Gender-Inclusive Bathrooms: How Pandemic-Inspired Design Imperatives and the Reasoning of Recent Federal Court Decisions Make Rejecting Sex-Separated Facilities More Possible

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Abstract

This article suggests that the moment may be right to rethink the societal need for sex-separated bathrooms, and to consider the harmful ways in which they perpetuate a problematic gender binary. Architectural innovations for public restroom design, inspired by the need to increase social distancing during the pandemic, align well with designs that have already been proposed for gender-inclusive bathrooms. At the same time, recent federal cases have confronted the tortured logic of those insisting on policing the gender binary that sex-separated bathrooms represent. The responses in these decisions, which uphold the rights of transgender students to have access to the bathrooms that align with their gender identity, are shown to undermine the logic of the gender binary in general and the rationale for sex-separated facilities in particular.

I. Introduction

When "nature" calls in public, we are continuously reminded of the gender binary. The gender binary asserts that there are only two genders into which all people can be easily categorized; it asserts that the failure of some to conform to

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these categories is not a problem with the categories but a problem with the nonconforming individual. While this normative assertion is reinforced in many settings, it is invariably associated in our minds with the urge to pee. When, say, we exit an airplane and look for the needed restroom, what we are looking for is the iconic gendered pair: the unclothed male figure and his triangle-skirted female partner. When we find the location these two friends signify, we are careful to part ways appropriately. Indeed, relieving oneself is currently so strongly associated with sex segregation that even a unisex toilet is typically designated by these male and female icons side by side.

Like the urge that occasions this binary search, the division into two genders is assumed to arise naturally. This assumption forms what sociologists Suzanne Kessler and Wendy McKenna call the "natural attitude." The "natural attitude," as they use the term, is an unquestioned assumption governing our everyday lives "that every human being is either a male or a female."[1] While the two restroom symbols are differentiated by their clothing, we mostly understand that clothing is not the basis for the differentiation. The woman in slacks still heads for the skirted icon, while the man in a kilt knows that the unkilted male figure is his destination.[2] But clothing is not entirely beside the point, because one of the ways in which the gender binary is policed is by an expectation that clothing matches and reveals an underlying reality about gender.[3] It is when the sartorial appearance of an individual does not match the expectations of the viewer about the individual's gender that cognitive dissonance can ensue. The result of such dissonance can be punitive measures against the nonconforming individual, but the result can also be the promulgation of incoherent rationales that create opportunities to question the underlying assumptions of the natural attitude.

The gender binary and the natural attitude cause harm most obviously to those whose gender identity varies from the expectations created. These victims include both those who embrace a gender identity opposite from what the natural attitude assumes is appropriate, and those whose gender presentation resists easy categorization under one of the sides of the binary. In addition, the continuous reinforcement of the gender binary also harms those whose identification and presentation do not as obviously diverge. For other members of society, the subtle policing of behavior and appearance and the shame attached to errors of presentation or direction (finding oneself in the "wrong" bathroom) detract from a fuller

1. SUZANNE KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 121 (1978).

2. *But see* many humorous memes playing off of this disconnect. *E.g., Meanwhile, in Scotland Funny Scottish Kilt Joke Postcard*, ZAZZLE: POSTCARDS, https://www.zazzle.com/meanwhile_in_scotland_funny_scottish_kilt_joke_postcard-239640100474084472 (last visited Oct. 18, 2021).

3. *See* Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 146–79 (2017).

experience of life and reduce compassion for those who diverge more significantly from the binary's expectations.[4]

Other scholars have provided compelling arguments that sex-segregated public restrooms are unconstitutional and reinforce negative gender stereotypes.[5] As Ruth Colker argues, the very ubiquity of sex-segregated facilities reinforces the notion that gender is a rigid binary by forcing a divide for physical functions that do not require it.[6] Laura Portuondo suggests in her article that the stereotypes perpetuated by separate bathrooms, including women's vulnerability, may actually perpetuate the dangers separate bathrooms are meant to avoid.[7] According to Prof. Colker, "[t]he current sex-based configuration of restrooms is not inevitable; changing that well-accepted configuration is essential to dismantling the sexual stereotyping that underlies gender-based inequality."[8]

Sex-segregated bathrooms may also perpetuate unfounded fears of invasion that find their basis in historical efforts to stoke racial anxiety. Cultural historian Gillian Frank documents that World War II era segregationists deployed imagery of invasion and infection to stave off racial integration of public restrooms.[9] He argues that the 1970s opposition to the Equal Rights Amendment (ERA) used similar fears about the gender integration of public restrooms to seek defeat of the ERA, and offers examples of racist and sexist images that explicitly link racial integration with gender integration.[10] A pamphlet distributed by the anti-ERA Eagle Forum, illustrating a his and hers bathroom, provides a potent example when it asks: "Do you want the sexes fully integrated like the races?" in a manner meant to elicit a negative response to both.[11]

Frank suggests that this connection to the language of racial segregation persists in the efforts to paint transgender bathroom visitors as invaders.[12] As Daniella Schmidt effectively argues, the fear of predation that figures in the opposition to bathroom access for transgender individuals is "unfounded," and ironic in light of the violence often experienced by transgender people in public restrooms.[13] The concerns expressed about privacy and invasion that animate the

4. *See* Susan Etta Keller, *What If We All Used the Same Bathroom?*, BOSTON GLOBE (Sept. 5, 2016 8:39 PM), https://www.bostonglobe.com/opinion/2016/09/05/what-all-used-same-bathroom/jnf1VvOIPzQXj8FfU2n4DL/story.html.

5. Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 468–70 (2018); Colker, *supra* note 3, at 163.

6. Colker, *supra* note 3, at 164–65.

7. Portuondo, *supra* note 5, at 523.

8. Colker, *supra* note 3, at 160.

9. Gillian Frank, *The Anti-Trans Bathroom Nightmare Has Its Roots in Racial Segregation*, SLATE (Nov. 10, 2015, 4:55 PM), https://slate.com/human-interest/2015/11/anti-trans-bathroom-propaganda-has-roots-in-racial-segregation.html; *see also* Colker, *supra* note 3, at 160.

10. *See* Gillian Frank, *"The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign Against Gay Rights in 1970s Florida*, 22 J. HIST. SEXUALITY 126, 138 (2013).

11. *Id*. at 136–37.

12. Frank, *supra* note 9.

13. Daniella A. Schmidt, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L., 155, 162–63 (2013).

claims of those recent litigants who would deny transgender students access to the bathrooms that align with their gender identity are haunted by these older arguments about racial and gender contamination. The fact that these arguments are rooted in harmful stereotypes further undercuts the assumed naturalness of the bathroom gender divide.

Events that have occurred in recent years may provide opportunities for thought and cultural opening that make the implementation of unisex—or gender inclusive—public toilets more possible. As the country seeks to emerge from a pandemic-induced quarantine, concerns about public restrooms have been highlighted for different reasons. According to a May 18, 2020 *Washington Post* article, fear of coronavirus contamination from surfaces and lack of distancing in public restrooms poses a significant obstacle for individuals to return to public spaces for shopping or entertainment.[14] This reluctance may impel new design and new construction of these public-private places. Interestingly, the suggestions provided in the article—which include individual toilet compartments and a de-emphasis of urinals because of the proximity to others they require—actually align well with suggestions made by architects seeking to develop workable plans for gender-inclusive public restrooms. Architects like Matt Nardella have created plans for multi-doored gender-inclusive facilities that gain space for extra stalls by joining the handwashing place into a single area.[15] Because separate restrooms are often justified by a reference to biological differences, the urinal, and men's affection for its convenience, are often presented in the popular imagination as a major obstacle to dismantling this division in how people meet the need to urinate.[16] With the COVID-19 infection as a common enemy and urinals now disfavored because of viral proximity, attitudes that would demand otherwise unsafe spaces in order to reinforce the gender divide may relax.

At the same time, there is a tendency in recent federal decisions addressing the consequences of sex-segregated bathrooms in schools to reject some of the tortured logic employed by defendants seeking to police the boundaries of the gender divide in the use of public restrooms. In these cases, which do not directly challenge the existence of sex-segregated facilities, the language of the decisions nonetheless creates an opening to question the rationales for defending this divide. The cases discussed in this article include those in which transgender students challenge the policies of public schools denying them access to the bathroom that accords with their gender identity,[17] and those cases in which cisgender

14. Marc Fisher, *The Need to Go Is a Big Barrier to Going Out. Why Public Bathrooms Are a Stumbling Block for Reopening*, WASH. POST (May 18, 2020), https://www.washingtonpost.com/national/coronavirus-reopen-bathrooms/2020/05/18/a6ed57fc-93ba-11ea-82b4-c8db161ff6e5_story.html?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most.

15. Matt Nardella, *Smart Architecture Solves The Political Problem of Gender Neutral Restrooms*, MOSS ARCHITECTURE (Nov. 2, 2015), http://moss-design.com/gender-neutral-bathrooms.

16. Portuondo, *supra* note 5, at 484.

17. *See infra* notes 29–56 and accompanying text.

students and their parents challenge policies by schools allowing transgender students access to the bathroom that accords with their gender identity.[18]

The results of these recently decided cases have become all the more important in the context of the combined decision in *Bostock v. Clayton County,* released on June 15, 2020. While the majority opinion in *Bostock* limits its holding to the employment context, deciding that Title VII's prohibition of discrimination on the basis of sex applies to employment actions against gay and transgender employees,[19] its reasoning is likely to now bolster the results of these earlier cases, which rest their holdings that Title IX prohibits discrimination against transgender students on analogies to Title VII.[20] And while the majority in *Bostock* also expressly declines to consider the applicability of its decision to bathrooms,[21] the specter of that applicability plays a role in Justice Alito's dissent and loomed large in the October 2019 oral arguments.[22] As Justice Sotomayor stated during the questioning, "same-sex bathroom use" is the "big issue right now raging [in] the country."[23]

The cases concerning the use of sex-segregated bathrooms by transgender students would appear to be unlikely vehicles for a push toward greater adoption of gender-inclusive restroom architecture. First, as the facts of these cases partly attest, restrooms in public schools are a locus of great sensitivity; public schools may be some of the last places likely to adopt gender-inclusive restrooms due to the strong feelings of those invested in the gender binary. Second, disciplinary interests of school administrators actually favor limiting privacy for all students in intimate spaces in ways that the privacy features of unisex architecture make difficult. Finally, the transgender litigants in these cases, or the transgender students whose interest the challenged school policy seeks to protect, are not at all seeking an end to bathrooms separated by gender. Indeed, these students often cite the medical and psychological advantages to them of using the sex-specific toilet that conforms to their gender identity, while rejecting as stigmatizing the alternative unisex toilets to which they are sometimes relegated. Their approach in this respect is eminently understandable, given the context and meaning of the policies they challenge, which seek to police the gender divide by excluding these students and denying their gender identity.

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18. *See infra* notes 57–68 and accompanying text.

19. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

20. *See, e.g.,* Whitaker v. Kenosha, 858 F.3d 1034, 1047 (7th Cir. 2017), Doe v. Boyerton, 897 F.3d 518, 534 (3rd Cir. 2018).

21. *See Bostock*, 140 S. Ct. at 1753 ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

22. *See* Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, But Can't Stop Talking About Bathrooms*, NEW YORKER (Oct. 9, 2019), https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms.

23. Transcript of Oral Argument at 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17–1618).

Nonetheless, these cases offer a pathway for questioning the assumptions underlying binary thinking. In most of the cases, school officials rely on a concept of "biological sex" to justify both the binary assignment of public bathrooms and the exclusion of transgender students from the gender-specific bathrooms they prefer.[24] This concept of "biological sex," when used in these contexts of exclusion, fails to adequately account for the multiple indicators of sex and gender that medical professionals recognize.[25] When judges must confront the arguments of proponents of rigid bathroom policies that rely on so-called biological sex, they are required to sift through the logic of the pro-binary argument, which ultimately reveals the incoherence with which these arguments are constructed.

These recent federal court decisions, which reveal a surprising sophistication in the understanding of gender expression, were issued even while other cultural and legal trends are suggestive of an increased intolerance for transgender and nonbinary individuals. It is particularly notable that most of the cases discussed in this article were issued after the 2017 withdrawal by the Trump Administration of the Obama-era guidance clarifying that the rights of transgender students covered by Title IX included access to restrooms that aligned with their gender identity.[26] The years 2020 and 2021 also brought a renewed spate of state bills that sought to limit options for transgender youth to use bathrooms, participate in athletics, and seek medical treatment for gender dysphoria.[27] However, the early response to such measures in the federal courts suggests that these actions, founded as they are on an incoherent approach to gender similar to that animating the measures addressed by the cases discussed in this article, will also be rejected by the federal courts, for similar reasons.[28]

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24. *See e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).

25. Katrina Karkazis, *The Misuses Of "Biological Sex"*, 394 LANCET 1898 (2019).

26. Title IX of the Education Amendments of 1972 is the federal statute that protects students from discrimination on the basis of sex. Its applicability to claims of discrimination by transgender students has received conflicting treatment by different presidential administrations. *Compare* Dep't. of Just., Dep't. of Educ., Dear Colleague Letter on Transgender Students (2016), (https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf), *with* U.S. Dep't. of Just., U.S. Dep't. of Educ., Dear Colleague Letter (2017), (https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf). *But see* Katie Rogers, *Title IX Protections Extend to Transgender Students, Educ. Dept. Says*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2021/06/16/us/politics/title-ix-transgender-students.html (announcing the new Biden Administration's change in policy that transgender students are now protected by the statute).

27. *See* Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most,* CNN (Apr. 15, 2021), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html.

28. *See* Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (issuing preliminary injunction against enforcement of Idaho statute that would bar transgender women from participating in women's sports). Though outside the scope of this article, the case of Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021), with its support of the claim by a professor who refused to use the preferred pronoun of one of his students, arguably points in a different direction. *See* Susan Etta Keller, *Doing Things with the Language of Gender: Using Speech Act Theory to Understand the Meaning and Effect of the Gender Identity Backlash* (unpublished manuscript) (on file with the author), for a reading of *Meriwether*.

II. CASES CHALLENGING SCHOOL BATHROOM POLICIES THAT RESTRICT ACCESS BY TRANSGENDER STUDENTS

In one set of recent cases, transgender students sued school districts for the right to use the restroom associated with their gender identity. While earlier cases along similar lines produced mixed results, recent cases have strongly favored these litigants, resulting in decisions, at both the district and circuit court levels, holding that the school policies in question violate both Title IX and the Equal Protection Clause. These cases often carefully interrogate the rationales school boards put forward and expose some of the fallacies of their reasoning.

A. GAVIN GRIMM LITIGATION

One example of the federal courts' struggles with the reasoning behind non-inclusive bathroom policies is the extended litigation involving Gavin Grimm, a transgender man who first sought an injunction as a 15-year-old high school student in 2015 to allow him to use the boys' restroom. That case, in which the district court denied the injunction, would ultimately have been heard by the U.S. Supreme Court in 2017 but for the Trump Administration's withdrawal of the Department of Education's earlier guidance. With the case sent back to the lower courts, Grimm's case was once again before a different district court judge, this time seeking nominal damages and an injunction that Mr. Grimm, now a graduate, would be allowed to use the appropriate restroom if he returned for alumni functions.[29]

Notwithstanding the withdrawal of the guidance, the court in this new decision takes a very different position and effectively undermines the arguments put forward by the school board that their interest in excluding Grimm was non-discriminatory and motivated by the privacy interests of all students, including Grimm. In considering the school board's version of the gender binary, the court recognizes the instability of the distinctions made in that policy. The court emphasizes that using "biological sex" as the basis for assigning students to gender-specific bathrooms created a set of categories that was by no means self-evident. The court cites research that distinguishes between sex characteristics and gender identity to question the meaning of the "biological sex" distinction, while also taking note that the sex characteristics underlying the school board's definitions may be diverse and ambiguous in certain individuals. Informed by these theories, the court declares the school's policy normative rather than descriptive:

> [The school board's] use of the term "biological gender" functioned as a proxy for physiological characteristics that a student may or may not have had. The term allowed the Board to isolate, distinguish, and subject to differential treatment any student who deviated from what the

29. Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).

> Board viewed a male or female student *should* be, and from the physiological characteristics the Board believed that a male or female student *should* have.[30]

The court further suggests that the school board's promotion of "sex" as a "binary term" ignores the ways in which the term does not neatly categorize all students:

> However, as noted above, this fails to address the question of how [the policy] is to be interpreted regarding transgender students or other individuals with physiological characteristics associated with both sexes.[31]

This recognition that the basis for assigning students to bathrooms does not always rely on obvious or universally accepted definitions furthers the important work of questioning the gender binary and its applicability to bathrooms.

Holding that the use of this policy to exclude Grimm from the restroom aligned with his gender identity violates his rights under both Title IX and Equal Protection, the court accuses the board of advancing privacy interests as a mere pretext, stating that this rationale "rings hollow."[32] The court also calls into question the very basis for a privacy expectation in public school restrooms, recognizing that these facilities are not particularly private to begin with, noting the many ways in which the privacy interests of students generally are not upheld by this policy.[33]

This most recent district court *Grimm* decision, like the other cases discussed here, does not directly challenge the separation of bathrooms by gender. In that respect, the decision is notable for what it does not accomplish as well as for what it does; it is by no means an endorsement of unisex restrooms. Indeed, the unisex restrooms to which the plaintiff was assigned were very much part of the problem for him because they "underscored his exclusion."[34] The ultimate point of the litigation is to preserve a gender binary with a different parameter, one in which Mr. Grimm may participate. However, in the process of exposing the fallacies in the binary of "biological sex" created by the school board, the court's reasoning also helps undermine the gender binary on which sex-separated restrooms in general are based. In that respect, the new decision represents a significant divergence from the original district court opinion of 2015, in which the court concluded that

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30. *Id*. at 743.

31. *Id*. at 744.

32. *Id*. at 751; *see also* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 614 (4th Cir. 2020), (noting the lack of evidence of any privacy invasion engaged in by the plaintiff, and stating that "the bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms").

33. *Grimm*, 302 F. Supp. 3d at 751; *See* Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 370 (1999).

34. *Grimm*, 302 F. Supp. 3d at 738.

Grimm's sex was female and that requiring him to use the restroom that corresponded with that biological sex was not discriminatory.[35] Whereas the original decision on the same facts accepted the binary logic of the school district's policy, the new decision confronts that logic and exposes its fallacies in a way that undermines the gender binary.

In upholding the new district court's decision, the August 2020 Fourth Circuit opinion challenges a binary view of gender to an even greater extent. For example, the court offers a relatively sophisticated understanding of gender identity in youth, suggesting that in addition to transgender and cisgender individuals, "there are other gender-expansive youth who may identify as nonbinary, youth born intersex who do or do not identify with their sex-assigned-at-birth, and others whose identities belie gender norms."[36]

This openness toward gender expression on the part of the appellate court is born of the rigidity of the school district's position, which the court finds logically incoherent. As the district court did, the Fourth Circuit finds the school district's policy incoherent:

> By relying on so-called "biological gender," the Board successfully excluded Grimm from the boys restrooms. But it did not create a policy that it could apply to other students, such as students who had fully transitioned but had not yet changed their sex on their birth certificate . . . . [T]he Board's policy is not readily applicable to other students who, for whatever reason, do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity.[37]

By insisting on a policy based on biological sex that is ill-defined and impossible to apply consistently to all students, the school district has occasioned the dissection of gender norms in which the district court and appellate court engage.

B. *A.H. v. Minersville* (2019)

A.H. v. Minersville is an example of another district court decision that unpacks the convoluted logic of gender separation policies while considering the circumstances of a transgender girl in elementary school. The plaintiff chose to start living as a girl, with the support of her parents and therapist, while in kindergarten.[38] Unlike in *Grimm* and other cases, where the school's bathroom policy was at the center of the dispute, here the issue concerned bathroom use on a school field trip. We learn from the opinion that kindergarten students at this school are not subjected to gender-separated bathrooms; instead, they all use a single bathroom

35. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 132 F. Supp. 3d 736, 752–53 (E.D. Va. 2015), *rev'd in part, vacated in part*, 822 F.3d 709 (4th Cir. 2016).

36. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 596 (4th Cir. 2020).

37. *Id.* at 615.

38. A.H. v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 544 (M.D. Pa. 2019).

attached to the classroom.[39] School administrators' anxieties about appropriate bathroom use were only triggered when a field trip to a zoo was planned and the prospect arose of this child using gender-separated bathrooms at the zoo. Rather than having the plaintiff, whose appearance was female, use the ladies' room with all the other girls, they insisted that she use the men's room, with administrators ensuring it was empty and blocked off prior to entry.[40] This incident forms the primary basis for the lawsuit, along with the requirement that the plaintiff's mother accompany the child on a subsequent field trip in order to bring the plaintiff into the ladies' room in a culturally approved manner.[41]

The district court strives mightily to fathom the rationale for this head-scratcher. In other cases concerning post-pubescent transgender women, the exclusion policies appear to rely on inchoate fears about the danger of an exposed penis, even if behind bathroom stall doors.[42] Here, however, the child is of an age when such fears should be irrelevant, as evidenced by the fact that parents routinely bring opposite sex children of the plaintiff's age into sex-separated restrooms. Despite pages of quoted testimony, the only consistent rationales offered by the administrators are worries that the plaintiff's original gender assignment might have been revealed to other occupants of the women's restroom by fellow students and thus "call unwanted attention" or pose a "safety" concern for the plaintiff herself.[43] However the court notes that blocking the men's room so that a child dressed as a girl may enter alone hardly served to avoid such potential attention:

> To the extent that either administrator's stated objectives may be interpreted as setting forth a concern that a member of the public may identify A.H. as a male and create a "safety concern" for A.H. if she used the women's restroom, this justification is deeply flawed. It is undisputed that at the time of the first field trip in kindergarten, when the policy was first implemented, A.H. was dressing in female clothing and presented herself as a female. Therefore, the risk that a member of the public may pose a safety concern to A.H. is arguably significantly higher when a child who by all appearances is female, is required to use a men's restroom.[44]

The district court's dismantling of the school board's justifications for this policy reveal them to be founded in anxiety that was based not on the well-being of the students themselves. Instead, the concerns seem to be based on what others might think and judge about a school that did not adequately police a rigid gender

39. *Id.*
40. *Id.*
41. *Id.* at 546.
42. *See infra* note 50 and accompanying text.
43. *Id.* at 578.
44. *Id.*

binary. As the District Superintendent stated, "[s]o when you go out in a public building, you go out into the public and you have a child who many perceive as being a boy going into a female bathroom, there may or may not be problems."[45] In the absence of any concrete safety concerns, the unspecified "problems" he identifies can only be the negative judgment of others, which is not an appropriate basis for restricting the student's access to the bathroom that aligns with her gender identity. In revealing the illogic of the school's decision making, opinions like *A.H.* help undermine the gender binary that motivates the anxiety on which those administrator's choices were based.

C. *WHITAKER V. KENOSHA* (2017)

In *Whitaker v. Kenosha*, a Seventh Circuit case, the court again questions the logic of policies that exclude a student whose appearance and identity conform to the gender-separated restroom he wishes to use. The plaintiff, a public high school student, chose to violate a policy that required him to use the girls' restroom despite his identification as a boy. Because the school records listed him as a girl during his original enrollment, the policy at the school dictated he only use the girls' restroom. The plaintiff worried that with a male appearance, he was far more likely to create a disciplinary violation if he used a restroom where his appearance was out of sync with the designation on the door.[46] The dilemma faced by this plaintiff reveals the incoherence of those policies intended to separate bathrooms on the basis of the sex announced on one's birth certificate or other document. The proponents of policies that insist on conforming bathroom use with original sex assignment are still likely to object to users of a sex-separated toilet whose gender presentation does not conform to the sign on the door, no matter what is on their birth certificate or school record. It is the disconnect between one marker of gender and the others that threatens a gender binary in which the promulgators are invested, and which transgender individuals threaten, no matter which gender-specific bathroom they use.

In *Whitaker*, the court recognizes, to a certain degree, this set of contradictions. The rationale the school district offered, that it was protecting the other students' privacy interests, did not make sense to the court under the facts. Indeed, the plaintiff had used the boys' room without any complaint from other students for weeks, and was disciplined not because of any action on his part that actually threatened other students' privacy interests, but only because a teacher saw that he was washing his hands in the boys' room. The court explains that the policy does nothing to advance privacy interests because it "ignores the practical reality of how [the plaintiff], as a transgender boy, uses the bathroom: by entering a stall

45. *Id.* at 545.

46. *See* Whitaker v. Kenosha, 858 F.3d 1034, 1040 (7th Cir. 2017); *see also* J.A.W. v. Evansville Vanderburgh Sch. Corp., 323 F. Supp. 3d 1030, 1035 (S.D. Ind. 2018) (transgender male teenager expressing similar concern about being required to use girls' restroom, noting that "female peers at school have expressed discomfort with him using the girls' restrooms because he appears male").

and closing the door."[47] The court refuses to accept that privacy is violated just by the mere presence of an individual whose identity is at odds with the school board's definition, arguing that

> [a] transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time.[48]

Because the themes of privacy and invasion form much of the justification for sex-separated bathrooms in general, the court's success in undermining these arguments in the context of this transgender student's efforts to use the bathroom of his choice, in this as in other cases, helps challenge the basis for maintaining sex-separated bathrooms.

D. OTHER RECENT CASES

Other recent district court cases similarly recognize the irrationality of the privacy rationale for the challenged policies. In *Adams v. School Board*,[49] the school district cited the privacy interests of other students for prohibiting a transgender male teen from using the boys' room. Although the plaintiff was a transgender boy wishing to use the boys' room, the examples the district cited for its policy, which would apply equally to transgender girls, were the privacy interests of girls in the girls' room. However, as the court notes, the private activities cited by the school board are none that are particularly threatened by the presence of another individual:

> While St. Johns County School personnel said girls may want privacy in the restrooms while talking to their peers, changing clothes (which can be done in a stall), putting on make-up, or removing stains from their clothing, none of that requires them to expose their anatomy to other students such that having a transgender student in the restroom would invade their bodily privacy. And, any student who wants additional privacy for any reason is permitted to use the gender-neutral single-stall bathrooms.[50]

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47. *Whitaker*, 858 F.3d at 1052.

48. *Id.* The quotation includes an unfortunate and seemingly unintended apposition that would equate the transgender student's presence with that of an "overly curious" student of the same sex assigned at birth. However, the ultimate point seems to be that privacy risks that are inherent in the restroom setting are not increased when one of the users is transgender.

49. Adams v. Sch. Bd., 318 F. Supp. 3d 1293 (M.D. Fla. 2018).

50. *Id.* at 1314; s*ee also* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 290–91 (W.D. Pa. 2017) (explaining that the layout of the student restrooms for both boys and girls shielded the users from exposure to one another's private anatomy).

The real point of these prohibitions, the courts seem to recognize, is not to preserve a privacy interest that is somehow only violated by the presence of those who defy the promulgators' understanding of gender norms, but to signal to those who have crossed or who stand astride the gender binary that they are not welcome among the rest of humanity and its biological functions. As the *Whitaker* court notes in concluding that the school has violated Title IX and that its excuses are unavailing, the effect of such policies is to "punish[] that individual for his or her gender non-conformance."[51]

The court in *J.A.W.* also notes the inconsistency between the school board's policy and its purported reason of avoiding "disruption." The policy relied on by the school for excluding the transgender male plaintiff from the boys' restroom was the sex recorded on the student's birth certificate. However, as the court notes, "it is unlikely that those causing the disruption would be aware of the content of his birth certificate or that their opinion that J.A.W. should not be using the boys' restrooms would change simply because a different box was checked on that document."[52] As the court notes, there is actually less cause for disruption when a masculine appearing student uses the boys' room compared to the girls' room.[53] Indeed, the only example the school board's witness could recall of a disruption occasioned by the presence of a transgender student in a restroom was a report of a "transgender man" (i.e. a female to male transgender teen) in the girls' room, which would have been an example of a student complying with the school board's policy.[54]

As with the 2018 *Grimm* case, none of these other cases challenge the validity of sex-separated restrooms in the schools. The *Adams* court frames the question presented explicitly as one that does not challenge this division: "Everyone agrees that boys should use the boys' restroom at [the school] and that girls should use the girls' restroom. The parties disagree over whether Drew Adams is a boy."[55] Indeed, the court in *Whitaker* counters the concern raised by the school district that "implementing an inclusive policy will result in the demise of gender-segregated facilities in schools" by noting that school administrators representing districts across the country, who joined the plaintiff's case as *amici curiae,* "have found that allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls."[56] Still, the efforts by these courts to question and undermine the school policies in ways that challenge the adherence to a particularly harmful form of the gender binary do suggest that there is more opening right now for questioning a gender binary in general, and with respect to restrooms in particular, than there has been previously.

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51. *Whitaker*, 858 F.3d at 1049.

52. *J.A.W.*, 323 F. Supp. 3d at 1038–39.

53. *See id.* at 1041; *see also* M.A.B. v. Bd. of Educ., 286 F. Supp. 3d 704, 709 (D. Md. 2018) (noting that transgender boy's use of boys' locker room occasioned no protest but rather words of support from other boys).

54. *J.A.W.*, 323 F. Supp. 3d at 1038.

55. *Adams*, 318 F. Supp. 3d at 1296.

56. *Whitaker*, 858 F.3d at 1055.

Concerns about stigma, which loom large for transgender students when they are forced to use facilities labeled as alternative, should not militate against a general position in favor of gender-inclusive facilities as a replacement for sex-segregated bathrooms. As mentioned, schools may be difficult sites to implement across-the-board unisex bathroom facilities at any rate, in part because the disciplinary role of schools requires a delicate balance between adequate privacy for students but not so much privacy that serious wrongdoing can be hidden. Most unisex designs, by affording greater privacy for all students, may make this vigilance problematic. The stigma problem, however, only applies when gender-inclusive facilities are set aside as appropriate only for those who do not fit in; there should be no stigma involved if they are the only alternative.

III. CASES CHALLENGING INCLUSIVE SCHOOL BATHROOM POLICIES

Another set of recent cases have been brought by coalitions of parents against schools that have policies friendly to the needs of transgender students to use facilities aligned with their gender identity. In defending the more inclusive policies against these attacks, the courts are forced once again to confront rationales that are internally incoherent. While the plaintiffs in these cases advance a number of claims against the school districts,[57] it is the cases' treatment of the argument that these policies constitute sexual harassment under Title IX and that they infringe on constitutional privacy interests of cisgender students that offer the courts the most opportunity to challenge the assumptions underlying the litigation. In both *Doe v. Boyerton* (3rd circuit) and *Parents for Privacy v. Barr* (9th circuit), the parent groups assert that the presence of transgender students in the school restrooms and locker rooms, which is allowed by the school policy, amounts to actionable harassment and violates the cisgender students' right to privacy. Because the plaintiff organizations are unable to point to any behavior other than the transgender students' mere presence that creates the alleged harassment[58] or threatens privacy,[59] the decisions reveal that the plaintiffs' concerns amount to an anxiety response to what is perceived as a difference, one that threatens the order—the particular gender binary—to which they subscribe.

A. HARASSMENT CLAIM

Both courts reject the plaintiffs' claims that the school policies allowing transgender students to use facilities that align with their gender identity amount to sexual harassment of cisgender students. The court in *Doe v. Boyerton* notes that the allegations under review "include an assertion that a cisgender student was harassed merely by a transgender student washing their own hands in a bathroom

57. *See* Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020) (rejecting plaintiffs' arguments that the policies violate Fourteenth Amendment privacy rights, Title IX protections against sexual harassment, a fundamental right of parents to educate their children, and First Amendment rights to free exercise of religion).

58. *Parents for Privacy*, 949 F.3d at 1228–29; Doe v. Boyerton, 897 F.3d 518, 535 (3rd Cir. 2018).

59. *Boyerton*, 897 F.3d at 532–33; *Parents for Privacy*, 949 F.3d at 1223.

or changing in a locker room."[60] As the court points out, "[t]hat is not the type of conduct that supports a Title IX hostile environment claim."[61] Similarly, the court in *Parents for Privacy v. Barr* states:

> Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender.[62]

Faced with an argument that on its face is absurd, both courts push back in a manner that serves to normalize and render appropriately unremarkable the presence of these other students.

B. PRIVACY CLAIM

The courts similarly question the factual basis for the privacy argument advanced by the plaintiffs. In response to plaintiffs' claims, the courts find it necessary to point out that the level of privacy present in school bathrooms and locker rooms is not great to begin with. Citing the Supreme Court's assertion, in a different context, that public school locker rooms provide little expectation of privacy,[63] the *Doe v. Boyerton* court states that

> appellants are claiming a very broad right of personal privacy in a space that is, by definition and common usage, just not that private. School locker rooms and restrooms are spaces where it is not only common to encounter others in various stages of undress, it is expected.[64]

Further, recoiling from the bias at the core of the plaintiffs' unsustainable assertions, the *Doe v. Boyerton* court uses language to distance itself from the assumptions of the plaintiffs:

> Thus, we are unpersuaded to the extent that the appellants' asserted privacy interest requires protection from the risk of encountering students in a bathroom or locker room whom appellants *identify as* being members of the opposite sex.[65]

60. *Boyerton*, 897 F.3d at 536.
61. *Id.*
62. *Parents for Privacy*, 949 F.3d at 1228–29.
63. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).
64. *Boyerton,* 897 F.3d at 531.
65. *Id.* (emphasis added).

Although not challenging the use of sex-separated facilities directly,[66] the courts are compelled to present an alternative view of gender difference from the one put forward by these plaintiffs. By being open to the possibility that gender can be identified differently from different perspectives, the courts in these cases create an additional opening to challenge the binary itself.

The privacy arguments brought forward by parents also include a notable fear of invasion. In trying to promote these arguments, the litigants invoke as precedent all manner of behavior from prior cases that has been found violative of young people's privacy interests, including strip searches and adult peeping toms, all examples that the court declares to be inapt.[67] The use of such scenarios suggest that these plaintiffs, like the school boards in the other set of cases, regard the mere presence of transgender students as invasive and harmful.

The imagery of invasion found in many of the litigants' arguments in the cases discussed in this and earlier sections of the article is haunted by the history of racist and sexist arguments about invasion that have previously formed the support for sex-segregated bathrooms.[68] The exposure of its irrationality by the recent federal court decisions may, as an unintended side effect, undermine the argument that separate public restrooms serve a meaningful barrier against invasions of privacy.

IV. CONCLUSION

Another sign that the present cultural moment may offer an opportunity for moving away from sex-separated restrooms is the near obsession with the topic evinced in the Supreme Court oral arguments in the companion cases of *Bostock v. Clayton County* and *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens,* which were decided together under the name *Bostock v. Clayton County* in an opinion issued June 15, 2020. In the published decision, the majority opinion, authored by Justice Gorsuch, was careful to limit its scope to exclude the issue that occupied many minutes of the questioning in October:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not

66. *Parents for Privacy*, 949 F.3d at 1227.

67. *See Boyerton*, 897 F.3d at 532 ("Cases about strip searches and a criminal conviction for voyeurism after a person repeatedly looked at women in the stalls of public restrooms are wholly unhelpful to our analysis." (citations omitted)); *see also Parents for Privacy*, 949 F.3d at 1224 (distinguishing cases relied on by plaintiffs that involved the taking of nude photographic and video images without the victims' consent).

68. See *supra*, note 9–12 and accompanying text.

> purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."[69]

However, at the previous oral argument, Justices Gorsuch, Roberts, Alito, Sotomayor, and Ginsburg questioned the advocates at length about bathrooms, suggesting they were confounded by the problems raised by the question of bathroom choice for transgender individuals.

The concerns raised in those oral arguments echo many of the themes found in the transgender student litigation. Justice Sotomayor captured many of the anxieties about sex-segregated bathrooms evidenced in the other justices' questions when she asked the following question:

> Mr. Cole, let's not avoid the difficult issue, okay? You have a transgender person who rightly is identifying as a woman and wants to use the women's bedroom, rightly, wrongly, not a moral choice, but this is what they identify with. Their need is genuine. I'm accepting all of that . . . and they want to use the women's bathroom. But there are other women who are made uncomfortable, and not merely uncomfortable, but who would feel intruded upon if someone who still had male characteristics walked into their bathroom. That's why we have different bathrooms. So the hard question is how do we deal with that?[70]

The perspective here invoked—whether actually held by Sotomayor or only raised in order to address objections by her colleagues—that the presence of individuals with male characteristics in public women's restrooms is not just a harm to women but an "intrusion," has echoes in multiple contexts. In one respect, it conforms to the language of intrusion raised by the litigants seeking to dismantle the gender inclusive policies of their school districts. Just as those plaintiffs argued that the mere presence of transgender students was both a privacy invasion and an act of harassment, in Sotomayor's formulation the hypothesized "other women" experience intrusion, not because of any feared action by the transgender woman seeking to use the same facility, but merely because she has "walked into their bathroom." Similarly, the sense of ownership—"*their* bathroom"—that sex-separated facilities promote is on display in those cases as well. It partly explains why the small number of concerned cisgender students described in those cases do not see the school's provision of unisex alternative facilities as a solution to the privacy concerns they experience in the presence of the transgender student. Rather, the plaintiffs suggest that the facilities labeled boys and girls belong to

69. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

70. Transcript of Oral Argument at 10, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107).

the cisgender students and it is the transgender students who should seek alternatives. That sense of ownership partly explains why a presence, a walking-in, that involves no display of the hypothesized male characteristics, should be considered an intrusion. Because of the sense of ownership, the presence of someone who is not perceived as a co-owner functions as a trespass.

When Justice Sotomayor states that the risk of being intruded upon is "why we have different bathrooms,"[71] the statement about causality also taps into a history that bolsters her point in some ways. As other scholars have effectively demonstrated, much of the reason that separate facilities were created in the first place arose from negative stereotypes of feminine vulnerability.[72] That perception of intrusion also echoes the propaganda cited by Gillian Frank that connected fear of racial contagion with sex segregation.[73] Of course, it is impossible to glean from the oral argument transcript what Justice Sotomayor's intent was in raising this concern; it may very well be to air and expose what would otherwise be unarticulated fears among her colleagues. Despite the worries raised by these questions, the fact that the justices were so interested in the subject may suggest that the comforts of an unchallenged gender binary when it comes to restroom separation are on a potential collision course with cases that challenge its naturalness. The destabilizing effects of this collision are already on display in the lower court cases reviewed throughout this article. As Justice Sotomayor suggests later during the oral argument, the question of what to do about bathroom access may become "inevitable"[74] in other contexts as well. While the questions raised in oral argument suggest that the Supreme Court justices may lag behind their lower court colleagues in challenging the gender binary, there is hope that when they are ultimately faced with this "inevitable" question, they too will confront the incoherence of the arguments that seek to police the bathroom gender binary.

When courts confront and dismantle arguments that have their origins in notions of bathroom privacy that are themselves vestiges of racist and sexist beliefs about contamination, they do much to undermine the inevitability of gender separated bathrooms. The architectural imperatives brought about by the fear of an actual contagion may further loosen the hold of the natural attitude on our approach to such spaces. If more and more workplaces and other facilities recognize this moment as one in which such gender-based segregation no longer makes sense for multiple reasons, there will be many salutary effects, including reduced distress for those who are on the receiving end of hurtful efforts to police the gender binary, and increased openness among others to a fuller diversity of experience.

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71. *Id.*

72. Portuondo, *supra* note 5, at 521; Colker, *supra* note 3, at 163.

73. *See* Frank, *supra* note 9.

74. Transcript of Oral Argument at 11, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107).