender segregation is both a cause and a consequence of harassment. Men have used harassment to prevent women from entering or remaining in male-dominated occupations, so that men can keep for themselves the concrete benefits of the job (e.g., higher pay) as well as the symbolic ones (e.g., “masculine” self-image). By contrast, in occupations and workplaces with relatively high levels of sex/gender integration, sex harassment is practically nonexistent and stereotyping more easily resisted. Id. at 2134, 2144, 2151; Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L. J. 1683, 1691, 1758, 1759, 1761 (1998); Olle Folke & Johanna Rickne, Sexual Harassment and Gender Inequality in the Labor Market, 137 Q. J. ECON. 2163, 2163 (2022).
204. See infra Section V.A.
construction site, for example, one cis straight man was called a “pussy” (among other gendered and pejorative names), flashed, and otherwise harassed by a coworker who found the man’s use of wet wipes “kind of gay” and “feminine.”  

When sex/gender segregation in employment is de facto, sex/gender essentialism is still present but might hide behind the language of choice.  

The argument that sex/gender segregation in employment is a result of men and women’s natural preferences disregards the ways in which choices of occupation are shaped by structural discrimination, including employers’ reliance on stereotypes in decision-making and parents’ gendered socializing of their children. These stereotypes shift when other aspects of an individual’s identity are taken into account, but remain tied to essentialism: for example, explanations of gay men’s overrepresentation in some traditionally women-dominated fields and lesbians’ overrepresentation in some traditionally men-dominated fields have relied on essentialized concepts of sex/gender when suggesting that these workers have an innate or natural affinity for fields in which the “opposite sex” dominates. A more accurate predictor of the overrepresentation of gay and lesbian workers in certain fields is not their sex/gender or sexual orientation, but the adaptation of these workers to discrimination by concealing their sexual orientation. This leads them to take jobs in which it is easier to continue this concealment and/or jobs in which social perceptiveness, a skill developed through stigma management, is particularly useful.

At its root, sex/gender segregation in employment, horizontal and vertical, is not caused by differences in an entire sex/gender’s inherent abilities or preferences, but instead by stereotypes. Stereotypes cause horizontal segregation because certain fields are seen as traditionally “masculine” or “feminine.” It is clear when observing patterns of employment across cultures that sex/gender segregation is due to stereotyping, rather than innate

206. Id. at 122–23.
210. Id. at 447–48.
211. Id.
212. Mary Borrowman & Stephan Klasen, Drivers of Gendered Sectoral and Occupational Segregation in Developing Countries, 26 FEMINIST ECON. 62, 64 (2020).
213. Id. at 66–68, 88.
characteristics of the person or the profession. For example, stereotypes in the United States about STEM work as most fitting for the male “geek” or “programmer” contribute to women earning only 23% of information and communication technology degrees, whereas women in Malaysia and India see STEM as suitable for their wants and needs, and earn 45% of these degrees. Stereotypes hold even when exceptions are presented, as they often are. For example, a study of the cultural industries in England found that stereotypes about women being better at caring, communicating, and staying organized could explain their overrepresentation in marketing, public relations, and production, as compared to more creative and technical roles. The study’s interviewees also discussed exceptions to the rule through reliance on stereotypes, explaining, for example, that documentary filmmakers are more often women because “women tend to put people more at ease. They’re not so threatening in some situations. They can make themselves quite vulnerable, just physically vulnerable. They’re smaller.” In another study, a man in the United States who had worked as a nurse for 23 years expressed discomfort about having pursued a profession traditionally associated with women: “I felt somewhat emasculated as a nurse. I still feel its identification is of female.” Stereotypes also cause vertical segregation because they further the narrative that men are more competent and authoritative at work and that women have more of a role to play at home.

Sex/gender segregation also perpetuates and reinforces stereotypes. For example, the simple fact that women or men are overrepresented in a profession can come to be seen as proof that they should be overrepresented in that profession because they are more caring or rational or whatever the case may be. But sex/gender segregation also perpetuates and reinforces stereotypes in more visibly harmful ways. Men have been known to resist women’s entry into traditionally “masculine” fields may by calling them names that reinforce the notion that their presence is an exception to the rule (e.g., “freak,” “deviant”), pressuring them to conform to male stereotypes, and

214. See Barbara Reskin & Irene Padavic, Women and Men at Work 57 (1994).
216. See David Hesmondhalgh & Sarah Baker, Sex, Gender and Work Segregation in the Cultural Industries, 63 Socio. Rev. 23 (2015).
217. Id. at 30.
221. Id.
other forms of harassment.222 Men who do not conform to gender stereotypes, especially gay men, are also targets of harassment.223 In women-dominated occupations that are characterized by vertical segregation (i.e., those who hold decision-making power are men), women also experience harassment, but in these cases they are more often pressured to conform to stereotypes of femininity than of masculinity.224

Sex/gender segregation in employment also invariably results in sex/gender hierarchy. Most notably, and in line with the observations of the UN treaty bodies,225 sex/gender segregation has been found to be the root cause of the gender wage gap in many studies, across countries and sectors of employment.226 Sex/gender segregation drives the gender wage gap not only because occupations associated with women have traditionally been devalued,227 but also because occupations that were traditionally held by men and later became dominated by women are devalued; lower wages have dogged women as a matter of custom, more than as a reflection of the specific work in which they are engaged.228 Conversely, occupations that were traditionally held by women and later became dominated by men have risen in pay and prestige.229 The wage gap is even more pronounced for individuals who experience intersecting forms of oppression. Black women in the United States, for example, are disproportionately represented in professions that are excluded from the protections of the Fair Labor Standards Act, which, among other things, establishes a minimum wage.230 In addition to causing the wage gap, sex/gender segregation in employment has also been found to create disadvantages by reducing the bargaining power of workers in women-dominated sectors, restricting women’s opportunities for advancement, and keeping women in low-status professions (or, inversely, keeping women’s professions low-status).231 Outside of the workplace as well, occupational

222. Schultz, supra note 203, at 1760.
223. Id. at 1691, 1776, 1777; Schultz, supra note 202, at 2142–43.
225. See supra note 106 and accompanying text.
227. McDonald, supra note 219, at 21.
228. Judith M. Bennett, History Matters: Patriarchy and the Challenge of Feminism, ch. 5 (2007); Dianne Otto, Gender Comment. Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women, 14 CAN. J. WOMEN & L. 1, 18–19 (2002).
229. McDonald, supra note 219, at 21.
231. Borrowman & Kliasen, supra note 212, at 63; Schultz, supra note 203, at 1756–57; Diksha Arora, Elissa Braunstein & Stephanie Seguin, A Macro-Micro Analysis of Gender Segregation and Job Quality in Latin America, 164 WORLD DEV. 1, 1 (2023).
segregation can contribute to gendered (as well as racialized) disparities because of the effects of reduced benefits and unsafe workplace environments.232

The effects of occupational segregation on trans, non-binary, gender-diverse, and intersex individuals is understudied, but nevertheless has clear potential to transform the way this phenomenon is viewed.233 Already, a study focused on Sweden found that discrimination against trans applicants was negligible in sex/gender-integrated professions but occurred at high rates in sex/gender-segregated occupations; men-dominated fields in the country were 16.3% less likely to hire trans applicants than they were cis men applicants, and woman-dominated fields were 13.1% less likely to hire trans applicants than they were cis women applicants.234 Discrimination may also occur when an employee comes out or transitions. For example, Russia’s banned job list, mentioned earlier in this Section, formed the basis for one company’s firing of a trans woman.235 At the same time, the unique experiences of trans, non-binary, gender-diverse, and intersex individuals could provide insight into the effects of gender stereotyping in evaluations of workplace performance, with implications for both horizontal and vertical segregation. For example, a small group of trans men in Southern California reported that, post-transition (and with the same skills and abilities they had pre-transition), they found themselves more respected and rewarded at work than they had been when their supervisors and colleagues perceived them to be women.236

B. Education

Essentialism is also at the root of sex/gender-segregated education, whether these are sex/gender-segregated schools or sex/gender-segregated classes within integrated schools.237 Supporters of sex/gender-segregated schooling in the United States, for example, generally have pointed to innate differences between male and female brains.238 Among other things, they in the

233. See McDonald, supra note 219.
235. Garg, supra note 199.
past have argued that it is relevant to learning ability and classroom instruction that “boys’ brains receive several daily ‘surges’ of testosterone, whereas girls can perform well on tests only a few days per month when they experience ‘increased estrogen during the menstrual cycle’.” They also have suggested that sex/gender segregation will help schools tailor themselves to differences in learning behavior between boys and girls. For example, an Idaho elementary school segregated its students by sex/gender because, they suggested, boys need a loud, active learning environment, whereas girls need an environment that is calm and quiet. These arguments overlook the fact that any differences among students are more likely due to gendered socialization than to innate characteristics, and that the variations within boys as a group and within girls as a group are much wider and across boys and girls as a group much smaller. Also, similarly to what has occurred in the context of employment segregation, arguments in favor of sex/gender segregation in education tend to attribute some men’s and women’s preferences for certain subjects to nature, rather than to interrogate how these preferences are shaped by structural discrimination and/or to observe that not all men share the same interests and that not all women share the same interests.

Essentialism is also present in arguments that attempt to rebrand sex/gender segregation in education as specifically advantageous to girls and women. The argument that academic performance and the quality of


244. See Levit, supra note 49, at 514, 526 (explaining that advocates for segregation in U.S. education who “argue that we can vest it with new meaning” are “ignor[ing] the history, social meaning, and impact of segregation” and thus are more likely to perpetuate essentialist notions of sex/gender than to break with them).
education of women and girls improves under conditions of sex/gender segregation has biases underlying it that go beyond essentialized notions of differences in learning ability and learning behavior. Girls’ schools, as well as parents choosing to enroll their child in a girls’ school, may also argue that boys are a distraction, which is based on an assumption of heteronormativity that ignores the existence of gay, lesbian, and bisexual youth. Arguments for sex/gender segregation as a means of protecting girls from boys’ intimidation and harassment are also essentializing because they suggest that girls are, as a group, uniquely weak and gentle, making them ill-suited to participation in public life.

Arguments that sex/gender segregation in education is favorable specifically to boys likewise depend on an essentialist myth of masculinity. In the United States, justifications of sex/gender-segregated schooling for boys essentialize their masculinity, in opposition to femininity, as heteronormative, aggressive, active, competitive, and unemotional. Most recently, in the United States, justifications for sex/gender-segregated schools have relied on essentialist notions of race and sex/gender, as some have begun to advocate for the creation of sex/gender-segregated schools to “save” Black and Latino boys, ostensibly by removing “distractions,” but more broadly broadcasting that “these boys spell trouble.” This is particularly concerning given stereotypes of Black men as “oversexed, dangerous, and threatening.”


246. Jackson, supra note 239, at 232–33; Elisabeth L. Woody, Homophobia and Heterosexism in Public School Reform: Constructions of Gender and Sexuality in California’s Single Gender Academies, 36 EQUITY & EXCELLENCE EDU. 148, 151 (2003); Watson, supra note 239, at 206; Elisabeth Bumiller, Same-Sex Academies Grapple with Parents’ Concerns, N.Y. TIMES (June 13, 1997), https://www.nytimes.com/1997/06/13/nyregion/same-sex-academies-grapple-with-parents-concerns.html; Epstein, supra note 246, at 115; Rebecca S. Bigler, Amy Roberson Hayes & Lynn S. Liben, Analysis and Evaluation of the Rationales for Single-Sex Schooling, in THE ROLE OF GENDER IN EDUCATIONAL CONTEXTS AND OUTCOMES 225, 249–50 (L.S. Liben & R.S. Bigler eds., 2014); Campbell & Wahl, supra note 241, at 67. Although this argument is used to justify the existence of boys’ and girls’ schools, it is more often emphasized in relation to girls’ schools because of the risk of pregnancy. Klein, supra note 239, at 178; Jackson, supra note 239, at 233.

247. Woody, supra note 246, at 157; Klein, supra note 238, at 171; Bigler, Hayes & Liben, supra note 246, at 246.


These essentializing arguments have been debunked: meta-analyses across various country contexts have found a lack of evidence to support the belief in inherent differences in abilities based on sex/gender, the belief that there are sex/gender differences in learning, the belief that students learn better in sex/gender-segregated classes, the belief that sex/gender-segregated schooling produces better academic outcomes, the belief that sex/gender-segregated schooling expands students’ academic interests beyond stereotypes, the belief that sex/gender-segregated schooling improves girls’ self-esteem, and more.252 Flaws in the science in support of sex/gender-segregated schooling include: drawing conclusions based on an individual study or anecdotes rather than on systematic and controlled reviews; the Hawthorn Effect (i.e., a practice is found to have an effect because it is new, rather than it being inherently effective); the John Henry and Pygmalion Effects (i.e., a practice is found to have an effect because those involved believe it will have an effect, rather than it being inherently effective); bias in the studies; selection bias; and inequitable resources for comparison groups.253 These flaws are exacerbated by the file drawer problem: journals generally publish papers that find statistically significant differences, not ones that do not.254

There is also a lack of evidence in support of the argument that sex/gender-segregated schools decrease harassment.255 Although it seems plausible that sex/gender segregation in education could decrease the harassment of girls by boys by keeping them apart, the boys are likely to find other victims, bullying boys who do not fit their vision of masculinity (especially gay boys and boys with disabilities),256 rather than altering their behavior. Girls also will not be free from harassment, because boys in their classes are not the only perpetrators (girls may be harassed, for example, by other girls in their classes, students from other schools, and authority figures such as teachers).257 In the United States, the expected result of sex/gender segregation in education is that


256. Kate Drury et al., Victimization and Gender Identity in Single-Sex and Mixed-Sex Schools: Examining Contextual Variations in Pressure to Conform to Gender Norms, 69 SEX ROLES 442, 451 (2013); Cohen, supra note 249, at 170–72; SEPARATED BY SEX, supra note 240, at 8; Klein, supra note 238, at 171.

257. Bigler, Hayes & Liben, supra note 246, at 246–47.
wealthy white boys will continue to dominate one classroom and wealthy white girls will dominate another, which is a far cry from equality.\textsuperscript{258}

Although stereotyping may occur in any educational context, it is more likely to occur in sex/gender-segregated educational settings.\textsuperscript{259} Even when pseudoscience is openly rejected and discredited by advocates of sex/gender segregation in education, it still influences teaching at sex/gender-segregated schools by opening the door for stereotyped curricula and pedagogy.\textsuperscript{260} For example, teachers in segregated classes in the United States have been known to assign different readings based on whether they are teaching boys or girls; they generally assign boys action-filled stories filled with animals, heroism, technology, and crude or physical humor, whereas they assign girls stories of romance, family, and friendship.\textsuperscript{261} They might even teach entirely different subjects, such as a girls’ school in Ohio that taught etiquette.\textsuperscript{262} Instructors also have been known to respond to sex/gender-segregated classes by adapting their teaching styles. A teacher who has one all-girls class and one all-boys class was found to teach them differently, exposing the boys to more ideas and argumentation by asking open-ended questions and challenging responses only in their class.\textsuperscript{263} This aligns with a general trend in teaching in sex/gender-segregated contexts, in which boys’ teachers are more likely to emphasize competition, aggression, and stoicism,\textsuperscript{264} and girls’ teachers are more likely to want them to feel comfortable and to rest.\textsuperscript{265} Teachers at sex/gender-segregated schools have also been known to reinforce the norm of heterosexuality.\textsuperscript{266} For example, teachers at girls’ schools in California warned girls to “stay away from the boys,” furthering the assumption that their students are heterosexual (as well as the notions that girls have the responsibility of protecting themselves from sexual assault and that it is inappropriate for girls to instigate sex).\textsuperscript{267} At the same time, these teachers failed to respond adequately to the ways in which students used homophobic teasing to police each other’s gender performance and sexuality.\textsuperscript{268}

\textsuperscript{258} Campbell & Wahl, supra note 240, at 68.
\textsuperscript{260} Cohen & Levit, supra note 237, at 381, 383, 387; Watson, supra note 238, at 193; Preliminary Findings of ACLU’s “Teach Kids, Not Stereotypes” Campaign, supra note 239, at 3–4.
\textsuperscript{261} Cohen, supra note 249, at 166–67; Bigler, Hayes & Liben, supra note 246, at 241; The Dangers of Single-Sex Education, supra note 250.
\textsuperscript{262} Klein, supra note 238, at 171.
\textsuperscript{263} Bigler, Hayes & Liben, supra note 246, at 244.
\textsuperscript{264} Klein, supra note 238, at 171.
\textsuperscript{265} Id. at 173.
\textsuperscript{266} See Jackson, supra note 238; Woody, supra note 246.
\textsuperscript{267} Woody, supra note 246, at 151.
\textsuperscript{268} Id. at 150–51, 154–56.
Sex/gender-segregated schooling likewise tends to make sex/gender more salient for students, contributing to the perpetuation and reinforcement of stereotypes not only in this context but throughout the students’ lifetimes, since schools are a key place where children form their understanding of sex/gender. The stereotypes students internalize include the essentialized views of learning ability noted above. Neuroscientist Lise Eliot has observed:

It’s bad enough to see teachers amplifying gender stereotypes, but it’s truly distressing to hear students themselves parrot false beliefs about boys’ and girls’ brains and abilities. In Tampa, a pair of single-sex middle schools, Ferrell and Franklin Academies, actually posts homepage videos of girls boasting about their superior frontal lobes and ability to read facial expressions and boys expounding on their brains’ better visual and spatial processing. The implication of girls or boys articulating, respectively, “We’re good at emotion” or “We’re good at spatial processing” is the unspoken, but powerful corollary: “and we’re bad at thinking” or “we’re bad at talking.”

These stereotypes extend into subject matter, perpetuating, for example, the notion that girls are naturally bad at math. They also include stereotypes about the way students are supposed to behave, which in the United States includes stereotypes of boys as hopelessly aggressive and girls as tattletales. A study of schools in Bogotá and Barranquilla, Colombia, likewise found that girls in sex/gender-segregated schools felt more pressured to conform to gender stereotypes than did girls in integrated schools. Girls’ attempts to fit stereotypes can have severe effects on their well-being. For example, segregation-fueled stereotypes are expected to contribute to the fact that girls studying at girls’ schools are more likely than girls studying at integrated schools to have body dissatisfaction and eating disorders. Conversely, integrated classes present opportunities for stereotypes to be contested and disproved. A study in Brazil found that co-ed physical education classes

271. Epstein, supra note 244, at 118.
275. Drury et al., supra note 256, at 450.
276. Bigler, Hayes & Liben, supra note 246, at 249.
277. Jackson, supra note 238, at 236.
contest stereotypes by making children question their assumptions that girls do not enjoy physical exertion and that boys are especially skilled in this context.278

Sex/gender segregation in educational contexts also reinforces sex/gender hierarchy.279 In the United States, sex/gender segregation in schools has generally resulted in fewer resources for girls’ schools, with the boys’ schools’ enjoying newer buildings, better teachers, and smaller classes.280 The practice of women-only or girl-only schooling also has contributed to the exclusion of women from public life.281 The connection between segregation in education and exclusion from public life is clearest when taking a historical view. For example, in the United States, the subject matter of sex/gender-segregated classes offered to boys once differed from those offered to girls, reflecting the notion that boys would go on to have careers and women would remain in the home: sex/gender-segregated classes for boys included shop and agriculture, whereas a standard sex/gender-segregated class for girls was home economics.282 There are also, however, more recent examples, such as that of a U.S. student who had enrolled in a technical high school because she wanted to be a plumber, but was prevented from taking the relevant courses and instead routed, along with the other girls at the school, into classes that would teach them to be secretaries and office managers.283 Sex/gender segregation in education thus contributes to employment segregation directly, by funneling women into certain professions (or out of the workforce altogether). It may also contribute to employment segregation indirectly, as in the example of an employer who was strongly disinclined to hire graduates of women’s colleges because she assumed that such individuals require “coddling” and find it difficult to collaborate with men.284 A study of sex/gender-segregated schooling in Hong Kong likewise found that students from these schools have greater anxiety about mixed-sex/gender interactions as compared to other students, which could have implications for their ability to study and work in areas not traditionally dominated by their sex/gender.285

279. Cohen & Levit, supra note 237, at 348.
280. Klein, supra note 238, at 170.
281. Levit, supra note 49, at 454.
283. Id. at 76.
schools also generally to prefer to hire teachers of the same sex/gender as the student body,\textsuperscript{286} even though there is no research supporting the idea that students of any sex/gender learn better with a teacher of any particular sex/gender,\textsuperscript{287} which also contributes to employment segregation. This aligns with the findings of UN human rights mechanisms that sex/gender segregation in education both results in fewer resources and opportunities for women and girls and also contributes to occupational segregation.\textsuperscript{288}

Sex/gender segregation also harms trans, non-binary, gender-diverse, and intersex students by failing to take their identities and experiences into account.\textsuperscript{289} Non-binary and intersex students might be denied placement at any sex/gender-segregated school.\textsuperscript{290} Trans students might not be given a choice between schools but instead be at the mercy of governments and school authorities.\textsuperscript{291} For example, the United Kingdom has considered permitting sex/gender-segregated schools to deny admission to trans students (i.e., an all-boys school could reject a trans boy, an all-girls school could reject a trans girl).\textsuperscript{292} A trans student at a sex/gender-segregated school might also feel pressured to delay coming out or transitioning in part because of the risk of being forced to leave their school.\textsuperscript{293} These students are also harmed by the stereotyping perpetuated and reinforced by educational segregation. Sometimes these are similar to the stereotypes and harms other students experience, although the shift in perspective is revealing. For example, a trans student in California told their school board:

In eighth grade PE the boys and girls were separated to play baseball and softball, respectively. Being forced to play softball with the girls was offensive to me, I did not enjoy the assumption of my gender or the prevailing sentiment that softball is "easier" or "gentler" or "less competitive." If my school had a sensible policy

\textsuperscript{286} Klein, supra note 238, at 172; Cohen, supra note 249, at 167.
\textsuperscript{287} Bigler, Hayes & Liben, supra note 246, at 241.
\textsuperscript{288} See supra notes 138–41 and accompanying text.
\textsuperscript{289} Jackson, supra note 237, at 231–32. Much of the literature on sex/gender segregation in education likewise neglects the experiences of trans, non-binary, gender-diverse, and intersex students. Watson, supra note 238, at 186.
\textsuperscript{290} Watson, supra note 238, at 208–9.
\textsuperscript{291} Id. at 210.
that took transgender students like me into account, PE sports would not be segregated by gender ever.294

The harms these individuals experience in the context of sex/gender segregated-schooling at times even resemble so-called "conversion therapy,"295 as some parents of LGBTI children purposefully send them to a sex/gender-segregated school to punish them for deviation from gender norms and to compel them to conform.296

C. Bathrooms297

Sex/gender segregation in bathrooms is also rooted in essentialism.298 For example, arguments in favor of sex/gender segregated-bathrooms are often phrased in terms of differences in biology or anatomy.299 As previously mentioned, UN treaty bodies have recommended segregation in bathrooms as a means of ensuring menstrual hygiene, with implications for girls and women's enjoyment of the rights to education, equality, and non-discrimination.300 Sex/gender-segregated bathrooms, however, are at best a proxy for menstrual-hygiene management301 that is both underinclusive (i.e., neglecting menstruators who do not identify as women) and overinclusive (i.e., encompassing women who do not menstruate).302 Segregation also perpetuates

294. Gender Segregated School Activities Can Be Harmful to Students, CAL. SCH. BDS. ASS'N (Oct. 18, 2011), https://www.csba.org/en/Newsroom/LinkToLearning/2011/Fall/InThisIssue/GenderSegregated [https://perma.cc/R2T8-F8GS].


297. This Section incorporates and expands on the analysis of sex/gender-segregated bathrooms that first appeared in Tueller, supra note 20, at 300–03.


300. See supra note 152 and accompanying text.


302. See Sarah E. Frank, Queering Menstruation: Trans and Non-Binary Identity and Body Politics, 90 SOCIO. INQUIRY 371, 396 (2020) ("Menstruation is socially defined and filed within women's spheres, but the relationship between menstruation and 'womanhood' is evidently inept, not only for trans and non-binary people who menstruate, but also trans women who do not. Additionally, intersex women, menopausal women, and women post-hysterectomy are still women even in the absence of menstruation.")
the stigma of menstruation. Studies have found that the root of the problem is not integrated bathrooms but instead the gendered culture of secrecy and shame around menstruation, a culture that sex/gender segregation only serves to reinforce. Likewise, the argument that new mothers need women-only bathrooms for breastfeeding both equates women with mothers (an essentializing move that is underinclusive and overinclusive) and more broadly perpetuates the gendered culture of secrecy and shame around women’s bodies and reproduction.

Another ostensibly biology- or anatomy-based argument for sex/gender-segregated restrooms, that men urinate standing up whereas women urinate sitting down, is also a cultural construct. Both men and women are able to urinate standing up or sitting down; they are merely socialized to prefer one posture over the other. To reflect this reality and to ensure restroom access for all, it might make more sense to divide restrooms into facilities for “standing up” and “sitting down” as opposed to facilities for “men” and “women.” Then again, there is no reason why there could not be facilities for those who prefer to stand to urinate and those who prefer to sit within one bathroom, as many men’s restrooms have both urinals and toilets. Fully integrated restrooms would also avoid the possibility that the labels “standing up” and “sitting down” would be interpreted to mean “men” and “women,” keeping de facto sex/gender segregation in place. Additionally, the fact that, within men’s restrooms, boys and men have been known to bully and harass each other for choosing toilets over urinals, perceiving urinals to be the “manly” choice, indicates that it will take more than a mere change in signage to eliminate segregation in these facilities.

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305. Overall, supra note 303, at 77; Mary Anne Case, Why Not Abolish Laws of Urinary Segregation?, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 222 (Harvey Molotch & Laura Noren eds., 2010).

306. Overall, supra note 303, at 81.


309. Colker, supra note 304, at 163.

310. Anthony & Duftesne, supra note 304, at 276 (citing Steven Soifer, A Template for Raising Toilet Hygiene Standards, in WORLD TOILET EXPO AND FORUM 2005 CONFERENCE PROCEEDINGS 51–59 (World Toilet Org. & Shanghai City Appearance & Env’t Sanitation Admin. Bureau, Shanghai, 2005)).
The other two common justifications for segregated bathrooms, safety and privacy,\textsuperscript{311} are also based on sex/gender essentialism.\textsuperscript{312} In the United States, for example, laws requiring sex/gender segregation in bathrooms emerged in the nineteenth century as a means of preserving “separate spheres” even as women entered public life.\textsuperscript{313} Women were viewed as fragile, weak, and vulnerable, needing protection from men as well as a private refuge from the dizziness, fainting, and fits of hysteria that the public sphere, especially the workplace, was bound to cause them given their delicate constitutions.\textsuperscript{314} Prior to this era, privacy was not as prized in Western cities; both men and women regularly urinated publicly (i.e., on the street).\textsuperscript{315} Although the Victorian attitude toward bathrooms has not continued, intact, through to today,\textsuperscript{316} its influence is still felt in the continued invocation of safety and privacy to justify sex/gender segregation in bathrooms, which perpetuates the notion that women are frailer than men and have a greater need for privacy.\textsuperscript{317} The underlying assumption that sex/gender segregation protects women and girls from sexual assault\textsuperscript{318} is gendered and heteronormative,\textsuperscript{319} is empirically suspect,\textsuperscript{320} and obscures harms to individuals other than women as well as harms committed by women. I elaborate on my response to the “protection” justification in Section V.A.

Sex/gender segregation in restrooms also perpetuates and reinforces stereotypes beyond the notion that women are weaker and more modest about their bodies than men are.\textsuperscript{321} For example, the common use of a stick figure for the men’s restroom and a skirted figure for the women’s restroom reinforces

\textsuperscript{311} Antony, supra note 49, at 4; Wickliff Shreve, Stall Wars: Sex and Civil Rights in the Public Bathroom, 85 LAW & CONTEMP. PROBS. 127, 129 (2022).

\textsuperscript{312} Antony, supra note 49, at 5 (“the scheme cannot be meant to secure privacy for the performance of intimate bodily functions, for then the sex of the person in the next stall would be irrelevant—the crucial factor ought to be the presence or absence of other people period”).


\textsuperscript{316} For example, it was considered improper at the time for a woman to even be seen entering a restroom. Baldwin, supra note 315, at 267; Kogan, supra note 314, at 1219–20.

\textsuperscript{317} Colker, supra note 304, at 157.

\textsuperscript{318} Fogg Davis, supra note 298, at 206. See also Shreve, supra note 311, at 128; Kogan, supra note 313, at 156, 160.

\textsuperscript{319} Colker, supra note 304, at 171.

\textsuperscript{320} Overall, supra note 303, at 82; Case, supra note 305, at 220.

\textsuperscript{321} Levy, supra note 307, at 256–58.
stereotypes of how women and men are supposed to dress. The harms of this are not merely theoretical: women-only bathrooms are sites of harassment of and violence against women, both trans and cis, who do not conform to stereotypes of feminine appearance. Not only do those charged with enforcing the segregated scheme in the restroom and the other users of the restroom police sex/gender in this context, but individuals also self-police. LGBTI persons especially feel added pressure to present themselves, even temporarily, in conformity with stereotypes when entering a restroom lest others contest their self-identification. For example, a self-described butch lesbian in Washington, D.C. explained, in a survey about bathroom access: “I sing and/or talk to people and feminize my walk every time I enter a public bathroom. I do this to help clue people in to the fact that I am a woman without announcing it. It works 50% of the time. I am often still read as a man.”

Another stereotype perpetuated by segregated bathrooms is the notion that women are vainer than men. Men-only bathrooms grant men an opportunity to consolidate negative attitudes about women, which can include conversations attributing women’s frequently longer wait times at restrooms to their gossiping and preening because men are not able to see what women’s experiences in restrooms are actually like. A woman takes approximately twice as long to urinate as a man primarily due to social differences (e.g., clothing that is more difficult to remove and replace, having been socialized to sit down and to use toilet paper) and due to the likelihood that she or someone else in the women’s restroom is menstruating. The architecture of women’s

322. Colker, supra note 304, at 150.
324. Kogan, supra note 299, at 687.
328. See Browne, supra note 322, at 336–40; Cohen, supra note 56, at 540–52; Pagliarini Bagagli, Veriato Chaves & Zoppi Fontana, supra note 323, at 5; Case, supra note 305, at 223–24. Men’s conversations in restrooms and similar spaces also have been known to include lewd, demeaning comments about women that men would be much less likely to say in the presence of women. Colker, supra note 304, at 168–69.
and men’s bathrooms also contribute to the long lines, as these bathrooms tend to have the same amount of square footage, but different set-ups that allow the men’s restroom to accommodate more occupants while women are forced to wait.\(^{331}\) Waiting for the restroom can damage women’s health, as it may cause cystitis, urinary tract infections, abdominal pain, diverticula, and hemorrhoids.\(^{332}\) Sometimes women at stadium events strategically avoid these lines by drinking less or not at all,\(^{333}\) an old strategy with another set of negative health repercussions.\(^{334}\) Meanwhile, resorting to men’s restrooms (where there is often no line at all) might mean risking arrest.\(^{335}\) Sex/gender segregation prevents the stereotype that women dilly-dally in bathrooms due to vanity from being refuted, and at the same time this stereotype obscures some of segregation’s harms.

Sex/gender segregation in bathrooms also contributes to the maintenance of sex/gender hierarchy by limiting women’s access to traditionally male power and knowledge.\(^{336}\) Historically, this exclusion was deliberate. For example, in the 1940s and 1950s, Harvard Law School used the scarcity of women’s bathrooms on campus as an excuse not to admit women as students.\(^{337}\) More recently, the exclusion is less formalized but still very real. Bathrooms are a place of informal conversations that may nevertheless result in political and commercial dealings.\(^{338}\) For example, former U.S. presidential candidate John Kerry found that, while on the campaign trail, men often took the opportunity to introduce themselves to him in the men’s restroom.\(^{339}\) Even when women have gained access to other spaces, such as workplaces, that have traditionally been dominated by men, sex/gender segregation in the restrooms might make it difficult for them to remain and thrive in those locations.\(^{340}\) For example, bathrooms on the floor of the U.S. Senate were men-only until the 1990s, which meant women senators had to use the bathroom in the visitors’ gallery,\(^{341}\) and risk that they might not return in time for a vote.\(^{342}\) It is also difficult for

\(^{331}\) Case, supra note 305, at 213; CAROLINE CRASO PEREZ, INVISIBLE WOMEN: EXPOSING DATA BIAS IN A WORLD DESIGNED FOR MEN 47–50 (2019).
\(^{332}\) Anthony & Dufresne, supra note 304, at 276.
\(^{333}\) Id. at 273.
\(^{334}\) Cooper et al., supra note 315, at 426.
\(^{335}\) Anthony & Dufresne, supra note 304, at 273.
\(^{336}\) See Browne, supra note 323, at 336–40; Cohen, supra note 56, at 540–52; Overall, supra note 303, at 83; Pagliarini Bagagli, Veriato Chaves & Zoppi Fontana, supra note 323, at 5; Case, supra note 305, at 223–24
\(^{337}\) Anthony & Dufresne, supra note 304, at 271.
\(^{338}\) Colker, supra note 304, at 151, 167; Levy, supra note 307, at 265–66.
\(^{339}\) Colker, supra note 304, at 168 (citing Case, supra note 305).
\(^{341}\) Id. at 1728.
\(^{342}\) Shreve, supra note 311, at 136; Anthony & Dufresne, supra note 304, at 271. The U.S. Supreme Court building likewise had only men’s restrooms until the first woman justice was appointed,
women to work as miners, firefighters, or taxi drivers, or in other traditionally male-dominated professions, because these might have no women’s bathrooms or no bathrooms at all. Segregation in restrooms thus has a role to play in the exclusion of women from public life, including as a (hardly compelling) justification for educational and employment segregation. At the same time, sex/gender segregation operates to exclude men from professions requiring the supervision of young children, since the stereotype of male sexual predation makes people equally uncomfortable to see a man enter the women’s restroom to supervise young girls as to have a man bring young girls under his supervision into the men’s restroom.

Sex/gender segregation in bathrooms also sends the message that intersex, trans, non-binary, and gender-diverse persons are not wanted or are not even believed to exist. For example, arguments in support of sex/gender-segregated bathrooms have included narratives about trans women as men only pretending to be women so they can commit assaults. This exclusion fuels violence and discrimination against intersex, trans, non-binary, and gender-diverse persons in these spaces. A survey of trans individuals in Washington, D.C., found that 18% had been denied access to sex/gender-segregated public restrooms, 68% had experienced verbal harassment, and 9% had experienced physical assault. Intersecting marginalization can increase the likelihood of these harms—for example, Black trans individuals were most likely out of all those surveyed to be denied access to restrooms. Some LGBTI individuals have responded to this discrimination by learning to avoid public bathrooms altogether, such as a queer woman in the United Kingdom who told an interviewer she preferred to “piss[] in the car park” rather than to risk entering a sex/gender-segregated space. These harms and the avoidance they sometimes trigger also have implications for education and employment, since inability to access a restroom affects performance and might lead to tardiness,

even though there had been women working in the building for decades. Fogg Davis, supra note 298, at 211.

345. Fogg Davis, supra note 298, at 211–12.
346. Overall, supra note 303, at 85; Pagliarini Bagagli, Veriato Chaves & Zoppi Fontana, supra note 324, at 5; Kogan, supra note 313, at 164; Kogan, supra note 299, at 679.
347. Fogg Davis, supra note 298, at 206; Kogan, supra note 314, at 1233.
348. Kogan, supra note 314, at 1234.
349. Herman, supra note 326, at 71.
350. Id. at 71–73.
absence, or even quitting.\footnote{Herman, supra note 326, at 74–75.} They also affect health: avoiding using restrooms can result in dehydration, urinary tract infections, kidney problems, and mental health problems.\footnote{Id. at 75, 77. See also Hazeldene, supra note 340, at 1741.} On top of that, intersex, trans, non-binary, and gender-diverse individuals may avoid going to the doctor to avoid sex/gender-segregated restrooms found there.\footnote{Herman, supra note 326, at 76.} As in the case of women’s unequal access, historically and contemporarily, it is true for intersex, trans, non-binary, and gender-diverse individuals that lack of public bathroom access hinders and may even prevent their participation in public life,\footnote{Fogg Davis, supra note 298, at 210; Farley & Leonardi, supra note 314, at 281.} including schools and workplaces.\footnote{Kogan, supra note 299, at 675; Hazeldene, supra note 340, at 1740.}

D. Prisons

Sex/gender essentialism also lurks behind arguments in favor of sex/gender segregation in prisons. Sex/gender segregation in prisons is commonly justified, including by human rights mechanisms,\footnote{See supra notes 170–71 and accompanying text.} as necessary for the protection of women from sexual and gender-based violence, but sex/gender segregation is only intelligible as a solution to the violence in prisons if one subscribes to essentialist notions that men will only ever be perpetrators of sex/gender-based violence and never its victims (and, conversely, that women will only ever be victims and never perpetrators).\footnote{Laura Stemple, Male Rape and Human Rights, 60 HASTINGS L.J. 605, 634 (2008).} This requires overlooking the reality that anyone who does not fit a masculine norm (e.g., an individual who is weak, young, gay, and/or trans) is a likely target of sexual assault and other forms of violence in men’s prisons.\footnote{Sarah Pemberton, Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes, 39 SIGNS 151, 152, 168–69 (2013).} Sex/gender segregation has not been found to reduce overall violence in prisons but instead to contribute to hegemonic masculinity, which is characterized by “aggression, violence, homophobia, and domination over women.”\footnote{Id. at 167–68; Lihi Yona & Ido Katri, The Limits of Transgender Incarceration Reform, 31 YALE J. L. & FEMINISM 201, 227–28 (2020).} The notion that sexual violence can be eliminated by separating men and women is also heteronormative, ignoring the fact that heterosexuality is not universal and the fact that sexual orientation/conduct is not fixed.\footnote{Mary K. Stohr, The Hundred Years’ War: The Etiology and Status of Assaults on Transgender Women in Men’s Prisons, 25 WOMEN & CRIM. JUST. 120, 122 (2015).} I will return to the “protection” justification for sex/gender segregation again in Section V.A.
Sex/gender segregation in prisons also perpetuates and reinforces stereotyping. It has been observed that, in some women’s prisons, requirements regarding appearance and behavior differ from those in men’s prisons: women might be allowed to keep their hair longer and wear makeup and jewelry, but they also are expected to be more submissive and thus are subject to stricter discipline.\textsuperscript{363} In men’s prisons, feminine styles of look and dress may be restricted.\textsuperscript{364} Trans women have reported that prison staff took wigs from their heads, laughed at their clothes, and ordered them to remove ponytail holders ("Do not, this is not a girl’s unit. Take that out of your head.").\textsuperscript{365} Trans women also reported being forced to present a more masculine appearance when staff and healthcare providers limited their access to feminizing hormones, a practice damaging to their physical and emotional health.\textsuperscript{366} Some trans women said they self-policed, conforming to masculine norms while in prison because it was too dangerous not to.\textsuperscript{367} Cis men in men’s prisons may also attempt to decrease the risk that they will become a target of violence by acting aggressive and bigoted, in accordance with masculine stereotypes.\textsuperscript{368}

Sex/gender segregation in prisons also reinforces sex/gender hierarchy, as UN human rights mechanisms have begun to observe.\textsuperscript{369} Women’s prisons are often under-resourced when compared with men’s prisons.\textsuperscript{370} Additionally, women’s prisons, since they are fewer, tend to place women farther away from their families than do men’s prisons; in higher-security establishments than necessary given the offenses committed; and together with the full range of women offenders, whether the offenses they had committed were violent or non-violent.\textsuperscript{371} Women’s prisons also tend to differ from men’s prisons by providing skills trainings that reinforce feminine norms, such as programs teaching women how to cook, clean, do hair and makeup, sew, and arrange flowers,\textsuperscript{372} likely contributing to employment segregation after release from.

\textsuperscript{363} Pemberton, supra note 359, at 153, 166, 167; Jennifer Summer & Lori Sexton, Same Difference: The "Dilemma of Difference" and the Incarceration of Transgender Prisoners, 41 LAW & SOC. INQUIRY 616, 619 (2016); Lynch & Bartels, supra note 164, at 218.


\textsuperscript{365} Id.

\textsuperscript{366} Id. at 76, 81.

\textsuperscript{367} Id. at 78–79.

\textsuperscript{368} Pemberton, supra note 360, at 168.

\textsuperscript{369} Pemberton, supra note 360, supra notes 174–78 and accompanying text.

\textsuperscript{370} Summer & Sexton, supra note 363, at 622.

\textsuperscript{371} Pemberton, supra note 360, at 166–67; Darren Rosenblum, Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism, 6 MICH. J. GENDER & L. 499, 533–34 (2000); Yona & Katri, supra note 361, at 243.

\textsuperscript{372} Pemberton, supra note 360, at 167; Rosenblum, supra note 371, at 533–34; Summer & Sexton, supra note 363, at 619; Yona & Katri, supra note 361, at 204–05.
prison. Likewise, women’s prisons are less likely than men’s prisons to have gyms or the infrastructure for conjugal visits, reinforcing the stereotypes that women are (or ought to be) physically weaker than men and less interested in sex.373 Women’s prisons in the United States are also more controlling of sexual activity than are men’s prisons, seemingly not for women’s protection but instead due to the stereotype that women who commit crimes are “impure sexually.”374

As in other contexts, sex/gender segregation in prisons reinforces the sex/gender binary, which makes it difficult for intersex, trans, non-binary, and gender-diverse persons deprived of liberty to have their identities recognized by authorities and, at the same time, makes them more visible within prison communities.375 Trans persons, for example, are often housed according to sex assigned at birth and not their gender identity, which exposes them to harm.376 Placement according to sex assigned at birth is common not only in prisons in Costa Rica377 and Hong Kong,378 which lack trans-inclusive protocols and policies in spite of the high likelihood of incarceration of trans individuals in these countries, but also in prisons in other countries where transgender identities are recognized but not always respected.379 Additionally, even when prisons recognize the existence of intersex, trans, non-binary, and gender-diverse individuals and the risks of violence against them, they sometimes respond by isolating these individuals from the main prison population, which produces its own harms.380 It may even place them at greater risk of sexual assault, as in the Canadian federal prison’s practice of removing trans women into “protective custody,” together with sex offenders.381

373. Yona & Katri, supra note 361, at 204–05.
374. Stohr, supra note 362, at 122.
375. Summer & Sexton, supra note 363, at 620–21, 636–37; Pemberton, supra note 360, at 152, 166; Yona & Katri, supra note 361, at 204–05.
378. John Nguyet Erni, Legitimizing Transphobia, 27 CULTURAL STUD. 136, 151–54 (2013). The lack of data might additionally be explained by Hong Kong’s failure to acknowledge in law that a man can perpetrate a rape of another man. Id. at 153.
379. White Hughto et al., supra note 364, at 70.
381. Yvonne Boyer et al., Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System, 31 CAN. J. WOMEN & L. 386, 390 (2019). Individuals may be placed, or request to be placed, in protective custody when interacting with the general population of the prison presents a risk to their safety. Sex offenders are among those commonly placed in protective custody. Rosemary Ricciardelli, Unpacking Harm: Corrective Officer Framing of Sex Offenders and Protective Custody, 59 HOW. J. 465, 466 (2020).
E. Sports

Sex/gender segregation in sports also reproduces sex/gender essentialism, treating “men” and “women” as natural and neatly divided categories in spite of evidence to the contrary.\(^{382}\) As Cheryl Cooky and Michael A. Messner have explained, segregation in sports has the effect of “symbolically converting what are actually average bodily differences (such as men on average being about five inches taller than women) to beliefs in categorical differences (i.e., men as a group are taller than women as a group).”\(^{383}\) Arguments in favor of sex/gender segregation in sports overlook the fact that variations in ability among men, as well as variations in ability among women, are much greater than the average differences in ability between men and women.\(^{384}\) They also fail to capture the fact that any biological differences are compounded by cultural factors (e.g., traits resulting in athleticism have historically been encouraged in men and discouraged in women) and that the gap in performance narrows as cultural changes allow women more opportunities to compete.\(^{385}\)

Sex/gender segregation, and the tools used to enforce it, also are based on the stereotype that women are—or must be made to be—physically inferior to men,\(^{386}\) a notion that dates back to nineteenth century medicine but persists through to today.\(^{387}\) Trans women, for example, are often required to undergo hormone therapy and surgery to eliminate the competitive advantage they are assumed to have from having been assigned male at birth.\(^{388}\) More recently, similar requirements have been applied to intersex women to eliminate potential competitive advantage.\(^{389}\) Meanwhile, men’s assumed superiority in athletics, both in terms of physical and psychological competitive ability, has no opportunity to be contested as they compete separately.\(^{390}\) Sex/gender segregation obscures the fact that women have performed as well as, or better than, men in distance swimming, rock climbing, long-distance running,


\(^{383}\) COOKY & MESSNER, supra note 11, at 4.

\(^{384}\) Mary Jo Kane, The Continuum Theory, in ROUTLEDGE HANDBOOK OF THEORY IN SPORT MANAGEMENT 342, 344, 346 (George B. Cunningham, Janet S. Fink & Alison Doherty eds., 2015).

\(^{385}\) Id. at 345–46.

\(^{386}\) Silvia García Dauder, Las fronteras del sexo en el deporte: Tecnologías, cuerpos sexuados y diferenciación, 8 INTERTHESIS 10 (2011); Leong, supra note 382, at 1255–56, 1266.


\(^{388}\) García Dauder, supra note 386, at 10, 13; Bethany Alice Jones et al., Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies, 47 SPORTS MED. 701, 707–12 (2017).

\(^{389}\) García Dauder, supra note 386, at 10.

\(^{390}\) E. McDonagh & L. Pappano, Playing with the Boys: Why Separate Is Not Equal in Sports, at x (2007); Kane, supra note 384, at 345–46.
shooting, dogsled racing, fencing, and wrestling.\textsuperscript{391} Comparison is made even more difficult by the fact that the assumption of women’s athletic inferiority has led in some instances to altered competitions, so their performances cannot be measured straightforwardly against men’s.\textsuperscript{392} Artistic gymnastics, for example, judges both men and women on acrobatic ability, but only women on elegance and grace and only men on strength and power.\textsuperscript{393} This difficulty of comparison is, perhaps, the point; there is some evidence that the instatement of sex/gender segregation in sports was motivated, at least in part, by a desire to protect men whose egos were bruised when women defeated them in athletic competitions.\textsuperscript{394} Overall, then, sex/gender segregation in sports is based on a series of essentialist premises, falsely purporting to be scientific, that “there are only two sexes; those two sexes are so different as to be almost separate species; and men will always beat women in physical contest.”\textsuperscript{395}

Sex/gender segregation in sport has also been justified as needed for the protection of women. Women have been perceived as generally being more prone to injury than men.\textsuperscript{396} The focus is often, however, on imagined injury to their ability to reproduce, derived from the stereotype that equates women with motherhood rather than on the reality of their experiences. For example, in the United States before 1870, the exclusion of women from sporting competitions was justified by reference to physiology and psychology, especially as they relate to menstruation.\textsuperscript{397} Similar arguments have also been made more recently. Women were not allowed to run marathons in the Olympics until 1984, because medical experts said that endurance sports could harm their reproductive health.\textsuperscript{398} This argument has also been framed as protection from “the violence of male athleticism”\textsuperscript{399} and as the protection of women from men who might fraudulently try to compete against women so they can win more easily.\textsuperscript{400} That men are more aggressive and more athletic than women are both, as previously mentioned, gender stereotypes, as is the transphobic notion that men are regularly pretending to be women in order to perpetrate some

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\textsuperscript{391} Leong, \textit{supra} note 382, at 1267–72.
\textsuperscript{392} Id. at 1276.
\textsuperscript{393} Id. at 1278.
\textsuperscript{396} Leong, \textit{supra} note 382, at 1272.
\textsuperscript{397} Id. at 1257–58.
\textsuperscript{398} COOKY & MESSNER, \textit{supra} note 11, at 48.
\textsuperscript{399} Eric Anderson, “I Used to Think Women Were Weak”: Orthodox Masculinity, Gender Segregation, and Sport, 23 SOCIO. FORUM 257, 265 (2008).
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Segregation in adolescent contact sports has also been justified with reference to the possibility of inappropriate sexual behavior when boys and girls compete against one another. This is based on an essentialist assumption of heteronormativity. I respond more fully to protectionist arguments in Section V.A.

Sex/gender segregation also perpetuates stereotypes in the context of sports. For example, when runner María José Martínez Patiño’s identity was questioned by sporting authorities in the 1980s, affecting her ability to compete in sex/gender-segregated competitions, the press speculated about her sex/gender by looking for signs of submissiveness, flirtation (directed at men), and interest in marriage and children. More recently, Caster Semenya, Edinanci Silva, and other athletes from the Global South whose sex/gender has been called into question have experienced racial as well sex/gender discrimination, as their appearance has been measured against that of a stereotyped white, Western femininity. Sporting authorities’ arbitrary testing of compliance with sex/gender segregation means that competitors who do not conform to gender stereotypes are targeted; for example, a deep voice might lead authorities to suspect that a competitor is not woman. In an attempt to prevent these suspicions and the harassment, discrimination, and potential elimination from competition that follow, coaches sometimes encourage women athletes to conform to stereotypes by wearing a padded bra, growing out their hair, wearing makeup and jewelry, or even having cosmetic surgery. The media contributes to this as well: for example, when a popular magazine profiled Caster Semenya it put her in make-up, a dress, heels, and jewelry to show readers that she is a woman. Sex/gender segregation also

401. See supra notes 382–95 and accompanying text; infra note 462 and accompanying text.
403. Garcia Dauder, supra note 386, at 9; McDonagh & Pappano, supra note 390, at x.
404. Garcia Dauder, supra note 386, at 11–12.
406. They’re Chasing Us Away from Sport, supra note 405, at 89, 91.
407. Id. at 88–89, 92–93.
enables the sports themselves to require stereotyped dress; for example, elite figure skating competitions have required women to wear skirts and men to wear sleeves and gymnastics competitions have required women to wear tight leotards and men to wear pants and tank tops.\textsuperscript{409} Women’s skintight competition outfits contribute to the development of eating disorders as well as the idea that it is more important that women be thin and beautiful than that they be strong, even when they are elite athletes.\textsuperscript{410}

Sex/gender segregation fuels stereotyping at all levels, not only at the highest ones. An eleven-year-old in Nebraska was banned from a girls’ soccer match because she played well and had short hair, leading to suspicions that she might be a boy.\textsuperscript{411} Children also suffer from unhealthy expectations, arising in the context of sex/gender-segregated sports, that they be thin. One gymnast began comparing her bodies with those of other girls at age five, started dieting at age ten, and had a heart attack at seventeen due to anorexia nervosa.\textsuperscript{412} Coaches contribute to this stereotyping, treating their teams differently based on sex/gender. A coach who yells at a boys’ team might not yell at a girls’ team because of the general perception that girls are sensitive, whereas boys either are or must become hardened in preparation for public life.\textsuperscript{413} These differences may be internalized by children playing on sex/gender-segregated teams. For example, when a children’s soccer league split into a boys’ league and girls’ league, the coaches assigned several girls’ teams pink uniforms (no boys’ teams were assigned this color) and encouraged the teams to choose names relating to their colors, resulting in a team called the “Barbie Girls,” an approbation of exaggerated feminine beauty standards voiced by the girls but prompted, initially, by the coaches.\textsuperscript{414}

Conversely, integration of teams has been found to combat stereotyping. A study of 68 male high-school football players who, after being cut from the sport in college, became cheerleaders alongside women, found that these athletes traded negative attitudes toward women for positive ones.\textsuperscript{415} Their preconceptions about the inferiority of women athletes were challenged as they realized how difficult cheerleading is, how tough cheerleaders are, and how

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\textit{Semenya’s Refusals and the Decolonization of Gender Testing, in ENVISIONING AFRICAN INTERSEX, 102 (2003); Sandy Montahola, From Sports to Science, Rhetorical and Power Issues in the Media Coverage of Caster Semenya, in GENDER TESTING IN SPORT, supra note 3, at 118.}
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409. Leong, supra note 382, at 1262.
411. \textit{Id.} at 1840.
412. \textit{Id.} at 1843.
413. \textit{Cooky & Messner, supra note 11, at 27–29.}
415. Anderson, supra note 399, at 259.

capable women are as coaches and team leaders. The former football players also were less likely to hypersexualize and exclude women as they began to treat the women on the team as peers and even friends. Notably, women’s attitudes appeared to change as well. One of the coaches said of the men on the team: “These guys have given me a new understanding of men, and they aren’t all that bad.” Another study found that sex/gender was less salient for adolescents when competing on an integrated swim team than it was out of the pool, and suggested that this could mean integrated sports are a good starting point for efforts to further sex/gender equality.

Sex/gender segregation in sports has also contributed to sex/gender hierarchy. Sports in which women have shown greater interest or ability, often due to stereotyping, tend to attract fewer resources, lower compensation, and less media attention. The devaluation of women’s sports thus tracks and even overlaps with the devaluation of women’s employment, as in the case of the U.S. women’s soccer team that had to complain to the Equal Employment Opportunity Commission to receive equal compensation in spite of being vastly more talented and successful than the men’s team. The assumption of male superiority in sport also means that societies tend to define sports as physical activities for which men are better suited than women, ignoring limbo, for example, which requires immense physical skill and at which women are more likely to excel. At the same time, men and boys who participate in “feminine” sports may experience bullying and harassment so severe that it results in suicide, as in the cases of twelve-year-old cheerleader Ronin Shimizu and fifteen-year-old figure skater Jamie Hubley. Women and girls are also deterred from sports that are considered to be for men, if not banned outright, which leads them to miss out on the physical and mental health benefits of inclusion and potentially also to suffer negative mental health impacts from exclusion. Sex/gender segregation in sports also contributes to employment segregation, because it gives men access to different networks and

416. Id. at 271–72.
417. Id.
418. Id. at 273.
421. COOKY & MESSNER, supra note 11, at 2.
422. Leong, supra note 382, at 1280–81.
423. Id. at 1279.
424. COOKY & MESSNER, supra note 11, at 197–98.
426. Id. at 1840.
because it genders notions of teamwork and leadership, which employers prize.427

Intersex, trans, non-binary, and gender-diverse individuals may feel unwelcome in athletic settings due to sports’ reliance on sex/gender as organizing categories. The confusion, discomfort, and vitriol some intersex, trans, non-binary, and gender-diverse individuals face when attempting to find their place within these segregated schemes can lead them to avoid certain sports or cease playing sports altogether.428 Nevertheless, as seen with the integrated college cheerleading teams and youth swim team, sports also can be the ideal environment in which to find not only teammates but also friends across sex/gender differences. A study of trans participation in adult recreational sports in Canada found that

non-queer, sport environments were also regarded as safe and welcoming spaces. M. (transgender woman) “contemplated quitting” recreational hockey many times due to instances of discrimination by participants; “I always had . . . four or five people on my team or friends that were really, ‘No, keep on playing! Screw them!’”. Similarly, Terra’s team captain even assured her that “when you’re out, awesome; we will fight with you to say that you are a woman and, like, we’ll come to that hill when we have to”. Participants recognized that with them being treated as “just another teammate” (Darrien, transgender woman), or “just another person, another friend, another player” (Terra, transgender woman), being transgender was no longer an issue.

Sex/gender segregation in sports puts the focus on the category of “woman” in debates about inclusion and ability in sports. Integration opens up the possibility that anyone, regardless of their sex, gender, or gender identity, could be welcomed into the categories of “athlete,” “teammate,” and even “friend.”

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Although international and regional human rights mechanisms have until now adopted inconsistent approaches to sex/gender segregation, prohibiting it in education and employment, requiring it in bathrooms and prisons, and addressing it unevenly (or not at all) in other spaces and activities, such as sports, the studies of sex/gender segregation covered in this Part have shown that, across all of these contexts, sex/gender segregation perpetuates and


428. Tung Nguyen, Sex Segregation and the Participation of Transgender Adults in Recreational Sport in British Columbia, Canada, 5 INNOVATIVE LEISURE PRACS. 93, 98–100 (2021).
reinforces sex/gender essentialism, stereotyping, and hierarchy, to the detriment of everyone, especially women and LGBTI persons.

IV. PROPOSED LEGAL FRAMEWORK FOR THE ANALYSIS OF SEX/GENDER SEGREGATION: WRONGFUL GENDER STEREOTYPING

As explained in Part II, human rights mechanisms have taken different approaches to sex/gender segregation depending on the context. These inconsistencies can be explained, at least in part, by the mechanisms’ reliance on context-specific provisions and instruments. For example, the CEDAW Committee has considered sex/gender segregation to violate CEDAW Article 11 on the right to work in the context of employment, but to be required, in accordance with Rule 11(a) of the Mandela Rules, in the context of prisons. Human rights mechanisms have occasionally mentioned gender stereotyping as a cause and consequence of sex/gender segregation in the contexts of employment and education, but gender stereotyping thus far has not been the primary framework through which human rights mechanisms evaluate segregation in these contexts, it has been largely neglected in the context of bathrooms and prisons, and its implications have yet to be fully unpacked in the context of sports. Part III, however, reviewed scholarship demonstrating that the causes and effects of sex/gender segregation in the context of


430. See supra Section II.D.


432. The UN Special Rapporteur on the right to education attributed one instance of inequality, observed in sex/gender-segregated detention facilities, to stereotyping, but the focus was (as the mandate of the special procedure would suggest) on educational opportunities within prisons specifically rather than on sex/gender segregation in prisons more generally. See supra note 174 and accompanying text.

433. Some human rights mechanisms have pointed to stereotyping as motivating the exclusion of trans and intersex women from sports, but have stopped short of using stereotyping to question the fact of sex/gender segregation in sports. See supra notes 194–98 and accompanying text.
employment and education resemble those of sex/gender segregation in the context of bathrooms, prisons, and sports. Across all these contexts, sex/gender segregation perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy to the detriment of everyone, especially women and LGBTI individuals. As such, this Part proposes that human rights mechanisms analyze sex/gender segregation in the framework of wrongful gender stereotyping. 434

A gender stereotype, under human rights law, “is a generalised view or preconception about attributes or characteristics that ought to be possessed by, or the roles that should be performed by, men and women.” 435 Gender stereotype is an umbrella term that includes sex stereotypes (“a generalised view or preconception about the physical, including biological, emotional and cognitive, attributes or characteristics that are or should be possessed by women and men”), sexual stereotypes (“a generalised view or preconception about the sexual characteristics that women and men are believed or expected to possess”), and sex-role stereotypes (“a generalised view or preconception about the roles that women and men are expected to perform, and the types of behaviours that they possess or to which they are expected to conform”). 436

434. Many human rights instruments expressly or implicitly require States to modify harmful gender stereotypes and eliminate wrongful gender stereotyping. The most well-known and well-developed of these is CEDAW, which addresses gender stereotyping in Article 5(a) (requiring States “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”) as well as several other provisions. Convention on the Elimination of All Forms of Discrimination Against Women arts. 2(f), 5(a), 10(c), Dec. 18, 1979, 1249 U.N.T.S. 13. Article 8(1)(b) of the Convention on the Rights of Persons with Disabilities likewise requires that States combat gender stereotypes, specifically as these intersect with stereotypes concerning disability. Convention on the Rights of Persons with Disabilities art. 8(1)(b), May 3, 2008, 2515 U.N.T.S. 3. Regional treaties, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), and the Protocol to the Banjul Charter on the Rights of Women in Africa (Maputo Protocol), also impose express obligations on States to modify harmful gender stereotypes and eliminate wrongful gender stereotyping. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) arts. 7(e), 8(b), 1994; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) arts. 12(1), 14(1), May 11, 2011, C.E.T.S. No. 210, Protocol to the Banjul Charter on the Rights of Women in Africa (Maputo Protocol) art. 2(2), 4(d), 6, 13, July 11, 2003. Moreover, both international and regional human rights mechanisms have interpreted the right to equality and non-discrimination, a principle found in all human rights treaties, to prohibit wrongful gender stereotyping. Gender Stereotyping as a Human Rights Violation, supra note 38, at 20, 35–36, 39–42; Rebecca J. Cook & Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives 111 (2011); Lourdes Peroni & Alexandra Timmer, Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence, in Stereotypes and Human Rights Law 39, 39 (Eva Brems & Alexandra Timmer eds., 2016); Verónica Undurraga, Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights, in Stereotypes and Human Rights Law, supra note 434, at 67, 83.

435. Gender Stereotyping as a Human Rights Violation, supra note 38, at 8.

436. Id. at 10–13.
Following this, the OHCHR has defined gender stereotyping as “the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.”

Sex stereotypes include the notion that women are less capable than men due to sex/gender directly, or indirectly (e.g., due to ability to bear children). For example, in *I.V. Bolivia*, the IACtHR found that doctors relied on sex stereotypes when they assumed that pregnant women were impulsive, unstable, and incapable of making decisions about their bodies. This category of stereotypes also includes preconceptions about how women and men should look and behave. For example, the UN Independent Expert on SOGI has observed that intersex persons are often stigmatized for not fitting societal expectations of what bodies should look like and how they should develop, and the IACtHR has observed that LGBT individuals face discrimination for not conforming to stereotypes about clothing, hairstyle, and mannerisms. The IACtHR has also noted that sex stereotypes may be modified when intersecting with other identities, creating compounded stereotypes such as the assumption that gay men are necessarily “effeminate” and that all trans individuals wish to undergo gender-affirming surgery.

Sexual stereotypes can involve assumptions about who fits the profile of a perpetrator or victim of sexual assault. For example, in *Tayag Vertido v. Philippines*, the CEDAW Committee found that a judge ruled on the basis of sexual stereotypes, including that an elderly man is incapable of rape and that a woman who does not appear “timid” cannot be raped. Similarly, in *Angulo Losada v. Bolivia*, the IACtHR found that a Bolivian trial court relied on a stereotype when it expressed disbelief that a girl with a “strong personality” could be raped. International and regional human rights mechanisms have also found that there exist sexual stereotypes, across cultures, associating

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437. *Id.* at 9.


LGBT individuals with criminality, predation, and pedophilia. The IACtHR has also identified as a sexual stereotype the notion that affection (e.g., hugging, kissing) displayed between an individual and their romantic partner of the same sex is necessarily erotic and offensive. Sexual stereotypes additionally include the notion that for a woman to have sex outside of marriage is unacceptable, immoral, and dishonorable, when the same would not be said of a man.

Sex-role stereotypes include the notion that men are breadwinners, destined to participate in public life, whereas women are wives, mothers, and caregivers whose labor is and ought to be domestic even when performed outside the home. For example, the IACtHR found that provisions of the Guatemalan Civil Code governing (heterosexual) marriage codified a sex-role stereotype when they imposed financial obligations on husbands and domestic responsibilities on wives, in effect requiring that women bear the burden of childcare and household management and preventing men from taking equal part. Sex-role stereotypes also include the notion that, for women, reproduction is not a right but a duty, which they should prioritize above their own health and well-being. Sex-role stereotypes shift in the face of non-traditional family structures. For example, single individuals, including women,


449. Inter-Am. Comm’n H.R., supra note 438, ¶ 118.


and same-sex couples, including lesbians, are often stereotyped as unfit to raise children.454

Sex/gender segregation is a cause and a consequence of gender stereotypes from across these three categories, sex, sexual, and sex-role. Among sex stereotypes, for example, sex/gender segregation perpetuates and reinforces the notion that men and women have differing capabilities and behaviors due to sex/gender. In employment and education, sex/gender segregation is sometimes explained as a result of natural preferences or abilities, such as women being more nurturing and better at listening than men are, whereas men are by nature more authoritative.455 In education, sex/gender segregation is sometimes justified on the basis of pseudoscience about differences between male and female brains.456 Across the contexts, sex/gender segregation perpetuates the notion that women are weaker and smaller than men.457 Sex/gender segregation, across contexts, also perpetuates stereotypes of men and boys as loud, aggressive, active and sporty, competitive, and unemotional.458 Sex/gender segregation also perpetuates and reinforces sex stereotypes with regard to how male and female bodies ought to act and appear. LGBTI persons have been known to alter—sometimes because they were asked or forced to alter—how they walk and talk; how they style their hair; what clothes they wear; whether they wear makeup; whether they take hormones; if and when they come out or transition; and more, to enable others to read them as male or female in a sex/gender-segregated context.459

Sex/gender segregation also perpetuates and reinforces sexual stereotypes, especially regarding who fits the profile of a criminal or of a victim of sexual assault. Across the contexts, the argument that sex/gender segregation is a means of protecting women from sexual and gender-based violence perpetuates the stereotype that men have natural, uncontrollable sexual urges, as compared to women who are sexually vulnerable and/or uninterested in sex except as a familial or reproductive obligation.460 It fails to engage with the reality that there are and will be perpetrators and victims who do not fit these stereotypes.461 At the same time, sex/gender segregation perpetuates the stereotype that intersex, trans, non-binary, and gender-diverse individuals are
predators or are perpetrating a fraud.\textsuperscript{462} Sex/gender segregation also perpetuates the notion that heterosexuality is the norm, which likely also fits within the category of sexual stereotypes.\textsuperscript{463}

Sex/gender segregation additionally perpetuates and reinforces sex-role stereotypes. Sex/gender segregation in education, sports, and prisons reflects and reinforces the stereotype that men are (or ought to be) breadwinners and women are (or ought to be) homemakers by providing them with different emotional and technical skills.\textsuperscript{464} Additionally, arguments that sex/gender segregation in employment, bathrooms, and sports is necessary for women’s reproductive health, in addition to being scientifically dubious, equate women with reproduction and motherhood, disregarding those women who do not want or cannot have children.\textsuperscript{465} At the same time, these arguments overlook the needs and responsibilities of individuals, other than women, who desire to have children and to care for them.\textsuperscript{466}

The OHCHR has clarified that human rights law concerns itself not with all gender stereotypes or gender stereotyping, but only with harmful gender stereotypes and wrongful gender stereotyping.\textsuperscript{467} The OHCHR defines a harmful gender stereotype as one that “limits [individuals’] ability to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans.”\textsuperscript{468} Additionally, the OHCHR emphasizes that a gender stereotype that appears positive could nevertheless be harmful; for example, women might be stereotyped as nurturing, with the effect of burdening them with child-care responsibilities.\textsuperscript{469} The OHCHR defines wrongful gender stereotyping as:

the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men, which results in a violation or violations of human rights and fundamental freedoms. The harm is caused by the application of a stereotypical belief to an individual (e.g., through a state enforcing a gender stereotype into a law) in such a way as to negatively affect the recognition, exercise or enjoyment of their rights and freedoms.\textsuperscript{470}

Although the example mentioned here is of a State enforcing a gender stereotype in a law, it is important to note that wrongful gender stereotyping

\textsuperscript{462} See supra notes 347, 401, and accompanying text.
\textsuperscript{463} See supra notes 246, 249, 266–67, 362, 402, and accompanying text.
\textsuperscript{465} See supra notes 200, 300–06, 397–98, and accompanying text.
\textsuperscript{466} See supra notes 201, 345, and accompanying text.
\textsuperscript{467} Gender Stereotyping as a Human Rights Violation, supra note 38, at 17–18.
\textsuperscript{468} Id. at 18.
\textsuperscript{469} Id.
\textsuperscript{470} Id at 19.
may be direct (i.e., domestic law openly incorporates and furthers gender stereotypes), indirect (i.e., ostensibly sex/gender-neutral domestic laws are influenced by or further gender stereotypes), or structural (i.e., patterns of behavior and organization, by public as well as private actors, reflect and further gender stereotypes). Examples of harms resulting from gender stereotyping that international and regional human rights mechanisms have found sufficient to form the basis of a human rights violation include violence, impunity, criminalization, negative health implications, etc.


barriers to education and employment;\textsuperscript{476} barriers to marriage and family formation;\textsuperscript{477} and harmful traditional practices, such as child marriage and forced marriage.\textsuperscript{478}

Sex/gender segregation produces harms that rise to the level of wrongful gender stereotyping, including violence, criminalization, negative health implications, and barriers to education and employment. Across contexts, sex/gender segregation is a cause of bullying and harassment of women and LGBTI persons, as well as of men who fail to live up to the norms of hegemonic masculinity.\textsuperscript{479} In the context of sex/gender-segregated bathrooms, to enter the “wrong” bathroom is to risk arrest.\textsuperscript{480} Sex/gender segregation in bathrooms can also present severe health issues for women, intersex, trans, non-binary, and gender-diverse individuals due to inequality of access.\textsuperscript{481} Sex/gender segregation in employment can result in health disparities through reduced benefits and unsafe workplace environments.\textsuperscript{482} Sex/gender segregation in prisons can lead to trans individuals being denied access to needed hormones and surgeries, while sex/gender segregation in sports can lead intersex and trans individuals to be coerced into taking unneeded


\textsuperscript{477} Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, supra note 472, ¶¶ 177, 224; Atala Riffo, supra note 454, ¶¶ 167, 237.


\textsuperscript{479} See supra notes 256, 310, 323, 348–50, 376–81, 423, and accompanying text.

\textsuperscript{480} See supra note 335 and accompanying text.

\textsuperscript{481} See supra notes 332–34, 354–55, and accompanying text.

\textsuperscript{482} See supra note 232 and accompanying text.
hormones and undergoing unnecessary surgeries. Sex/gender segregation in education and sports contributes to eating disorders among women and girls, and also results in fewer resources and a lower-quality learning environment for women and girls. Sex/gender segregation in education, bathrooms, prisons, and sports, have all been found to contribute to sex/gender segregation in employment, which in turn drives the gender wage gap, reduces the bargaining power of workers in women-dominated sectors, and can give employers an excuse not to hire, or to fire, trans individuals. Sex/gender segregation is thus, consistently, an act of wrongful gender stereotyping.

Human rights mechanisms should thus find that sex/gender segregation violates international law’s prohibition on wrongful gender stereotyping, regardless of the context in which this practice is found. Treaty provisions prohibiting wrongful gender stereotyping or, more broadly, establishing a right to equality and non-discrimination, can reach all the contexts mentioned thus far and more, because these provisions are usually justiciable (i.e., violations of those provisions may be alleged without having to connect them to a more specific provision). Human rights mechanisms also can and should use the framework of wrongful gender stereotyping when interpreting and applying context-specific treaty provisions to situations of sex/gender segregation. This will enable them not only to strengthen their approach to wrongful gender stereotyping by States, but also to root out the harmful gender stereotypes present in human rights instruments themselves. For example, the CESC has observed that the wording of ICESCR Article 11(1) perpetuates the stereotype that men are the heads of households and has updated its interpretation of the provision to reject this implication. The obligation to eliminate gender stereotyping should thus be capable of reaching sex/gender segregation in the context of prisons, even though separate prisons for men and women are generally required under international and regional human rights instruments. For example, European human rights mechanisms, which have already begun to interpret the requirement of sex/gender segregation in the

483. See supra notes 4–7, 366, 388–89, and accompanying text.
484. See supra notes 276, 410, 412, and accompanying text.
485. See supra notes 139, 280, 420, and accompanying text.
489. Freeman, Chinkin & Rudolf, supra note 471, at 143, 154; Sepper, supra note 488, at 590, 596. Comm. on the Elimination of Discrimination Against Women, supra note 33, ¶ 6; Gender Stereotyping as a Human Rights Violation, supra note 38, at 37, 40.
490. Gender Stereotyping as a Human Rights Violation, supra note 38, at 41.
491. Id.
European Prison Rules flexibly, could move from a permissive approach to integration to aggressive efforts to eliminate sex/gender segregation in prisons if they begin to apply a wrongful gender stereotyping framework when interpreting the Rules.

V. RESPONSES TO COMMON JUSTIFICATIONS FOR SEX/GENDER SEGREGATION

According to Rebecca Cook and Simone Cusack’s transnational study of human rights and gender stereotyping, there may exist an exception to States’ obligation to eliminate gender stereotyping, even when harmful, “where the application, enforcement, or perpetuation of a gender stereotype in a law, policy, or practice serve[s] a legitimate purpose and the means chosen to attain that purpose [are] both reasonable and proportionate.”492 Cook and Cusack define a legitimate purpose as “one that has an objective and reasonable goal” and a reasonable and proportionate response as one in which “the means chosen to achieve the legitimate purpose [are] not . . . excessive; that is, the benefits of the differential treatment that result from gender stereotyping should outweigh its negative effects.”493 In this Part, I argue that protection (Section V.A), choice (Section V.B), and culture (Section V.C), three common justifications for sex/gender segregation, fail the test articulated by Cook and Cusack, and so should not present a barrier to deriving from the gender stereotyping framework the need for a universal prohibition on sex/gender segregation. At the same time, I note that these factors should be taken into consideration when designing and implementing measures to eliminate sex/gender segregation.

A. Protection

As noted in Part III, sex/gender segregation is often justified as necessary to protect women. This justification is most frequently heard in relation to bathrooms,494 since it is a context in which people feel particularly vulnerable,495 and prisons,496 due to heightened safety concerns in this context. Nevertheless, sex/gender segregation has been identified as a method of promoting women’s safety from sex/gender-based harassment and violence in

492. COOK & CUSACK, supra note 434, at 123.
493. Id. at 124.
495. Shreve, supra note 311, at 128; Kogan, supra note 299, at 683–85.
496. See supra note 358 and accompanying text.
all contexts considered in this Article, including employment, education, and sports. It has also been suggested that sex/gender segregation guards women’s privacy in the context of bathrooms, and protects women’s health in the contexts of employment and sports. I consider the protection of safety, privacy, and health, to constitute a legitimate purpose. I do not, however, consider sex/gender segregation to constitute a reasonable and proportionate means of protecting safety, privacy, and health. In this Section, I argue that the “protection” justification overlooks the harms that women experience in the context of segregation, that this justification in itself perpetuates harmful gender stereotypes, and that the justification also obscures harms experienced by individuals other than women. I suggest that sex/gender segregation be replaced with measures that are known to be effective in protecting the privacy, health, and safety of all individuals.

The “protection” argument in favor of sex/gender segregation overlooks the harms that women experience in segregated contexts. For example, women experience harms in spaces restricted to, or traditionally dominated by, women, at the hands of other women. Some of these harms arise out of the enforcement of the sex/gender-segregated scheme, including harassment in bathrooms. Others harms arise out of the stereotypes that segregation perpetuates. For example, the pressure to fit a feminine ideal at girls’ schools in Ireland resulted in higher rates of eating disorders among girls studying at those schools than among girls studying at integrated schools. Other harms are mere byproducts of sex/gender segregation. For example, the low number of women in prison means that non-violent and violent offenders are often held together, whereas in men’s prisons they are usually held separately.

Women, when in sex/gender-segregated contexts, also do not entirely avoid harms perpetrated by men. Men generally can be found in (readily abused) positions of power in these supposedly women-only contexts: they

497. See supra notes 203, 222, and accompanying text.
498. See supra note 247 and accompanying text.
499. See supra note 402 and accompanying text.
500. See supra note 311 and accompanying text.
501. See supra notes 199, 397–98, and accompanying text.
502. See Otto, supra note 21, at 306 (“In questioning the natural foundation of both gender dualism and gender hierarchy, I do not want to deny the patterns of gender disadvantage that impact on every woman’s life, although the picture is vastly complicated by the many differences among women because of intersecting systems of discrimination. Rather, the question that weighs increasingly heavily is whether dualism and asymmetry provide the best way to pursue the emancipatory possibilities for everyone, including ciswomen, that are opened up by the recognition that gender is primarily (if not entirely) a social category.”).
503. See supra note 323 and accompanying text.
505. Yona & Katri, supra note 361, at 242–43.
work at women’s prisons, they coach women’s sports, they teach at women’s colleges, and, thanks to vertical segregation, they are in the upper echelons of traditionally women-dominated industries. It has also been argued, with regard to bathrooms, that sex/gender segregation provides women with an illusion of safety that is itself a danger. A man intent on committing a crime is unlikely to be deterred by a sign that says “women.” The possibility of another man entering the space, on the other hand, might serve as a deterrent. It seems what women-only bathrooms achieve is simply to endanger women by isolating them and by giving a potential perpetrator an expectation of where they will be. If safety is a concern, then there are other measures, such as surveillance cameras and cultural and educational change, that are more likely to be effective than a sign marked “women.” Sex/gender segregation also exacerbates dangers to women when women venture into traditionally male-dominated or men-only spaces. Women entering male-dominated workplaces, for example, experience more sexual harassment than do women in integrated environments as some men intentionally attempt to drive women away from these jobs. This harassment also goes to extremes unheard of in integrated workplaces, with men leaving women coworkers stranded in mines or on top of wind turbines.

511. Colker, supra note 304, at 175.
512. Id. at 176.
513. Overall, supra note 303, at 82; Case, supra note 305, at 220; Antony, supra note 49, at 5.
514. Archibald, supra note 325, at 39–40; Overall, supra note 303, at 82; Case, supra note 305, at 220.
Additionally, as noted in Part III, the “protection” justification itself perpetuates harmful gender stereotypes.\(^{517}\) While it is true that men are more likely than women to commit sex/gender-based harassment and violence and that women are more likely than men to experience it,\(^{518}\) the “protection” argument in favor of sex/gender segregation turns these statistics into a categorical assumption that men are necessarily the perpetrators of this violence and women, necessarily, its victims. This perpetuates and reinforces sexual stereotypes, including that “men have a natural urge to sexually dominate or even assault women” and that “women are seductive objects who lure men into sexual violence” who moreover bear the responsibility for preventing sexual assault by separating themselves from men.\(^{519}\) This justification also perpetuates and reinforces sex stereotypes by framing women as universally weak and men as hopelessly aggressive.\(^{520}\) Although human rights mechanisms may once have permitted protective measures that are based on gender stereotypes, there is now, among courts at the international, regional, and domestic levels, a trend toward a critical examination of these stereotypes and a rejection of protective measures that rely on them.\(^{521}\)

The “protection” justification also relies on the inaccurate, discriminatory assumption that heterosexuality is natural and universal\(^{522}\) such that separating men and women removes the possibility of sexual relations.\(^{523}\) This argument overlooks the homoerotic encounters, consensual and non-consensual, that occur in the context of sex/gender-segregated schools,\(^{524}\) bathrooms,\(^{525}\) prisons,\(^{526}\) and sports,\(^{527}\) among other sex/gender segregated settings.\(^{528}\) It appears to do so intentionally, in an attempt to erase nonheteronormative ways of being. Commenting on the argument that sex/gender segregation protects

\(^{517}\) Rana Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 Harv. Hum. Rts. J. 1, 6 (2002); Colker, supra note 304, at 151.

\(^{518}\) Colker, supra note 304, at 175.

\(^{519}\) Hazeldene, supra note 340, at 1771–73; Levy, supra note 307, at 255.

\(^{520}\) Kogan, supra note 313, at 164.


\(^{522}\) Overall, supra note 303, at 79–80.

\(^{523}\) Colker, supra note 304, at 152, 158–59.

\(^{524}\) Epstein, supra note 245, at 115.

\(^{525}\) Shreve, supra note 311, at 139–43.


privacy in bathrooms, Richard Wasserstrom observed that this argument’s unspoken premise seems to be “the importance of inculcating and preserving a sense of secrecy concerning the genitalia of the opposite sex” in order to “maintain the primacy of heterosexual attraction central to that version of the patriarchal system of power relationships we have today.”

The “protection” justification has also obscured harms to individuals other than women. The safety, privacy, and health of trans, non-binary, gender-diverse, and intersex persons are jeopardized by sex/gender segregation. Sex/gender segregation increases their visibility and at the same time provides grounds for their exclusion, which combine to make them a frequent target of violence and discrimination in workplaces, schools, bathrooms, prisons, and sports. The policing of sex/gender that occurs in sex/gender-segregated contexts also intrudes on their privacy, as seen in sports’ gender verification practices, prisons’ invasive searches, and the scrutiny of appearance and behavior prompted by segregated bathroom facilities. The health of trans, non-binary, gender-diverse, and intersex individuals is negatively affected as they avoid sex/gender-segregated spaces, including not only bathrooms but also hospitals that have sex/gender-segregated bathrooms. Sex/gender segregation in sports has also resulted in some of these individuals being coerced into taking medically unnecessary hormones. At the same time, safety and privacy concerns that have been raised in response to trans individuals’ accessing bathrooms and similar spaces in accordance with their gender identity are not empirically grounded, arising instead out of sexual stereotypes associating LGBT individuals with criminality, predation, and pedophilia.

Gender-conforming men are also vulnerable to harassment, violence, and rape in all-male environments, where men are prone to compete to prove their masculinity and to maintain a masculine environment. Men who are gay, or
perceived to be gay, as well as men who otherwise depart from masculine norms in appearance or behavior are targets of gender-based violence that a woman-specific approach overlooks.\textsuperscript{537} This is true at school,\textsuperscript{538} in the workplace,\textsuperscript{539} in bathrooms,\textsuperscript{540} in prisons,\textsuperscript{541} and in sports.\textsuperscript{542} The stereotype that men are strong and women are weak also has been used to justify the exclusion of women from football, but not the alteration of the sport itself, which has caused permanent brain damage to many men.\textsuperscript{543} This is based on gendered and racialized understandings of football players “as disposable, even if sometimes highly remunerated, bodies.”\textsuperscript{544} The perception that men have less need of protection than women also results in their enjoying less safety in men’s bathrooms, which are frequently the location of muggings, drug deals, and other criminal activity.\textsuperscript{545} Privacy could also be an argument in favor of sex/gender-integrated bathrooms, since mixed-sex/gender facilities tend to provide men greater privacy than do men-only bathrooms,\textsuperscript{546} with serious implications for the not unsubstantial number men with paruresis who are unable to use urinals because these are insufficiently private.\textsuperscript{547} In an extreme case, Harvard University removed the stall doors of the men’s restroom in the Science Center, one of the few buildings on campus that has public restrooms, in an attempt to prevent sexual encounters, thereby erasing any semblance of privacy.\textsuperscript{548} In another violation of privacy, Ohio police filmed and arrested gay men who had sex in a bathroom in Ohio, then used the film for a training video.\textsuperscript{549}

Sex/gender-segregated schemes also fail to protect children, the elderly, and persons with disabilities.\textsuperscript{550} Sex/gender segregation in bathrooms sometimes leads caregivers to allow children to use a restroom alone when they are too young to be safe without a supervising adult, which has in extreme

\textsuperscript{537} Steemple, supra note 359, at 645.
\textsuperscript{538} See supra note 256 and accompanying text; see also Byrne & Cathy, supra note 504, at 7; Jackson, supra note 238, at 226.
\textsuperscript{539} See supra notes 206, 223, and accompanying text.
\textsuperscript{540} See supra note 310 and accompanying text.
\textsuperscript{541} See supra note 354 and accompanying text.
\textsuperscript{542} See supra note 423 and accompanying text; see also Roberto Baiocco et al., Sports as a Risk Environment: Homophobia and Bullying in a Sample of Gay and Heterosexual Men, 22 J. GAY & LESBIAN MENTAL HEALTH 385 (2018).
\textsuperscript{543} Leong, supra note 382, at 1273.
\textsuperscript{544} Cooky & Messner, supra note 11, at 3.
\textsuperscript{545} Anthony & Dufresne, supra note 304, at 277; Case, supra note 305, at 217; Colker, supra note 304, at 171, 176.
\textsuperscript{546} Case, supra note 305, at 217.
\textsuperscript{547} Joel Sanders & Susan Stryker, Stalled: Gender-Neutral Public Bathrooms, 115 S. ATL. Q. 779, 785 (2016); Fogg Davis, supra note 298, at 211; Anthony & Dufresne, supra note 304, at 276.
\textsuperscript{548} Shreve, supra note 311, at 143.
\textsuperscript{549} Id. at 145.
\textsuperscript{550} Colker, supra note 304, at 175; Anthony & Dufresne, supra note 304, at 277.
cases resulted in children being molested and even murdered in bathrooms while family members wait outside.\textsuperscript{551} Similarly, family members might be left waiting outside for an elderly relative or a relative with a disability who ought to be accompanied into the restroom, only to discover from someone else that the relative has fallen and hurt themselves.\textsuperscript{552}

Let me be clear: when I argue that human rights law requires the prohibition of sex/gender segregation, I am not arguing that States should eliminate sex/gender segregation without attending to the consequences this will have for safety, privacy, and health. Where protection has been used as a justification for sex/gender segregation, the elimination of sex/gender segregation should be accompanied by the institution of measures that, unlike sex/gender segregation, do constitute reasonable and proportionate means of achieving the protection and promotion of safety, privacy, and health for everyone, including women. Policymakers should cease to fish about for justifications for sex/gender segregation, which will inevitably be discriminatory, and instead invest in the creation of safe, private, and sanitary integrated spaces. There are already design proposals for integrated bathrooms\textsuperscript{553} and experimental studies of integrated prisons\textsuperscript{554} for their consideration. Arguments in support of other alternatives, such as prison abolition, should also be considered.\textsuperscript{555} Additional studies, specific to each country’s cultural context, should be undertaken. Sex/gender segregation is not a reasonable and proportionate means of achieving protection, but that does not indicate that protection is wholly unnecessary. It only indicates that other measures that are reasonable and proportionate in achieving protection must be found and implemented.

B. Choice

Another common justification for sex/gender segregation is choice. Some variations of this argument appeared in Part III. For example, one argument, in the context of education and employment, is that individuals make choices

\textsuperscript{551} Colker, \textit{supra} note 304, at 175; Anthony & Dufresne, \textit{supra} note 304, at 277; Levy, \textit{supra} note 307, at 266–67.

\textsuperscript{552} Anthony & Dufresne, \textit{supra} note 304, at 277.

\textsuperscript{553} Sanders & Stryker, \textit{supra} note 547, at 783.


about what to study and what career to pursue based on natural preferences, and these happen to result in de facto segregation.\textsuperscript{556} Likewise, in the context of sports, it has been suggested that women and girls are naturally inclined toward only certain sports or naturally inclined away from sports altogether, as compared to boys who are naturally sporty in general.\textsuperscript{557} Choice additionally features in arguments that women might appreciate and prefer sex/gender segregation itself due to negative feelings about sharing space with men (e.g., discomfort, fear) and/or positive feelings about sharing space with women (e.g., support, solace).\textsuperscript{558} It is also true that some feminists have advocated for the existence of women-only spaces,\textsuperscript{559} including in the contexts of bathrooms,\textsuperscript{560} prisons,\textsuperscript{561} and sports.\textsuperscript{562} It has even been suggested that some trans individuals might prefer sex/gender-segregated bathrooms because these bathrooms present an opportunity to affirm one’s gender identity in a public space.\textsuperscript{563} In this Section, I argue that, although choice has the potential in the abstract to constitute a legitimate purpose, the formulation of the “choice” justification for sex/gender segregation in particular is flawed because it fails to acknowledge that societal and parental influence can shape or even dictate individuals’ preferences, that allowing some people to opt for sex/gender segregation skews the sex/gender balance in spaces that are meant to be integrated, and that the preferences of individuals other than women and girls have been discounted. I suggest that preferences ought to be considered not in determining whether sex/gender segregation should be eliminated, but rather in determining how best to proceed toward its elimination.

Individuals’ expressed preferences for segregated spaces and activities, as well as any preferences that indirectly result in their finding themselves in such situations, cannot be understood apart from the societal shaping of those preferences. As Martha Minow has explained:

Choice may seem to put all options on the table, yet it is not neutral. It converts schooling to private desires. It obscures continuing inequalities in access and need; it invites self-separation unless collectively controlled. It treats the aggregation

\textsuperscript{556} See supra notes 207, 209, 243, and accompanying text.  
\textsuperscript{557} See supra note 278 and accompanying text.  
\textsuperscript{558} SEPARATED BY SEX, supra note 240, at 8; Levy, supra note 307, at 278; Overall, supra note 303, at 83  
\textsuperscript{559} Epstein, supra note 245, at 106; Haag, supra note 253, at 13. See also supra note 27 and accompanying text.  
\textsuperscript{560} Shreve, supra note 311, at 137.  
\textsuperscript{562} COOKY & MESSNER, supra note 11, at 61.  
\textsuperscript{563} Colker, supra note 304, at 150.
of separate decisions as free when the result so often impedes freedom and equality.\textsuperscript{564}

The fact that sex/gender segregation, specifically, currently exists in some contexts also influences individuals’ preferences for sex/gender segregation. As Nancy Leong commented, in her analysis of sex/gender segregation in sports, “It is worth asking whether those women who prefer sex-segregated sports in domains where no physical reason requires sex-segregation prefer segregation simply because it is traditional, and traditions die hard.”\textsuperscript{565} Flipping the default rules illustrates the relationship between individuals’ preferences and the status quo. Ruth Colker, for example, recalled that her college dormitory had integrated bathrooms and that she quickly grew used to the practice:

I . . . remember my father coming to visit. He asked me, “Where is the men’s room?” Unabashedly, I explained he could use any restroom. He responded, “I’ll wait until we get to the restaurant.” For me, the default rule had flipped so I was accustomed to using a coed restroom. For him the default rule was firmly in place so he experienced discomfort until he could find a restaurant with a sex-segregated restroom.\textsuperscript{566}

Individuals’ preferences that relate, directly or indirectly, to sex/gender segregation, will likely cleave to the status quo, but that does not mean that the status quo should be left unquestioned and unchanged. Individuals’ preferences can adjust to embrace greater equality.

An individual’s preferences are also shaped, and during childhood potentially supplanted, by the preferences of their parent(s). Parental influence, like societal influence more broadly, should not be left unquestioned, especially given the history of parents’ prioritizing sex/gender norms over the well-being of their children.\textsuperscript{567} Parents’ power over children’s experiences is especially great in the context of education.\textsuperscript{568} As mentioned in Part III, parents might choose to send an LGBTI child to a segregated school to punish them for deviation from sex/gender norms and to compel them to conform.\textsuperscript{569} Parents could conceivably sign their children up for segregated sports teams with this

\begin{thebibliography}{9}
\item 565. Leong, supra note 382, at 1287–88.
\item 566. Colker, supra note 304, at 178–79.
\item 567. For example, parents have been known to consent to surgeries that bring the sex characteristics of their intersex children into closer alignment with the sex/gender binary, even when these surgeries are medically unnecessary and prone to cause suffering and severe side effects. Human Rights Violations Against Intersex People: A Background Note, supra note 4, at 5, 18. They also have been known to abuse and abandon LGBT children. Inter-Am. Comm’n H.R., supra note 188, ¶ 311.
\item 568. Watson, supra note 238, at 199.
\item 569. Id. at 206–07.
\end{thebibliography}
same intention. Parental influence over children also extends into adulthood. For example, preferences for certain career paths are shaped by structural factors, including parents’ gendered socializing of their children. This gendered socialization may be achieved indirectly through the purchase of toys that promote stereotyped activities and appearances. The “choice” justification is thus flawed in part because it attributes segregation to the individual, obscuring the role of the family and of society.

The “choice” justification is also flawed because it neglects the ways in which some individuals’ choice of a sex/gender-segregated scheme over an integrated one can affect the experiences of those who remain in the integrated space. One scholar has observed that the higher rates of stereotyping and harassment associated with segregated contexts generally dissipate when women constitute about fifteen to twenty percent of employees; if too many women gravitate toward women-dominated fields, it becomes difficult for women who want to work in men-dominated fields to make inroads. Similarly, students who opt to enroll in sex/gender-segregated schools can skew the sex/gender balance in the classrooms they leave, potentially making those spaces also, de facto, segregated.

The “choice” justification also tends to discount the preferences of individuals other than women and girls. In the context of education, male students generally have expressed a preference for integrated classrooms, as have their teachers. Trans and intersex individuals’ preferences, which are often to be in a space that accords with their gender identity (if not an integrated space), are often disregarded as those overseeing segregated schemes fixate on their sex assigned at birth and sex characteristics. They might also be denied access to both men’s and women’s spaces and activities, by being directed to a third option that serves to reinforce the overall sex/gender segregation scheme, as in the case of trans persons’ access to

570. See David J. Kinnis & Travis Salway, Cisgender and Other Identity Among Sexual and Gender Minority People: A Narrative Inquiry and Creative Non-Fiction, 32 QUAL. HEALTH RES. 1955, 1970 (2022) (recounting the experience of a teenager whose pastor suggested he combat feelings of sexual attraction toward men by playing team sports).
571. Higgins, supra note 208, at 251–59; Escrache, supra note 208, at 852–53.
573. Chamallas, supra note 515, at 111–12 (reviewing trial testimony by Dr. Susan Fiske).
574. SEPARATED BY SEX, supra note 240, at 9.
576. An exception is that trans men might prefer to be housed in women’s prisons. EDWARD SCHIAPPA, THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY 133 (2022).
577. See supra notes 3, 376–79, 406, and accompanying text.
bathrooms. They might even be excluded altogether, as in the case of intersex women who are excluded from competing in both men’s and women’s sporting competitions unless they undergo surgery or take hormones, neither of which are necessary to their health. Non-binary and gender-diverse persons, similarly, might be left with no choice at all.

I do not mean to say that individuals’ preferences that relate, directly or indirectly, to sex/gender segregation are irrelevant. I believe that these preferences should be taken into account. I simply argue here that “choice” does not justify sex/gender segregation. Preferences should be considered not in determining whether or not sex/gender segregation should be eliminated, but rather in determining how best to proceed toward its elimination. To smoothly and effectively integrate, it will be important to learn who is expressing what preferences and then engage accordingly. For example, addressing employment segregation might require a focus on men whose expressed preference is to avoid care work, both in their professional lives and in the home. On the other hand, addressing bathroom segregation might require a focus on women who feel comfortable in a women-only space. Although the “choice” justification in favor of sex/gender segregation is flawed, the preferences on which this argument is built could be useful in shaping the design and implementation of measures for the elimination of sex/gender segregation.

C. Culture

Arguments against integration may also arise directly out of sex/gender segregation’s cultural entrenchment, which can be deep. These arguments might point to culture in general or to specific religions, such as Judaism and Islam, that traditionally have incorporated some level of sex/gender segregation into their beliefs and practices. Christianity has also ties to sex/gender segregation; for example, many segregated schools in the United States are Catholic. In this Section, I argue that, although culture could, in the abstract,
constitute a legitimate purpose, the formulation of the “culture” justification in favor of sex/gender segregation is flawed because it essentializes culture, failing to acknowledge that culture is dynamic and heterogenous. I also argue that, if a culture-based argument in favor of sex/gender segregation were found to be a legitimate purpose, sex/gender segregation in that instance would constitute a harmful traditional practice, a human rights violation associated with gender stereotyping. I suggest that, although culture does not justify sex/gender segregation, attention to culture is important to facilitate integration.

The “culture” justification of sex/gender segregation suggests that culture is monolithic, when in reality every culture contains within itself a diversity of perspectives. This diversity is illustrated by a study of the perspectives of African-American college students on trans individuals’ access to bathrooms, which found that students raised religious arguments both for and against inclusivity. Some students criticized the exclusion of trans individuals from bathrooms by pointing out that “the Bible says treat others like you want to be treated” and that “We are all God’s children first.” Other students argued against trans individuals’ existence and inclusion by using religion as the basis for the sex/gender binary:

[The] Bible says there are only two genders that Jesus created, Men and Women. Anything else is not in the [sic] God’s world. We should show some respect to God. We formed this nation as one nation under God. The nation under God doesn’t have transgender. Only male and female, therefore at least preserve bathrooms that way.

This diversity of opinion also exists in Islam, although the perspectives of Muslim secularists who advocate for gender equality are often neglected in

583. Cultural essentialism has been found in human rights law and advocacy in the past, and must be rooted out in favor of more realistic, nuanced, and effective approaches. Kapur, supra note 517, 11–17. See also Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, 42 HARV. INT’L L.J. 201 (2001).
584. Sarah Song, Feminists Rethink Multiculturalism: Resisting Essentialism and Cross-Cultural Hypocrisy, in THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 139, 145 (Margaret Davies & Vanessa E. Munro eds., 2013).
587. Id. at 107, 110.
588. Id. at 110.
human rights work, while Muslim fundamentalist movements have not only been “misread . . . as ‘cultural,’ as embedded in Islam” but also privileged as “a singular ‘Muslim view’ or Muslim reality.” The “culture” justification in favor of sex/gender segregation similarly serves to privilege only one view within a culture, when there are a plurality that can be leveraged to criticize as well as to support segregation. Culture is not singular and does not exclusively trend in one direction.

The “culture” justification for sex/gender segregation also fixes culture as static, when in fact it is dynamic. Culture can change in ways that reverse gains in sex/gender equality. For example, sex/gender segregation in Israel and Turkey is on the rise as these countries trend more fundamentalist. Culture can also change in uneven ways, as in the case of Iraq, where adapting religious tradition to modern circumstances is seen as necessary in the economic sector but not even considered as an option in the realm of women’s rights. Ideally, however, cultures will adapt in ways that promote equality. Given that culture is dynamic, as well as that law interacts with and forms part of culture, it is fitting that law work together with culture to move in the direction of equality, including on the issue of sex/gender segregation.

If, however, circumstances arise in which a culture-based argument in favor of sex/gender segregation appears to be nuanced and realistic, as opposed to essentialist, this still will not be sufficient to support the creation or continuation of sex/gender-segregated schemes because international human rights law has established that, when a society’s beliefs and practices perpetuate harmful gender stereotypes, these must be modified. As already


594. Salbiah Ahmad, Islamic Law and CEDAW: Managing Diversity, Developing Consensus in Muslim Communities, in LAW, JURISPRUDENCE AND HUMAN RIGHTS IN ASIA 315, 337 (2011).

595. Freeman, Chinkin & Rudolf, supra note 471, at 147, 155–56; Sepper, supra note 488, at 630–32.

established, sex/gender segregation perpetuates and reinforces a range of gender stereotypes and causes a range of harms, including violence, criminalization, negative health repercussions, and barriers to education and employment, that rise to the level of human rights violations. If anything, the “culture” justification indicates that sex/gender segregation in some cases could additionally constitute a harmful traditional practice (another human rights violation associated with gender stereotyping), as Lisa Fishbayn Joffe has argued with respect to sex/gender-segregated buses in Israel.

Although the “culture” justification should not prevent human rights mechanisms from finding that international law prohibits sex/gender segregation, culture is relevant to the implementation of this prohibition. The best approach to integration will be one that acknowledges that the rights to equality and non-discrimination, to culture, and to freedom of religion and belief are mutually reinforcing. As Frances Raday, former expert on the CEDAW Committee and former chair of the UN Working Group on Discrimination Against Women, has explained: “The clash with which we are dealing is not between culture or religion, on one side, and the right to gender equality, on the other.” It is, instead, between gender equality and “those norms of culture or religion that inculcate patriarchal values and rely on a claim to cultural tradition or religious freedom in order to perpetuate these patterns of behavior to the disadvantage of women.” An approach to the elimination of

Gender Identity, supra note 580, ¶ 7; Freeman, Chinkin & Rudolf, supra note 471, at 142, 145, 150, 160–61; Sepper, supra note 488, at 588, 592; Konstantin Markos, supra note 476, ¶ 127.

See supra Part IV.

597. The CEDAW Committee and Committee on the Rights of the Child define harmful traditional practice as: persistent practices and forms of behavior that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status. Comm. on the Elimination of Discrimination Against Women & Comm. on the Rts. of the Child, supra note 478, ¶ 15.

599. See supra note 478 and accompanying text.


603. Id.
sex/gender segregation that is sensitive to both gender and culture is more likely to be developed by domestic human rights defenders, drawing on international human rights law, than by States directly implementing international law. A close understanding of and connection to the context, including the cultural context, of sex/gender segregation should facilitate effective integration.

CONCLUSION

In this Article, I have argued that human rights law should be interpreted to prohibit sex/gender segregation in all contexts, including education, employment, bathrooms, prisons, and sports, because of the gendered harms it produces. Prohibiting sex/gender segregation would constitute a departure from the current approach of human rights mechanisms, which has been to discourage sex/gender segregation in education and employment, require it in bathrooms and prisons, and devote little attention to it in other contexts, such as sports. This departure is needed because sex/gender segregation, no matter the context, perpetuates and reinforces sex/gender essentialism, stereotyping, and hierarchy, to the detriment of everyone, especially women and LGBTI persons. Since international law requires States to modify harmful gender stereotypes and eliminate wrongful gender stereotyping, States have an international obligation to eliminate sex/gender segregation regardless of the context in which it occurs. Common arguments in favor of sex/gender segregation, arising out of protection, choice, and culture, do not prevent human rights mechanisms from finding that international law prohibits sex/gender segregation, but these concerns should be taken into consideration when proceeding toward the elimination of sex/gender segregation.

Although I have argued in this Article that human rights mechanisms should, immediately, interpret international law to prohibit sex/gender segregation anywhere this practice is found, I expect the implementation of this prohibition to be gradual and context-specific. Human rights mechanisms have urged States to take steps toward the modification of harmful gender stereotypes by establishing comprehensive strategies with concrete objectives and clear timelines, because they recognize that combatting wrongful gender

605. See supra Part II.
606. See supra Part III.
607. See supra Part IV.
stereotyping is a continual process that moves slowly and gradually. Sex/gender segregation, in large part due to its connection to gender stereotypes, has a similar tendency to persist. Integration will require both human rights mechanisms and States to make consistent efforts over a long period of time. Human rights mechanisms can encourage this incremental improvement by gradually recommending more robust measures tailored to the country context, a practice the CEDAW Committee and the UN Special Rapporteur on the right to food have demonstrated in their anti-gender stereotyping efforts. Sex/gender segregation in employment is a prime example of discrimination, with a basis in gender stereotyping, that human rights mechanisms have, over time, recommended be addressed and eliminated by more concrete measures. The timeframe in which human rights mechanisms usually expect States to modify harmful gender stereotypes could prevent or reduce backlash from States and civil society actors who might prefer to maintain or expand sex/gender segregation.

Eliminating sex/gender segregation will be difficult, as evidenced by the persistence of de jure and de facto sex/gender segregation in education and employment, in spite of human rights mechanisms’ efforts to combat these practices. Failure to identify sex/gender segregation as violation of human rights, however, is not an option, since it would leave discrimination intact. Human rights mechanisms should thus proceed with naming sex/gender segregation as a human rights violation, but should also recognize that this is only the beginning of addressing the phenomenon and that many other measures will be needed. Human rights mechanisms might draw on the measures they have recommended to address sex/gender segregation in education and employment, including that States survey the current state of

608. COOK & CUSACK, supra note 434, at 2; FREEMAN, CHINKIN & RUDOLF, supra note 471, at 148; Undarraga, supra note 434, at 93.


610. Rikki Holtmaat, Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination, THE HAGUE: MIN. SOC. AFF. & EMPLOYMENT 45 (May 2004); supra Section II.A.

611. FREEMAN, CHINKIN & RUDOLF, supra note 471, at 166.

612. See supra Sections II.A–B & III.A–B; see also DONALD TOMASKOVIC-DDEVY & KEVIN STAINBACK, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT, at xxiii (2012).

613. Gender Stereotyping as a Human Rights Violation, supra note 38, at 68.

sex/gender segregation in their jurisdictions, consult with communities disproportionately affected by sex/gender segregation (e.g., women, LGBTI persons), consult with communities likely to support sex/gender segregation (e.g., traditional or religious leaders), repeal measures that require sex/gender segregation, evaluate facially neutral measures to determine whether they result in sex/gender segregation in practice, enact prohibitions on sex/gender segregation in domestic law, train those who need to enforce prohibitions of sex/gender segregation, and raise awareness of the harms of sex/gender segregation in their jurisdictions as a whole through educational and cultural measures, as well as monitor and assess the impact of these measures. In cases in which sex/gender segregation has been treated as serving a legitimate purpose, such as the protection of health, privacy, or safety, human rights mechanisms might additionally suggest that sex/gender segregation be replaced by other measures that are more targeted and effective in achieving the objectives that sex/gender segregation has ostensibly served.

Human rights mechanisms might also consider providing support to States that goes beyond identifying sex/gender segregation as a human rights violation and recommending measures to eliminate the practice. For example, human rights mechanisms could publicize good practices in a variety of contexts to illustrate what successful integration looks like. A study of mixed-sex/gender prisons in Denmark, for example, might help States to understand why and how sex/gender segregation should be eliminated in this context. Human rights mechanisms might also produce a model law on sex/gender segregation that States could adopt, create forums for dialogue among States and civil society for the purpose of sharing good practices and addressing concerns around the implementation of this prohibition, and provide technical assistance to States, such as trainings for officials and consultations on law reform.

Effective implementation will also require additional scholarship on sex/gender segregation. Because of the broad scope of the Article, I have not been able to address, narrowly and specifically, how implementation of this prohibition ought to proceed in particular contexts. To develop appropriate solutions, there will need to be scholarship that analyzes in greater detail each of the contexts I considered (i.e., employment, education, bathrooms, prisons, and sports) and more (e.g., public transit, changing rooms, domestic violence shelters, polling stations, the military), while also taking into consideration other factors. I have already flagged that choice and culture could be factors to consider, but there are others. Age, for example. Studies on sports have determined that sex/gender segregation can easily be eliminated in children’s sports, since, prior to puberty, children’s bodies do not present significant
variations, \textsuperscript{615} whereas for professional athletes, it would be better for gender equality and for competitive fairness if sports continued to be divided, but on the basis of physical traits other than sex/gender, \textsuperscript{616} such as (depending on the sport) skill, weight, height, strength, or other characteristics for which sex/gender is at best a proxy. \textsuperscript{617}

As noted in Section V.C, the most effective and sensitive approaches to integration will likely be developed and championed by domestic human rights defenders. Real and lasting change is not imposed from above; it is demanded from below. By abandoning their current position that the law requires sex/gender segregation in bathrooms, prisons, and potentially also sports, human rights mechanisms will be one less obstacle in the path of advocates for integration. By asserting that sex/gender segregation is a violation of human rights, no matter the context in which it is found, these international and regional mechanisms may begin to be a support.

\textsuperscript{615} Archibald, supra note 325, at 34–36.


\textsuperscript{617} Archibald, supra note 325, at 34–36; Catherine Jean Archibald, Transgender and Intersex Sports Rights, 26 VA. J. SOC. POL’Y & L. 246, 249 (2019); Jones et al., supra note 388, at 713; Leong, supra note 382, at 1286.