
CHAPTER TWO

TRANSGENDER YOUTH AND ACCESS TO GENDERED SPACES IN EDUCATION

“All students should have the opportunity to fully participate and succeed in school.”¹ While this statement might appear uncontroversial at first blush, the context in which it was made was anything but. Last summer, California Governor Jerry Brown signed into law one of the most sweeping protections of transgender youth in the country; AB 1266² allows these students to use restrooms and play on sports teams that align with their gender identities regardless of their status in official school records or their sex assigned at birth.³ Supporters of the bill applauded it as a major step forward in ensuring that transgender students statewide received rights that had already been granted in a few school districts.⁴ Shortly after the signing, however, opponents vowed to strip the new law from the books, decrying it as a “grotesque[]” violation of other students’ privacy⁵ and “a horrible attempt by activists to strip society of all gender roles.”⁶ With public opinion evenly split,⁷ one Republican member of the California State Assembly has vowed to join (in his words) “[m]any of the parents [he has] heard from” in pulling his children out of public schools.⁸

California’s heated, high-profile debate over how school districts should treat transgender students is symptomatic of a larger nationwide discussion. As these students begin to publicly embrace their

¹ Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, L.A. TIMES, Aug. 12, 2013, <http://www.latimes.com/local/political/la-me-pc-gov-brown-acts-on-transgender-bill-20130812,0,706863.story> (internal quotation marks omitted) (quoting Evan Westrup, spokesman for Governor Jerry Brown, after the signing of AB 1266).

² 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE § 221.5).

³ McGreevy, *supra* note 1.

⁴ *Id.* (“While many California schoolchildren are already protected by policies in some of our biggest school districts, other districts don’t seem to understand that transgender students should have equal access to all programs and facilities,’ [Assemblyman Tom] Ammiano said Monday.”).

⁵ Chris Megerian, *Conservatives Target Law on Transgender Students*, L.A. TIMES, Aug. 16, 2013, <http://www.latimes.com/local/political/la-me-pc-california-transgender-students-20130816,0,4950843.story>.

⁶ Maura Dolan, *Prop. 8 Backers Behind Effort to Repeal Transgender Law*, L.A. TIMES, Sept. 20, 2013, <http://www.latimes.com/local/lanow/la-me-ln-prop-8-transgender-20130920,0,1385482.story> (internal quotation marks omitted). This repeal effort narrowly failed to qualify for the ballot. See Melanie Mason, *Measure to Block Transgender Student Law Fails to Make Ballot*, L.A. TIMES, Feb. 24, 2014, <http://www.latimes.com/local/political/la-me-pc-transgender-student-initiative-20140224,0,68994.story#axzz2u1bv81io>.

⁷ See Megerian, *supra* note 5 (citing a USC Dornsife/Los Angeles Times poll showing forty-three percent in favor of AB 1266 with forty-six percent opposed).

⁸ Assemblyman Tim Donnelly, Op-Ed., *Transgender Restroom Law Humiliates the 98%*, WND (Aug. 15, 2013, 8:08 PM), <http://www.wnd.com/2013/08/transgender-restroom-law-humiliates-the-98>.

gender identities, the government is forced to balance these children's right to participation against traditional gender divides, opposition from parents, and potential disruption for other students. Moreover, given that all fifty states have some form of compulsory education,⁹ schools must find a way to treat fairly all students who are legally required to be there. This Chapter has two aims: First, it will describe the efforts that schools, administrative agencies, and legislatures have made as they seek to balance these competing interests. Second, and perhaps more critically, it seeks to provide an animating principle to guide policymakers as they make these decisions. Specifically, this Chapter argues that the inclusion of transgender students in traditionally gendered spaces and deference to these students' conceptions of their own gender identities can help schools further their academic missions by improving scholastic outcomes and sending messages to the wider student body about diversity and community. While, as a practical matter, this Chapter's discussion largely deals with spaces aligned with one side or the other of the predominant gender binary,¹⁰ it also seeks to spark further discussion regarding reasons and methods for deconstructing this binary as society moves forward, particularly as non-gender-conforming children become more visible.

The Chapter will proceed in five sections. Section A explores recent trends toward people coming out as transgender at younger ages — thus bringing the question of transgender rights to the educational sphere for the first time. Section B surveys justifications underlying the public education system, emphasizing socialization, participation, and the teaching of critical thinking and expression. Section C analyzes two areas in which schools have confronted questions related to transgender students and their right to access gendered spaces, measuring these questions and their responses along the yardstick of the goals laid out in section B. Section C.1 examines access to school restrooms, focusing on several recent high-profile cases as well as recent legislation in California; section C.2 looks at school sports, discussing how the goals of scholastic athleticism inform potential responses to transgender students seeking to compete with their peers. Section D considers potential counterarguments to the animating principle of inclusion of and deference to transgender students, while

⁹ See Marga Mikulecky, *50-State Analysis: Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (2013), <http://www.ecs.org/clearinghouse/01/07/03/10703.pdf>. For another discussion of the rights of transgender individuals in institutions subject to government control, see *infra* ch. III.

¹⁰ There are several justifications for this pragmatic approach: most schools would be loath to eliminate binary gendered spaces entirely, and many transgender children who lack nuanced views of gender tend to view themselves relative to this binary even if they later reject rigid gender constructions. For further discussion, see *infra* section E, pp. 1744–45.

section E charts a potential path forward that goes beyond the argument advanced in the rest of the Chapter.

A. *The Rise and Trials of Transgender Youth*

While the prominence of transgender¹¹ people in society has varied over the years,¹² transgender children have only recently begun coming out in relatively large numbers.¹³ The first — and now largest — clinic offering hormone therapy to transgender children opened at Boston Children’s Hospital in 2007;¹⁴ since then, the average number of children the clinic treats every year has risen from five to twenty.¹⁵ Other programs offering treatment to transgender children exist in Los Angeles, San Francisco, and Seattle.¹⁶

To what can we attribute the rise of transgender youth? While it is impossible to say for certain, many experts believe that the increase stems from transgender issues attaining a higher profile in popular media, both in entertainment¹⁷ and in news program-

¹¹ This Chapter uses the term “transgender” because it represents a middle ground between the terms transsexual (which is not usually applicable to children whose gender identities do not align with the sex assigned to them at birth given that they have not yet undergone a full transition including surgery) and trans* (which includes a wide array of potential gender identities that reflect a more nuanced understanding of gender than most children demonstrate in discussing their own gender, see Sam Killermann, *What Does the Asterisk in “Trans*” Stand For?*, IT’S PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2012/05/what-does-the-asterisk-in-trans-stand-for> (last visited Mar. 1, 2014)). For a basic primer on transgender identity, see generally SUSAN STRYKER, *TRANSGENDER HISTORY* 1–28 (2008). For clarity, when this Chapter calls a person a “transgender female” or “transgender male,” these terms refer (respectively) to someone transitioning from male to female and someone transitioning from female to male. Additionally, “cisgender” describes someone whose gender aligns with his or her sex assigned at birth.

¹² See STRYKER, *supra* note 11, at 31–57 (discussing transgender people in American society as far back as the 1850s); Margaret Talbot, *About a Boy*, NEW YORKER, Mar. 18, 2013, http://www.newyorker.com/reporting/2013/03/18/130318fa_fact_talbot (stating that the first American to publicly come out as transsexual was Christine Jorgensen, a former G.I. who underwent sex reassignment surgery in 1952 in Copenhagen).

¹³ E.g., Petula Dvorak, *Transgender at Five*, WASH. POST, May 19, 2012, http://www.washingtonpost.com/local/transgender-at-five/2012/05/19/gIQABfFkbU_story.html (“In the United States, children have been openly transitioning genders for probably less than a decade . . .”); Chris Purdy, *More Students Coming Out at [sic] as Transgender, Expert Says*, CTV NEWS (Sept. 3, 2013, 7:44 AM), <http://www.ctvnews.ca/canada/more-students-coming-out-at-as-transgender-expert-says-1.1437649>. This is not to say that transgender children did not exist before recent times — rather, they are simply identifying themselves as transgender earlier in life.

¹⁴ *What if Your Child Says, ‘I’m in the Wrong Body?’*, NPR (Dec. 26, 2011, 12:00 PM), <http://www.npr.org/2011/12/26/144156917/transgender-kids>.

¹⁵ Tommy Nguyen, *Transgender Children in America Encounter New Crossroads with Medicine*, NBC NEWS (July 8, 2012, 9:21 AM), http://insidedateline.nbcnews.com/_news/2012/07/08/12625007-transgender-children-in-america-encounter-new-crossroads-with-medicine.

¹⁶ Madison Park, *Transgender Kids: Painful Quest to Be Who They Are*, CNN (Sept. 27, 2011, 10:34 AM), <http://www.cnn.com/2011/09/27/health/transgender-kids/index.html>.

¹⁷ See Talbot, *supra* note 12 (citing youth-oriented programming such as *Glee* and *DeGrassi* as ways in which children can be exposed to transgender people). More adult-oriented television shows and movies have featured complex transgender characters as well. See Matt Kane,

ming.¹⁸ This prominence has sparked the growth of transgender youth in multiple ways. Transgender children who are exposed to trans characters at young ages may recognize their own struggles reflected onscreen, thus allowing them to firmly identify what had previously been only a nebulous feeling that something was very wrong.¹⁹ Meanwhile, parents who see transgender people in the media are more aware of what to look for in their own children²⁰ and of the increasingly wide array of medical options available for transgender youth.²¹

Once children have come out as transgender, they face a variety of challenges.²² As puberty approaches, the psychological burden of facing bodily changes out of sync with one's gender identity can cause depression and anxiety.²³ Between twenty-five percent and thirty-five percent of transgender adolescents attempt suicide — a rate more than five times higher than that of their cisgender peers.²⁴ The number of transgender youth who have considered suicide without attempting it is even higher: one study places that number at forty-five percent.²⁵ In the school environment, transgender children must deal with harassment more severe than that experienced by lesbian, gay, or bisexual cisgender students.²⁶ The vast majority are subjected to verbal

Transgender Characters that Changed Film and Television, GLAAD (Nov. 12, 2013), <http://www.glaad.org/blog/transgender-characters-changed-film-and-television>. Most recently, transgender actress Laverne Cox has drawn attention and praise for her role as prisoner Sophia Burset on Netflix's *Orange Is the New Black*. See *Laverne Cox: Transgender Actress on the Challenges of Her "New Black" Role*, NPR (Aug. 7, 2013, 12:00 PM), <http://www.npr.org/2013/08/07/209843353/orange-is-the-new-black-actress-calls-role-complicated>.

¹⁸ See Talbot, *supra* note 12 (discussing a prominent six-year-old transgender girl who appeared in segments on the popular news programs *20/20* and *60 Minutes*).

¹⁹ *Id.* ("A recent survey of thirty-five hundred transgender Americans found that, the younger the respondents, the more likely they were to have had 'access to transgender people and resources at a young age,' and to have identified as trans at a young age.")

²⁰ Nguyen, *supra* note 15 ("[The increase in patients at the Boston Children's Hospital clinic is] a result of more information being available to both parents and children, especially online. They're now able to identify the problems, if there are any, more readily.")

²¹ Ellen Huet, *Awareness, Laws Help Transgender Youths Flourish*, SFGATE, Aug. 19, 2013, <http://www.sfgate.com/lgbt/article/Awareness-laws-help-transgender-youths-flourish-4739711.php> (attributing the rise to "increasing awareness among parents and advancements in medical options for transgender children").

²² Given this Chapter's focus on schools and the social environment, I will not discuss the medical challenges faced by transgender youth and their families. For a nuanced description of the medical options available to these children, see generally STEPHANIE BRILL & RACHEL PEPPER, *THE TRANSGENDER CHILD* 193–228 (2008).

²³ Nguyen, *supra* note 15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ EMILY A. GREYTAK ET AL., *GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS*, at vi (2009) [hereinafter *GLSEN REPORT*], available at <http://glsen.org/sites/default/files/Harsh%20Realities.pdf>. For a thorough exploration of current law surrounding the bullying of LGBT youth, see *supra* ch. I.

harassment from other students, while roughly a third report hearing school staff use biased language as well.²⁷ More than half experience physical harassment, while nearly a third suffer physical contact rising to the level of assault.²⁸

As one might expect, the pervasively hostile climate at school has a severe negative impact on transgender students' educational outcomes. These children are likely to skip class or miss school out of fear for their own safety.²⁹ Transgender youth subjected to harassment have lower GPAs, hold diminished educational aspirations, and are less likely to plan on attending college.³⁰ In order to avoid harassment, some students even opt to drop out of school entirely.³¹

Although many transgender students see school as a minefield of occasions for harassment, there are ways in which they can become more integrated into the school community. Generally, students who are able to be out as transgender and are able to discuss LGBT issues with other students report a healthier sense of belonging than their peers who are not able to express and embrace their transgender identities publicly.³² Critically, this sense of belonging can improve educational outcomes, boosting academic motivation and success.³³

B. *The Goals of Public Education*

Before this Chapter can discuss how transgender children fit into the missions of their schools, it must examine the goals and justifications of public education more broadly. There are two primary schools of thought on the goals of education: one school emphasizes achievement (particularly quantifiable achievement), while the other looks more broadly to notions of citizenship and personal and community development. The former view is exemplified by the purpose section shared by the Elementary and Secondary Education Act of 1965³⁴ and the No Child Left Behind Act of 2001³⁵ (NCLB), two of the most

²⁷ GLSEN REPORT, *supra* note 26, at x–xi.

²⁸ *Id.* at xi.

²⁹ *Id.* at xi–xii.

³⁰ *Id.* at xii.

³¹ Cf. LAURA E. DURSO ET AL., THE WILLIAMS INST., PROVIDER PERSPECTIVES ON THE NEEDS OF GAY AND BISEXUAL MALE AND TRANSGENDER YOUTH OF COLOR 4 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACCESS-final-rev-aug-2013.pdf> (discussing the fact that LGBT youth of color may drop out of school).

³² See GLSEN REPORT, *supra* note 26, at 30–37.

³³ *Id.* at 29 (citing Carol Goodenow & Kathleen E. Grady, *The Relationship of School Belonging and Friends' Values to Academic Motivation Among Urban Adolescent Students*, 62 J. EXPERIMENTAL EDUC. 60 (1993); Robert W. Roeser et al., *Perceptions of the School Psychological Environment and Early Adolescents' Psychological and Behavioral Functioning in School: The Mediating Role of Goals and Belonging*, 88 J. EDUC. PSYCHOL. 408 (1996)).

³⁴ Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301–6578 (2012)).

³⁵ Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

comprehensive educational statutes ever passed by the federal government.³⁶ While some critics of this achievement metric have focused on the perverse incentives created by absolute achievement benchmarks,³⁷ a larger portion of the critique has called NCLB “at odds with the consensus about the goals of public education to which Americans historically have subscribed.”³⁸ Specifically, focus on measurable achievement comes at the expense of “activities that develop[] citizenship, social responsibility, and cooperative behavior.”³⁹ This critique, rooted firmly in the broader conception of the purposes of education, has strong links to the educational philosophies of many of our nation’s founders and intellectual leaders.⁴⁰ The more civically minded conception of education is reflected in Supreme Court rhetoric as well — Justice Frankfurter once wrote that “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools”⁴¹

³⁶ See 20 U.S.C. § 6301 (2012) (defining Congress’s goal as “ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach . . . proficiency on challenging State academic achievement standards and State academic assessments”).

³⁷ See, e.g., James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934 (2004) (arguing that NCLB’s achievement requirements (1) “create[] incentives for states to lower academic standards,” (2) “create[] incentives to increase segregation by class and race and to push low-performing students out of school entirely,” and (3) “may deter some from teaching altogether and divert others away from the most challenging classrooms”).

³⁸ Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, 88 PHI DELTA KAPPAN, 264, 264 (2006); see also, e.g., Richard F. Elmore, *Testing Trap*, HARV. MAG., Sept.–Oct. 2002, available at <http://harvardmagazine.com/2002/09/testing-trap.html> (arguing for a more capacious understanding of how academic performance should be measured).

³⁹ Rothstein & Jacobsen, *supra* note 38, at 265.

⁴⁰ See *id.* at 267 (citing Benjamin Franklin’s desire to see schools teach “justice and injustice”); *id.* (stating that George Washington desired the creation of a national university “that would encourage tolerance of diversity, bringing together students of different backgrounds to show them there is no basis for their ‘jealousies and prejudices’” (quoting JOSEPH J. ELLIS, FOUNDING BROTHERS 154 (2001))); Albert Grande, *Education as a Natural Right*, 21 ST. JOHN’S J. LEGAL COMMENT. 53, 69–70 (2006) (stating that Horace Mann once wrote of “the *absolute right* of every human being that comes into the world to an education” and argued that this “proves the correlative duty of every government to see that the means of that education are provided for all,” *id.* at 70 (quoting THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 63 (Lawrence A. Cremin ed., 1957))).

⁴¹ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). In the same case, Justice Frankfurter also stated that public schools are “[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people.” *Id.* at 216. Justice Stewart also voiced his conviction that education plays a profound role in shaping how children engage with society later in life. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting) (referring to “a compulsory state educational system so structur[ing] a child’s life”). Additionally, Justice O’Connor now serves as co-chair of the National Advisory Council for the Civic Mission of Schools. *Campaign Steering Committee*, CAMPAIGN FOR CIVIC MISSION OF SCHS., <http://www.civicmissionofschools.org/the-campaign/campaign-steering-committee> (last visited Mar. 1, 2014).

Given the tension between recent legislation and historical perspectives on education, how should we decide which yardstick to use when evaluating how well a school's treatment of transgender students comports with its educational mission? This is actually a bit of a trick question, as the same action taken by a school can move the ball forward regardless of which metric is applied. Under the broader educational philosophy that emphasizes justice, diversity, and community, the benefits of transgender-friendly policies are clear. After all, it is difficult to teach community when a highly visible minority is forced to suffer based solely on who they are. Even if some individual students may reject transgender students socially, the decision of schools to offer transgender students protections still furthers the goals of this civic model of education by sending the institutional message of tolerance. Turning to the achievement-based yardstick embodied by NCLB, the benefits are similarly clear. By adopting policies that boost a sense of inclusion and belonging among transgender students, a school can improve those students' academic performance.⁴²

C. Access to Gendered Spaces at School

Now that this Chapter has established that better treatment of transgender students furthers the mission of our nation's schools, it may turn to recent developments in the law that foster transgender youths' inclusion in the school community. This section shall proceed in two parts, each of which will explore one specific area of law and policy related to transgender youth. Section C.1 will discuss access to restrooms, while section C.2 will examine school sports.

1. *Restrooms.* — One of the most high-profile flashpoints in the ongoing debates over transgender students is access to school bathrooms. This section explores the terms of this particular debate, examining two recent cases and a statute and arguing that schools should design policies that promote equal access to gendered spaces and deference to students' own perceptions of their gender.

Using the restroom is something most of us take for granted; we rarely question where we are supposed to answer nature's call or how we might be received by others using those spaces. Indeed, restrooms are an important part of our social education.⁴³ Yet for transgender

⁴² See *supra* p. 1726.

⁴³ Judy Harrison, *Maine Pediatricians Support Transgender Student's Use of Girls Bathroom*, BANGOR DAILY NEWS, May 3, 2013, <http://bangordailynews.com/2013/05/03/health/maine-pediatricians-support-transgender-students-use-of-girls-bathroom> ("For girls, no small part of that experience takes place in girls' bathrooms. . . . The socializations and bonding that take place in these settings are critical components of building confidence, self-esteem, and healthy relationships with same-sex peers." (quoting Brief for Maine Chapter of the American Academy of Pediatrics et al. as Amici Curiae in Support of Doe, Doe v. Reg'l Sch. Unit 26, No. Pen-12-582, 2014 WL 325906 (Me. Jan. 30, 2014))).

people, selecting a bathroom and dealing with the people they find there can be a process fraught with distress.⁴⁴ In the bathroom, transgender people fear harassment and even violence; the concern is so pervasive in the trans community that activists have compiled an internet database of gender-neutral or single-occupancy restrooms that may be used without fear of retribution.⁴⁵ The distress caused by selecting a bathroom is no less for children — and the trauma can be so severe that “[c]hildren as young as 3 admit to holding their pee to the point of wetting their pants in order to avoid this stress.”⁴⁶ For younger children, this problem is compounded by the confusion they may feel over how to reconcile their internal gender identity, bathroom choice, and desire to avoid harassment and teasing.⁴⁷

The negative reactions that students may face when seeking to use a bathroom aligned with their gender identity come not only from other children — parents frequently object vociferously as well. Tim Donnelly, the California assemblyman who threatened to pull his children out of school in response to AB 1266, called the policy of allowing transgender students to use bathrooms aligned with their gender identity nonsensical, and he argued that it could lead to an increase in sexual assault and a decrease in overall educational outcomes.⁴⁸ Many parents fearful of the effect a transgender student may have on their own child demand that the school bar transgender students from the restroom aligned with their gender identity; in some instances, they have even started smear campaigns against the parents of the transgender child in order to bring more people over to their point of view.⁴⁹ This past fall, a conservative group spread reports nationwide that a transgender female student harassed cisgender female students in the bathroom; the superintendent in charge of the school later stated that the story was fabricated by parents unhappy with the school’s decision to allow the transgender student to use women’s facilities.⁵⁰

Given the depth of this trauma, it comes as no surprise that media portrayals of transgender children frequently include horror stories arising from restroom choice. “Part of why it was so important to get into the men’s room is because when [my son] was in the women’s room, girls would walk in, they would be startled and flustered, walk

⁴⁴ See, e.g., C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey’s Gender Identity Protection*, 61 RUTGERS L. REV. 409, 416–17 (2009).

⁴⁵ See *id.*

⁴⁶ BRILL & PEPPER, *supra* note 22, at 175.

⁴⁷ See *id.*

⁴⁸ Donnelly, *supra* note 8.

⁴⁹ BRILL & PEPPER, *supra* note 22, at 181.

⁵⁰ Zack Ford, *Anti-LGBT Group Admits It Invented Story About Transgender Student Harassing Classmates*, THINKPROGRESS (Oct. 17, 2013, 11:13 AM), <http://thinkprogress.org/lgbt/2013/10/17/2797141/pacific-justice-institute-invented-transgender>.

out and check that they went into the right bathroom,” said the mother of a transgender boy in the process of transitioning from female to male. “Sometimes the [monitors] that didn’t know him would scold him for going into the women’s restroom because he looks like a boy.”⁵¹ One male-to-female transgender student banned from using the girls’ bathroom at her elementary school was disciplined after entering the restroom with her female friends to chat.⁵² Many transgender students are asked not to use regular restrooms; instead, they are relegated to gender-neutral bathrooms in the principal’s or nurse’s offices.⁵³

To their credit, some schools and districts have instituted transgender-friendly policies of their own accord. The Los Angeles Unified School District had a policy allowing transgender students to choose bathrooms based on their own perceptions of their gender for nearly ten years before AB 1266 mandated this policy statewide; the San Francisco Unified School District had such a policy as well.⁵⁴ Massachusetts and Colorado have statewide trans-inclusive regulatory policies,⁵⁵ and Connecticut has issued guidelines regarding obligations under the state’s general gender identity antidiscrimination statute.⁵⁶

Two recent major developments in the law governing transgender access to sex-segregated bathrooms have thrown the terms of the debate and the theories underlying the conflict into sharp relief. First, two cases that made national headlines⁵⁷ took great steps forward for the equality of transgender students, but each decision demonstrates the tension between deferring to students’ experiences

⁵¹ Huet, *supra* note 21.

⁵² Anna Gorman, *Transgender Kids Get Help Navigating a Difficult Path*, L.A. TIMES, June 15, 2012, <http://articles.latimes.com/print/2012/jun/15/local/la-me-transgender-kids-20120615>.

⁵³ See *id.*; see also *infra* p. 1731.

⁵⁴ *California Law Allows Transgender Students to Pick Bathrooms, Sports Teams They Identify With*, CBS NEWS (Aug. 12, 2013, 10:46 PM), http://www.cbsnews.com/8301-250_162-57598231. The San Francisco policy allows students to access the restroom aligned with their gender identity and provides for non-mandatory-use, single-occupancy bathrooms for any student who feels more comfortable in that setting. BRILL & PEPPER, *supra* note 22, at 167.

⁵⁵ *VICTORY! CA Bill Will Ensure the Success and Well-Being of Transgender Students*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/archives/3544> [hereinafter *VICTORY!*] (last visited Mar. 1, 2014).

⁵⁶ CONN. SAFE SCH. COAL., *GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS (2012)*, available at http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf.

⁵⁷ Elizabeth Flock, *Coy Mathis Case May Set Precedent on Transgender Kids and Bathrooms*, U.S. NEWS & WORLD REP. (June 24, 2013), <http://www.usnews.com/news/articles/2013/06/24/coy-mathis-case-may-set-precedent-on-transgender-kids-and-bathrooms> (calling a Colorado decision “a ruling never before seen in the United States”); Elizabeth Kuhr, *Court Rules for Transgender Student in Maine Bathroom Dispute*, TIME (Jan. 31, 2014), <http://nation.time.com/2014/01/31/court-rules-for-transgender-student-in-maine-bathroom-dispute>.

and hewing to outdated legal frameworks that become inconsistent when sex and gender diverge. Second, AB 1266 represents a major legislative step⁵⁸ that grants restroom access rights to transgender students without getting bogged down in discussion of the legal distinction between sex and gender, thus focusing attention on the individuals most directly affected by the law.

The first major decision regarding transgender bathroom access centered on Coy Mathis, a six-year-old transgender girl seeking to use the girls' bathroom at her Colorado elementary school.⁵⁹ While the school allowed her to do so in kindergarten, administrators reversed course halfway through her first-grade year, stating that she must use the boys' room or a gender-neutral room reserved for adult staff.⁶⁰ Mathis's parents then filed a complaint with the state civil rights division alleging violations of Colorado's gender identity nondiscrimination law.⁶¹

Steven Chavez, the director of the civil rights division and the author of the decision in the case, evaluated Mathis's petition under a law that covered transgender status through its sexual orientation provision.⁶² Ultimately, because Mathis was denied access to her restroom of choice in a way that cisgender students were not, Chavez found that she had proven a prima facie case of discrimination.⁶³ Two facets of Chavez's opinion merit attention. First, in response to the tension between laws mandating sex-segregated bathrooms and those barring discrimination against people on the basis of gender identity, he stressed the idea that sex and gender are mutually contingent. Chavez based this insight on the fact that the legal system frequently uses the two concepts interchangeably⁶⁴ and that determination of sex (rather than simply gender) may rely on more factors than mere biology.⁶⁵ Second, he highlighted the social disengagement fostered by the discriminatory bathroom policy⁶⁶ and compared the policy to the re-

⁵⁸ *VICTORY!*, *supra* note 55 (calling AB 1266 "the first [law] of its kind in the country").

⁵⁹ Dan Frosch, *Rights Unit Finds Bias Against Transgender Student*, N.Y. TIMES, June 23, 2013, <http://www.nytimes.com/2013/06/24/us/agency-says-district-discriminated-against-transgender-student.html>.

⁶⁰ See Mathis, Charge No. P20130034X, at 4-5 (Colo. Dep't of Regulatory Affairs, Div. of Civil Rights June 17, 2013) (determination), available at http://www.transgenderlegal.org/media/uploads/doc_529.pdf.

⁶¹ Frosch, *supra* note 59.

⁶² See Mathis, Charge No. P20130034X, at 2, 9, 11.

⁶³ *Id.* at 10.

⁶⁴ *Id.* at 7 (discussing the frequent legal equivalence of sex- and gender-segregated facilities).

⁶⁵ *Id.* at 10 ("Given the evolving research into the development of transgender persons, compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue. The [school], moreover, ignores federal and legal documents . . . which undeniably state [Mathis's] sex as female.")

⁶⁶ *Id.* at 11.

viled doctrine of “separate but equal.”⁶⁷ After emphasizing that school is a place to “learn social skills, such as respect, communication, trust, how to appropriately interact with people from different backgrounds, and how to become part of a community”⁶⁸ — a perspective clearly reminiscent of the civically minded mission of the public education system discussed above⁶⁹ — Chavez concluded by arguing that denying Mathis access to the girls’ bathroom “deprives [her] of the acceptance that all students require to excel in their learning environment, creates a barrier where none should exist, and entirely disregards [her] gender identity.”⁷⁰

The Mathis decision was widely hailed in the media as a landmark case for transgender youth rights. Speaking to the *New York Times*, the director of the transgender rights organization that filed the complaint on Mathis’s behalf called the decision “the first ruling in the nation that holds that transgender students be allowed to use bathrooms that match who they are.”⁷¹ Other LGBT activists told *U.S. News & World Report* that the ruling would offer much-needed instruction for schools dealing with similar situations, as many schools interested in doing “the right thing” often look to courts and government agencies for guidance.⁷²

A case arising in Maine represents a different approach to the tension between laws mandating sex-segregated bathrooms and laws barring gender identity discrimination. The case centered on a transgender girl named Nicole Maines who was allowed to use the girls’ restroom at her elementary school until a cisgender male student, acting on the instructions of his grandfather, began using Maines’s presence as an excuse to use the girls’ room himself.⁷³ After Maines moved on to middle school, the school forced her to use a unisex single-occupancy bathroom.⁷⁴ She experienced harassment from other students throughout her sixth grade year.⁷⁵ When the harassment did not abate, Maines’s parents moved her to another school district.⁷⁶

⁶⁷ *Id.* at 13.

⁶⁸ *Id.*

⁶⁹ See *supra* section B, pp. 1726–28.

⁷⁰ Mathis, Charge No. P20130034X, at 13.

⁷¹ Frosch, *supra* note 59 (internal quotation mark omitted).

⁷² See Flock, *supra* note 57.

⁷³ See *Doe v. Reg'l Sch. Unit 26*, No. Pen-12-582, 2014 WL 325906, at *2 (Me. Jan. 30, 2014). The anonymous plaintiff in this case later identified herself as Nicole Maines. See Judy Harrison, “I Wouldn’t Wish My Experience on Another Trans Person,” *Girl Denied Use of School Bathroom Says*, BANGOR DAILY NEWS, June 12, 2013, <http://bangordailynews.com/2013/06/12/news/bangor/i-wouldnt-wish-my-experience-on-another-trans-person-girl-denied-use-of-school-bathroom-says>.

⁷⁴ See *Doe*, 2014 WL 325906, at *2.

⁷⁵ *Doe v. Clenchy*, No. CV-09-201, slip op. at 7 (Me. Super. Ct. Nov. 20, 2012).

⁷⁶ See *Doe*, 2014 WL 325906, at *2.

A panel of the Maine Human Rights Commission found that the school had unlawfully discriminated against Maines,⁷⁷ but after Maines's parents and the Commission filed suit in state court, a judge granted summary judgment to the school district.⁷⁸ In January, the Maine Supreme Judicial Court (SJC) reversed and held that the school had unlawfully discriminated against Maines by barring her from the girls' bathroom.⁷⁹ The bulk of the decision was devoted to reconciling title 20-A, section 6501 of the Maine Code, an old statute mandating sex-segregated bathrooms, with the Maine Human Rights Act⁸⁰ (MHRA),⁸¹ a nondiscrimination statute that defines its sexual orientation provision to include gender identity in a manner similar to the statute at issue in the Mathis case.⁸² After examining the purposes of each of these statutes, the SJC found that the provisions were not irreconcilable.⁸³ Specifically, the court held that the purpose of section 6501 was to establish the layout of school bathrooms, not to mandate policies regarding how schools prescribe and monitor the bathrooms' use.⁸⁴ The SJC thus found that the school had violated the sexual orientation prong of the MHRA by barring Maines from the girls' restroom — and critically, it hinged its decision on Maines's psychological and educational needs as determined by her doctors, family, and school.⁸⁵ The dissent, though in agreement that transgender people are best served by using restrooms aligned with their gender identity, questioned what it saw as a major inconsistency in the court's reconciling of section 6501 with the MHRA: if section 6501 does not bar application of the MHRA's sexual orientation nondiscrimination provision to policies regulating restroom access, it would not bar application of the MHRA's sex nondiscrimination prong either.⁸⁶ This holding would mean that schools could not bar people from bathrooms on the basis of their biological sex — and, because the legislature could not have intended that result, the court's reading of the MHRA as it relates to section 6501 must be wrong.⁸⁷ This tension, the dissent ar-

⁷⁷ Heather Steeves, *Panel Rules Against Orono School in Transgender Bathroom Access*, BANGOR DAILY NEWS, Sept. 20, 2010, <http://bangordailynews.com/2010/09/20/news/bangor/panel-rules-against-orono-school-in-transgender-bathroom-access/>.

⁷⁸ Judy Harrison, *Judge Finds in Favor of Orono Schools over Transgender Girl's Use of Bathroom*, BANGOR DAILY NEWS, Nov. 20, 2012, <http://bangordailynews.com/2012/11/20/news/bangor/judge-finds-in-favor-of-orono-schools-over-transgender-girls-use-of-bathroom/?ref=inline>.

⁷⁹ *Doe*, 2014 WL 325906, at *5.

⁸⁰ 5 ME. REV. STAT. ANN. tit. 5, §§ 4451–4634 (2013).

⁸¹ See *Doe*, 2014 WL 325906, at *3–5.

⁸² Compare *supra* p. 1731.

⁸³ *Doe*, 2014 WL 325906, at *4.

⁸⁴ *Id.*

⁸⁵ *Id.* at *5.

⁸⁶ *Id.* at *7–8 (Mead, J., dissenting).

⁸⁷ *Id.*

gued, could be remedied only by the legislature clarifying the interaction of these statutes.⁸⁸

How do the approaches to sex, gender, and the needs of transgender students used in the Mathis and Maines decisions link to the goals of public education? While each approach is distinct, both reflect tension between the lived experiences of transgender students and legal frameworks that seem to mandate contradictory results when sex and gender are evaluated independently. In the Maines case, the SJC evaded the tension between section 6501 (mandating sex segregation) and the MHRA (forbidding gender discrimination) by instead emphasizing doctors', parents', and schools' determinations of the psychological needs of transgender students. This approach is problematic for two reasons: First, by ignoring the tension inherent in the law and offering its own strained reading in lieu of the statutes' intended meanings, the SJC runs afoul of both its own statutory construction doctrine and the notion of comity with the representative branches.⁸⁹ Second, and more important for the purposes of this Chapter, the SJC's means of determining a student's educational needs privileges the perspectives of others over the experience of the student herself — looking to doctors and administrators to articulate the needs of transgender youth. By taking away transgender students' agency in determining their gender, the court risks creating a sense of helplessness that has effects nearly as pernicious as those the court sought to avoid. The Mathis decision avoids these costs by emphasizing the subjective experience of Mathis herself, vesting her with the self-determination critical to a positive educational experience. Yet the case still reflects the tension created when the law's edicts regarding sex segregation and gender nondiscrimination conflict with one another. The decision attempts to solve this problem by considering the way that the law sometimes treats sex and gender as interchangeable and by offering documents describing Mathis's sex as female, but this approach is both conclusory (in that it announces too hastily that sex and gender are the same for legal purposes because the law seems to treat them interchangeably) and confusing (in that it stands in tension with the more conventional view that sex relates to physical characteristics while gender relates to identity and social roles).

Each of the problems created by these opinions is resolved by the approach of AB 1266, which was signed into law in California last August.⁹⁰ Assemblyman Tom Ammiano, a San Francisco Democrat⁹¹ who in 1975 became the first public school teacher in the city to pub-

⁸⁸ *Id.* at *8.

⁸⁹ *See id.* at *9.

⁹⁰ McGreevy, *supra* note 1.

⁹¹ *Id.*

licly come out as gay,⁹² introduced the bill “to reduce bullying in schools and help transgender students feel more comfortable on campuses.”⁹³ The bill amends section 221.5 of the California Education Code, adding a new subsection (f) that reads: “A pupil shall be permitted to . . . use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”⁹⁴ Before the passage of AB 1266, section 221.5 of the Education Code focused on equal treatment of male and female students, but it was silent on gender identity and discrimination against gender-variant children.⁹⁵ California now affirmatively requires that all schools grant equal restroom access to transgender children, making it the first state to enact a statute specifically addressing this issue.⁹⁶

Following AB 1266’s enactment, opponents angry about the law’s perceived violation of the privacy of cisgender students vowed to use California’s robust voter proposition system to repeal the new protections.⁹⁷ In particular, the National Organization for Marriage — a group opposed to same-sex marriage that played an instrumental role in the passage of Proposition 8 in 2008 — worked to place a repeal vote on the ballot in November 2014.⁹⁸ In February 2014, however, state officials confirmed that the repeal effort had narrowly failed to make the ballot.⁹⁹ Particularly now that its status is secure, AB 1266 is a big step forward in transgender student rights, and other states would do well to follow California’s example in etching these critical protections into state law.

By making restroom access for transgender students explicit in state law, AB 1266 avoids the problems arising from the approaches of the Mathis and Maines cases. Unlike the Maines case, which relies on doctors’ and schools’ assessments of a student’s transgender status, the law defers to the subjective experience of the student herself, thus maximizing her own agency in a way that improves her educational experience. Moreover, AB 1266 avoids the confusion created by the Maines and Mathis decisions’ attempts to reconcile statutes mandating bathroom sex segregation and statutes mandating gender nondiscrimi-

⁹² *Assemblymember Tom Ammiano*, CAL. LEGIS. LESBIAN, GAY, BISEXUAL & TRANSGENDER CAUCUS, <http://lgbtcaucus.legislature.ca.gov/assemblymember-tom-ammiano> (last visited Mar. 1, 2014).

⁹³ McGreevy, *supra* note 1.

⁹⁴ 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE § 221.5). Omitted portions of subsection (f) deal with the right to participate in school sports; this issue will be discussed in *infra* section C.2, pp. 1737–42.

⁹⁵ See EDUC. § 221.5.

⁹⁶ *Calif. Governor Jerry Brown Signs Landmark Transgender Student Rights Bill*, LGBTQ NATION (Aug. 12, 2013), <http://www.lgbtqnation.com/2013/08/calif-governor-jerry-brown-signs-landmark-transgender-student-rights-bill>.

⁹⁷ See Megerian, *supra* note 5.

⁹⁸ Dolan, *supra* note 6.

⁹⁹ Mason, *supra* note 6.

nation. Rather than wading into the morass of differing legal approaches to sex and gender, AB 1266 answers the call of the Maines dissent and speaks with clarity: only gender is relevant to the determination of transgender students' access to bathrooms.

Two major counterarguments seek to undercut policies of equal transgender restroom access, but neither is availing. First, some argue that the "separate but equal" critique does not apply in this context because sex-segregated bathrooms have existed throughout American history without having been seen as discriminatory.¹⁰⁰ If we can mandate that cisgender individuals use separate bathrooms, this argument goes, there is no reason why transgender individuals should not use the bathrooms associated with their assigned sex. This argument, however, elides the difference between biological sex and gender identity. When the question is analyzed through the lens of gender identity, analogies to racial discrimination become more apt: students whose gender identities do not align with their sex assigned at birth suffer discrimination relative to their cisgender peers, who alone are permitted to access bathrooms that reflect their gender.

Second, opponents of trans-inclusive policies might argue that this inclusion is a zero-sum game: policies that help transgender children come at the expense of cisgender children's discomfort.¹⁰¹ Assemblyman Donnelly, who vowed to pull his children from public school in response to AB 1266, argued that the law "will take the normal hormonal battles raging inside every teenager and pour gasoline onto those simmering coals," adding that "[t]he right to privacy enjoyed by every student will be replaced by the right to be ogled."¹⁰² He further argued that this loss of privacy might discourage cisgender students from using restrooms or locker rooms, create anxiety that reduces overall academic achievement, or even increase the likelihood of a sexual assault.¹⁰³ Even setting aside those whose opposition is rooted in hostility toward transgender people, some might suggest that trans-inclusive policies could be harmful to cisgender girls who are unfamiliar (and thus uncomfortable) with the exposure to male body parts that could result from such policies.

This potential discomfort of cisgender children, however, does not militate against trans-inclusive policies. Exclusion of transgender stu-

¹⁰⁰ For further discussion of sex segregation and society, see *infra* section E, pp. 1744–45.

¹⁰¹ See, e.g., Megerian, *supra* note 5 ("It's a very extreme piece of legislation that grotesquely violates the right of privacy of boys and girls . . .," [one objector] said. "No 13-year-old girls should have to have the continued apprehension of a boy seeing them naked in the locker room."); Donnelly, *supra* note 8 ("While trying to address a concern of less than 2 percent of the population, California is now forcibly violating the rights of the other 98 percent.").

¹⁰² Donnelly, *supra* note 8.

¹⁰³ *Id.*

dents from gendered spaces in response to this discomfort serves to reify and reinforce the ignorance (and, at times, the intolerance) that spawned this discomfort in the first place.¹⁰⁴ Rather than responding to discomfort with exclusion, schools should seek to educate cisgender students about gender variance, building students' empathy for their transgender peers while simultaneously eroding their discomfort. This approach — education rather than exclusion — better reflects the civic goals of education, as it fosters community and understanding in a way that simply forcing transgender students to avoid bathrooms aligned with their gender never can.¹⁰⁵

2. *Athletics.* — While the restroom question deals with transgender students' ability to perform basic human functions in spaces that reflect their gender identity, the world of education also includes gendered spaces that transcend biological needs. One of the most prominent gendered activities at any school is athletics, as most school sports are segregated by sex. This system sets up transgender students for harm on multiple levels: in addition to being deprived of the benefits of athletics, they may internalize this exclusion as they would when excluded from sex-segregated restrooms. Often, transgender people's desire to play sports sparks controversy, as many people believe that those born with male bodies have a competitive edge over those born with female bodies.¹⁰⁶ Although the most high-profile battles over transgender athletes' right to compete have taken place at the professional level,¹⁰⁷ the choice to play has many pitfalls for transgender children as well — particularly once they have gone through puberty.¹⁰⁸ Questions over the purported competitive advantage of male

¹⁰⁴ Cf. Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 73–74 (2006) (discussing a social experiment in which preteen boys were divided into two groups and subsequently began to exhibit hostility toward those placed in the other group). If this hostility is left unchecked, it can be incorporated into the identity of those in the majority ingroup. See *id.* at 75 (“The multitude of explicit and implicit messages the individual has received over the course of a lifetime influence the individual’s perception of groups. The person’s ‘very conception of self changes to partake of the common attributes of an historically originated, socially determined and culturally and situationally constructed social group.’” (quoting John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 15, 33 (Henri Tajfel ed., 1982))).

¹⁰⁵ For a different perspective on the role that discomfort of cisgender individuals may play in transgender rights, see *infra* ch. III.

¹⁰⁶ See, e.g., Pablo S. Torre & David Epstein, *The Transgender Athlete*, SPORTS ILLUSTRATED (May 28, 2012), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1198744>.

¹⁰⁷ See *id.* Perhaps the most famous controversy over a transgender athlete’s right to compete alongside others with her gender identity was the case of Renée Richards, a male-to-female transgender tennis player who won a New York Supreme Court battle allowing her to enter the U.S. Open as a woman. *Id.* For a survey of prominent transgender athletes in more recent times, see Elizabeth M. Ziegler & Tamara Isadora Huntley, “*It Got Too Tough to Not Be Me*”: Accommodating Transgender Athletes in Sport, 39 J.C. & U.L. 467, 471–74 (2013).

¹⁰⁸ See BRILL & PEPPER, *supra* note 22, at 235–36.

bodies become even more complicated when a transgender child wants to play a team sport, as such participation raises the issue of locker room access as well.¹⁰⁹ This section describes the various trans-inclusive policies created at different levels of sport, analyzing each according to the goals of their specific contexts. It then argues that the goals of athletics at the scholastic level counsel strongly in favor of a broadly inclusive policy that allows transgender students to choose to participate alongside those who share their gender identity.

At the adult level, some progress has been made toward transgender inclusion. The International Olympic Committee (IOC) promulgated the first set of rules regarding transgender competitors in 2004; the IOC requires that an athlete wishing to compete alongside others with the same gender identity “must undergo sex reassignment surgery and then two years of hormone therapy — either testosterone supplementation (to go from female to male) or testosterone suppression (to go from male to female).”¹¹⁰ The policy has received mixed reviews: while some transgender advocates have praised it as “ahead of the curve,”¹¹¹ others have argued that the surgery requirement can be prohibitively expensive, particularly for female-to-male transgender athletes.¹¹² In the years since the policy’s adoption, “this model has become the standard bearer against which many high-level sports organizations have measured themselves.”¹¹³ Given the high level of Olympic competition, these stringent rules make some sense — when the value underlying the sport is competitive perfection, lingering concerns over the potential advantage of women born with male bodies may justify restrictive policies designed to wear away any potential edge a transgender competitor might have.

For student athletes, there has been progress at both the collegiate and scholastic level. In 2011, the NCAA changed its policy on transgender inclusion: where it had previously looked to government documentation (which is itself often a fraught issue for transgender people¹¹⁴), it now has laxer requirements than does the IOC.¹¹⁵

¹⁰⁹ Cf. Torre & Epstein, *supra* note 106 (discussing locker room access at the collegiate level).

¹¹⁰ *Id.*

¹¹¹ Cyd Zeigler, *Moment #22: International Olympic Committee Allows Transgender Athletes to Compete*, OUTSPORTS (Sept. 12, 2011, 8:30 AM), <http://www.outsports.com/2011/09/12/4051806/moment-22-international-olympic-committee-allows-transgender-athletes>.

¹¹² See, e.g., *Transsexual Athletes OK for Athens*, CNN (May 18, 2004, 4:52 AM), <http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual>. The IOC policy has also been criticized for its lack of clarity regarding intersex athletes. Zeigler, *supra* note 111. This question drew worldwide attention in 2009, when intersex South African runner Caster Semenya became the world champion in the 800-meter event. See Torre & Epstein, *supra* note 106.

¹¹³ Zeigler, *supra* note 111.

¹¹⁴ See, e.g., STRYKER, *supra* note 11, at 150 (discussing difficulties in obtaining identification documents reflecting a transgender person’s “current name or gender appearance”).

¹¹⁵ See Torre & Epstein, *supra* note 106.

Transwomen need only receive one year of hormone therapy before competing alongside other women; transmen may compete with other men and are given special dispensation to take testosterone.¹¹⁶ Neither transmen nor transwomen are required to undergo sex reassignment surgery, as “[g]enitalia . . . do not impact athletic performance.”¹¹⁷ The NCAA also recommends that transgender athletes be allowed to use locker rooms aligned with their gender identity, though this recommendation is not always followed.¹¹⁸ The NCAA’s laxer policy relative to the IOC arguably fits the goals of collegiate athletics, which straddle scholastic and professional sports: the fact that college sports may lead to a professional career can justify some restrictions, while the role that sports play in education (discussed in more depth below) points toward broadening access to athletics and the academic benefits they may bring.

For transgender athletes at the interscholastic level, Washington and California have led the way in broadening access to sports.¹¹⁹ In 2007, the Washington Interscholastic Activities Association (WIAA) adopted a policy mirroring the IOC’s, the first such policy allowing for transgender student athletes.¹²⁰ The next year, the WIAA made its policy even more trans-inclusive: rather than focusing on the sex assigned at birth and requiring hormone treatments and surgery, the organization shifted its emphasis to broad access and deference to students’ gender identity.¹²¹ Stressing the need for “fundamental fairness” and “equal opportunities to participate in athletics,” the new model states that “[a]ll students should have the opportunity to participate . . . in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”¹²² If a student’s eligibility (that is, his or her status as someone who is genuinely transgender) is challenged, the policy creates a review process where the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.* (“[One transman athlete] was given his own makeshift locker room — a converted cement room with a door. ‘The school felt that it would be best and less confusing if I had my own space,’ [he] says. ‘Did it suck? Yeah, it sucked. I didn’t like it. I wasn’t bonding with my team.’”).

¹¹⁹ *See, e.g.,* Ernie Clark, *Maine Principals’ Association Draws Up New Policy for Transgender Athletes*, BANGOR DAILY NEWS, Mar. 28, 2013, <http://bangordailynews.com/2013/03/28/sports/high-school-sports/maine-principals-association-draws-up-new-policy-for-transgender-athletes> (discussing new protections for transgender students in Maine and citing similar statewide protections in Colorado, Vermont, and Washington).

¹²⁰ Cyd Zeigler, *Moment #80: Washington Becomes First State to Adopt High School Trans Athlete Policy*, OUTSPORTS (Jul. 13, 2011, 4:29 PM), <http://www.outsports.com/2011/7/13/4051532/moment-80-washington-becomes-first-state-to-adopt-high-school-trans>.

¹²¹ *See id.*

¹²² WIAA HANDBOOK: ELIGIBILITY, WASH. INTERSCHOLASTIC ACTIVITIES ASS’N § 18.15.0 (2013), available at <http://www.wiaa.com/ConDocs/Con1287/Eligibility.pdf>.

student may seek to prove his or her gender identity before a panel of experts.¹²³

The recent developments in California echo those in Washington, but the changes are statutory rather than simply regulatory. In February 2013, the California Interscholastic Federation (CIF) — the organization that supervises school athletics in the state¹²⁴ — instituted a new bylaw (effective in the fall of that year) that allows transgender children to play on their desired teams if a panel confirms that they are truly transgender.¹²⁵ Unlike the positions of the IOC and the NCAA, the CIF policy does not require any hormone therapy (let alone surgery) because “medical professionals advised that most students are too young and underdeveloped for hormone therapy.”¹²⁶ The change was lauded as a step toward fairness for gender-variant students, but the potential inconsistency between school districts regarding locker rooms and similar accommodations troubled many supporters of the policy.¹²⁷

This potential inconsistency fed into what sets California apart from other states in creating rules for transgender student athletes: AB 1266. In addition to its effect on restroom access,¹²⁸ the law also elevates the protections offered by the CIF to the statutory level.¹²⁹ The relevant language appears in subsection (f) of section 221.5 of the California Education Code — the same portion of the law as the restroom protections — and states that “[a] pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions . . . irrespective of the gender listed on the pupil’s records.”¹³⁰ Supporters of the law applauded this provision’s broad inclusion of transgender students, but opponents argued that some cisgender students might try to pass themselves off as transgender in order to gain a competitive advantage.¹³¹ Defenders of the policy point out that school districts with similar policies have not seen

¹²³ *Id.* § 18.15.3.

¹²⁴ Sharon Noguchi, *California Law Protecting K–12 Transgender Students Gets Mixed Response*, SAN JOSE MERCURY NEWS, Aug. 14, 2013, http://www.mercurynews.com/education/ci_23861258/california-law-protecting-k-12-transgender-students-gets.

¹²⁵ Editorial, *A Level Playing Field for Transgender Students*, L.A. TIMES, May 3, 2013, <http://articles.latimes.com/2013/may/03/opinion/la-ed-transgender-20130503>.

¹²⁶ Ellen Huet, *New State Law Opens Doors for Transgender Students*, SFGATE, Aug. 12, 2013, <http://www.sfgate.com/news/article/New-state-law-opens-doors-for-transgender-students-4726696.php>.

¹²⁷ *See id.*

¹²⁸ *See supra* pp. 1734–35.

¹²⁹ *See* Huet, *supra* note 126 (“The new law underlines the CIF’s current policies, said [CIF’s] executive director, Roger Blake.”).

¹³⁰ 2013 Cal. Legis. Serv. 85 (A.B. 1266) (West) (to be codified at CAL. EDUC. CODE § 221.5).

¹³¹ McGreevy, *supra* note 1.

this kind of gaming of the system.¹³² Other detractors have suggested that the law might run afoul of Title IX's application to girls' sports, as a transwoman might displace a cisgender student who would otherwise make the team;¹³³ this argument, however, rests on a conception of transwomen students as actually male, which directly opposes the understanding of gender that underlies the policy in the first place. Put differently, male-to-female transgender students do not displace girls from the team, as they *are* girls themselves (albeit girls born with male bodies). Indeed, a guidance letter issued by the U.S. Department of Education's Office for Civil Rights suggests that transgender students may be a protected class under Title IX, thus vitiating any argument that inclusion of trans students on girls' teams violates the law.¹³⁴

Having established that the transgender inclusion policies of the IOC and the NCAA roughly track the goals of the level of sport that each of those organizations oversees, how should we analyze the access of transgender students to interscholastic sports? The answer to this question hinges on the role that sports play in middle and high schools. Unlike professional sports, where the sole focus is on perfection and competition, the academic mission is a key component of the justification for scholastic athletics.¹³⁵ Participation in sports specifically fosters "teamwork, self-knowledge, self-esteem, and citizenship";¹³⁶ playing sports can also improve emotional well-being and boost a student's chance of getting into college.¹³⁷ Indeed, Benjamin Franklin argued in 1749 that schooling should include physical instruction because "exercise invigorates the soul as well as the body."¹³⁸ Put succinctly, sports at school are motivated by different principles and goals than sports at the top levels (though competition continues to play some role). While the IOC's high bar for transgender participation might make sense given the focus on competition at that level, that justification is weaker when transposed onto the scholastic setting. Although schools might have to sacrifice *perfect* competition in order to allow transgender students to participate fully, the losses stemming from that sacrifice pale in comparison to the benefits arising from the

¹³² See *id.*

¹³³ Noguchi, *supra* note 124.

¹³⁴ See Ziegler & Huntley, *supra* note 107, at 499–501.

¹³⁵ See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 43–46 (2011) (discussing the philosophical linkages between athletics and education).

¹³⁶ *Id.* at 44.

¹³⁷ PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 6 (2010), available at <http://www.wiaa.com/ConDocs/Con550/TransgenderStudentAthleteReport.pdf>.

¹³⁸ Rothstein & Jacobsen, *supra* note 38, at 267.

educational values of teamwork, community, and a stronger sense of self. Accordingly, schools should follow the lead of the WIAA, the CIF, and the California legislature in allowing transgender students easy access to sports aligned with their gender identities, as this participation maximizes those students' ability to learn the lessons sports have to offer, boosting their success at school. Moreover, broad inclusion of transgender student athletes sends a positive message to cisgender students as well, emphasizing the benefits of participation (and the associated values of teamwork and community) over cutthroat competition.¹³⁹

D. Critiques of Transgender Inclusion in Gendered Spaces

Although they are aligned with many of the values animating American public education, school policies deferring to transgender students' own conceptions of their gender identities are subject to numerous critiques. This section will answer two arguments that have not been addressed in the sections above: first, the argument that cisgender students may take advantage of access granted to transgender students; and second, the argument that inclusion of transgender students puts them at too high a risk of harassment from their peers. These arguments are particularly pertinent because they apply to both the restroom and athletics contexts and more broadly to discussions of transgender inclusion outside the educational sphere.

First, many opponents of policies allowing transgender students to access gendered spaces in accordance with their gender identities argue that cisgender students will take advantage of this access to go into bathrooms or play on sports teams of the opposite sex.¹⁴⁰ While this trope has appeared periodically in arguably lowbrow entertainment,¹⁴¹ reality tells a different story: a Los Angeles school district has allowed transgender students equal access to sex-segregated restrooms for nearly a decade and has had no problems with exploitation of the policy.¹⁴² These concerns are diminished further in the case of transwomen who are taking hormone treatments: although there is little empirical evidence regarding the effect that this treatment has on transitioning athletes, anecdotal evidence suggests that it may lessen any intrinsic physical advantages more quickly and dramatically than many critics of

¹³⁹ See Buzuvis, *supra* note 135, at 55–56.

¹⁴⁰ See, e.g., *Doe v. Clenchy*, No. CV-09-201, slip op. at 4–6 (Me. Super. Ct. Nov. 20, 2012) (describing a cisgender male student who followed a transgender female student into the girls' bathroom); McGreevy, *supra* note 1 (citing the concern that AB 1266 would be “exploited . . . by boys who want a competitive advantage by joining the girls' swim team”).

¹⁴¹ See, e.g., *JUWANNA MANN* (Warner Bros. 2002) (depicting a male basketball star who joins a women's team after getting expelled from his own league); *LADYBUGS* (Paramount Pictures 1992) (depicting a coach who uses his fiancée's son as a ringer on his girls' soccer team).

¹⁴² McGreevy, *supra* note 1.

transgender inclusion in sports allege.¹⁴³ This consideration becomes increasingly relevant as more medical treatment options become available to transgender youth.¹⁴⁴ Moreover, in addition to the questionable contention that cisgender students will subject themselves to the pervasive traumas associated with being transgender merely to gain a competitive edge or a peek at the opposite sex's bathroom, this exploitation argument is belied by the fact that even the policies granting the most deference to transgender students' conceptions of their gender identities have checks to prevent this kind of deceit.¹⁴⁵ While these safeguards do not extend to restroom access, simple school discipline may counter those trying to exploit trans-friendly rules to enter the wrong bathroom.¹⁴⁶

Second, opponents of policies like AB 1266 might argue that inclusion does transgender students more harm than good: although the policy could have potential psychological benefits, it exposes them to potential harassment and assault. This risk could take many forms: transgender individuals on sports teams may be ostracized by their teammates, undercutting any teambuilding benefits they may hope to receive; similarly, cisgender students who chafe at inclusion mandated from the top down could take out their frustration on those whom the inclusion is meant to help. While this concern for the well-being of transgender students is well founded, using potential harm to these students as a justification for their exclusion from gendered spaces unduly privileges the intolerance of harassers over transgender students' ability to be full members of their educational communities. Just as, in the First Amendment context, we do not allow the fear of retribution to support a heckler's veto of controversial speech,¹⁴⁷ we should not abandon the worthy goal of trans-inclusive schools simply because others may wrongly put transgender students at risk of harm. Ultimately, while there may be some risk to transgender students, undertaking such risks may be a necessary step toward a more inclusive status quo.

¹⁴³ See, e.g., Tracy Clark-Flory, *Why Don't Transsexuals Dominate Women's Sports?*, SALON (Oct. 13, 2010, 6:30 PM), http://www.salon.com/2010/10/13/trans_athletes/; Torre & Epstein, *supra* note 106.

¹⁴⁴ See *supra* section A, p. 1724.

¹⁴⁵ See *supra* p. 1740.

¹⁴⁶ Some may suggest that this discipline may not be enough — for instance, the boy who followed Nicole Maines into the bathroom continued to do so despite some school intervention, see *Doe v. Clenchy*, No. CV-09-2011, slip op. at 4–6 (Me. Super. Ct. Nov. 20, 2012) — but that does not mean that the solution should be different in kind rather than only in degree. Furthermore, supportive students can help the school police exploitations of trans-friendly rules. *Cf. id.* at 6 (“It is undisputed . . . [that] the students at [Maines’s elementary school] were all protective of [her.]”).

¹⁴⁷ E.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). For further discussion, see *supra* ch. I.

E. Broader Implications for Sex Segregation

To this point, this Chapter has dealt solely with the argument that transgender students should be allowed access to gendered spaces from which they are otherwise excluded. This focus, however, leaves off the table a broader argument: that we should transition away from gendered spaces entirely. The chief argument against policies like AB 1266 from this perspective is that the law may reify gender: while some decry the law as “a horrible attempt by activists to strip society of all gender roles,”¹⁴⁸ others may wonder whether that is such a bad thing. What, they ask, is so wrong with having schools shift toward gender-neutral facilities and activities on a broad scale? Some scholars have argued that sex-segregated bathrooms actually are a historical artifact of the oppression and isolation of women;¹⁴⁹ switching solely to gender-neutral facilities, they suggest, may “force everyone to recognize our common ground, the abject component of us all.”¹⁵⁰ In the same vein, others have argued that sex-segregated sports allow for the dismissal of women’s athletic achievement,¹⁵¹ leading some to call for an end to different teams for boys and girls.¹⁵²

Concerns about reinforcing dichotomous gender boxes may be particularly strong for transgender children, as they are at an age at which they are still forging their identities. Some experts on transgender children advocate gender neutrality, both because some children outgrow gender dysphoria and because children should be allowed to figure out their own identity without being forced into one of only two options.¹⁵³ Just because a child does not identify as a boy, this line of argument goes, that does not mean the child identifies as a girl — and presenting the child with only boys’ and girls’ restrooms means that the child may be shoehorned into an identity that does not quite fit.

In many respects, this Chapter’s focus on access to existing sex-segregated facilities in sections C and D is a pragmatic one. Given the furor arising from provisional attempts to cross or blur gender distinctions, it is difficult to imagine many schools erasing the line entirely

¹⁴⁸ Dolan, *supra* note 6 (internal quotation marks omitted).

¹⁴⁹ See Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007); Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297 (2008).

¹⁵⁰ More, *supra* note 149, at 312.

¹⁵¹ Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1630–34 (1997).

¹⁵² B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107 (2002) (arguing that school teams should split rosters and play time fifty-fifty between sexes).

¹⁵³ Dvorak, *supra* note 13 (“Kenneth Zucker, a child psychologist in Toronto who is serving on the psychiatric association’s task force, advocates neutrality for kids struggling with their gender identity. Children who see him get the Barbies or toy soldiers replaced by puzzles and board games. His theory is that kids should be allowed to grow into a gender and not be categorized.”).

(though some colleges have begun allowing students to designate bathrooms as coed¹⁵⁴). Yet in a world in which a growing number of people demonstrate that sex and gender cannot be neatly sorted into two distinct categories, a broader move toward coed restroom facilities could help to deconstruct some of society's more pernicious gender-based divisions.¹⁵⁵ Ultimately, policies like AB 1266 could serve as the foundation for a movement toward neutralizing conventional gender categories by allowing transgender students to chart their own experience of gender at school and by showing both transgender and cisgender youth that gender is not written in stone. These experiences in the educational context could lay the groundwork for a future generation that may be willing to rethink the rigid gender binary in ways that current societal attitudes toward sex and gender do not allow.

* * *

In proposing a public school system in Virginia, Thomas Jefferson once wrote that education should teach every citizen “to observe with intelligence and faithfulness all the social relations under which he shall be placed.”¹⁵⁶ Now, as we apply that intelligence and faithfulness to our examination of the mission of our country's education system, we find that in order to remain true to the lofty ideals of Jefferson and his fellow Founding Fathers, we must do our best to treat transgender students equally. A school system premised on transforming children into citizens betrays its core principles of diversity, community, and academic achievement if it does not seek to maximize transgender inclusion. The benefits of this inclusion accrue to cisgender and transgender students alike: cisgender students will learn a valuable lesson about marginalization, while transgender youth may for the first time feel like they truly belong.

¹⁵⁴ Christine Lagorio, *If You Go...*, N.Y. TIMES, April 16, 2010, <http://www.nytimes.com/2010/04/18/education/edlife/18coed-t.html>.

¹⁵⁵ Cf. Smith, *supra* note 104, at 75 (discussing how lifelong exposure to division between groups can reify otherwise artificial social distinctions).

¹⁵⁶ Rothstein & Jacobsen, *supra* note 38, at 267 (quoting Thomas Jefferson et al., *Report of the Commissioners Appointed to Fix the Site of the University of Virginia, Etc.*, in THE EDUCATIONAL WORK OF THOMAS JEFFERSON app. J at 248–60 (Roy J. Honeywell ed., 1964)).