

# STALL WARS: SEX AND CIVIL RIGHTS IN THE PUBLIC BATHROOM

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## I

### INTRODUCTION

*“[I]t is dangerous to unmask images, since they dissimulate the fact that there is nothing behind them.”<sup>1</sup>*

*Jean Baudrillard*

*The basic expectation of privacy in the most personal of settings, a restroom<sup>2</sup> or locker room, for each gender was violated by government overreach and intrusion by the mayor and city council of Charlotte. This radical breach of trust and security under the false argument of equal access not only impacts the citizens of Charlotte but people who come to Charlotte to work, visit or play. This new government regulation defies common sense and basic community norms by allowing, for example, a man to use a woman’s bathroom, shower or locker room.<sup>3</sup>*

On February 22, 2016, by a vote of 7-4, the Charlotte City Council passed a nondiscrimination ordinance amending the municipal code to add marital status, familial status, sexual orientation, gender identity, gender expression.<sup>4</sup> Of

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1. JEAN BAUDRILLARD, *Simulacra and Simulations*, in *SELECTED WRITINGS* 166 (Mark Poster ed., 1998).

2. In this Article, “bathroom” and “restroom” will be used interchangeably.

3. Press Release, Governor Pat McCrory, Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms, (Mar. 23, 2016), *available at* <https://web.archive.org/web/20160406190958/http://governor.nc.gov/press-release/governor-mccrory-takes-action-ensure-privacy-bathrooms-and-locker-rooms>. *See also* Pat McCrory (@PatMcCroryNC), TWITTER (Mar. 23, 2016, 10:16 PM), <https://twitter.com/PatMcCroryNC/status/712825502772269056> [<https://perma.cc/Z3EJ-PRWZ>], for a blunter description of Charlotte’s action by Governor McCrory.

4. Press Release, City of Charlotte, Council Approves Changes to Non-Discrimination Ordinance, (Feb. 22, 2016), *available at* <https://web.archive.org/web/20160226023751/http://charmeck.org/city/charlotte/Newsroom/Pages/Council-approves-changes-to-non-discrimination-ordinance.aspx> (last accessed Jan. 9, 2022). For the full text of the changes to the municipal code and the sections affected, *see*

immediate concern to many was the deletion of Section 12–59, which allowed for sex discrimination in “[r]estrooms, shower rooms, bathhouses, and similar facilities which are in their nature distinctly private.”<sup>5</sup> On March 21, 2016, N.C. House Speaker Tim Moore and Lieutenant Governor Dan Forest called an emergency session of the North Carolina General Assembly; and just two days after that, on March 23, Governor Pat McCrory had signed into law House Bill 2 (“H.B. 2”), the “Public Facilities Privacy & Security Act”, overturning the Charlotte nondiscrimination ordinance.<sup>6</sup> At the time, North Carolina’s Public Facilities Privacy & Security Act was the first in the nation; however, a flurry of “bathroom bills” was being debated in legislatures across the country. By 2017, at least sixteen such bills were put up for debate.<sup>7</sup>

That public bathrooms are at the center of this firestorm is not altogether surprising, as “[t]here’s a vulnerability we feel [there] we don’t feel in other places.”<sup>8</sup> Because of this vulnerability, access to public bathrooms has always, if not necessarily famously, been a part of the struggle for civil rights. At least, we have traditionally used them to segregate people.<sup>9</sup> Justifications for this segregation are generally based on two concerns: privacy and safety.<sup>10</sup> These justifications are clearly at play in the context of transgender bathroom bills: privacy means that women (and young girls) should be free to use the bathroom without risk of being exposed to male genitalia,<sup>11</sup> and safety means those populations should not have to fear sexual assault from predators attempting to gain access to “the wrong bathroom.”<sup>12</sup>

In the civil rights context, the twin justifications of privacy and safety have almost exclusively been used in attempts to purposefully exclude a particular

City of Charlotte, Meeting Agenda, February 22, 2016, 44–51, <https://charlottenc.gov/CityClerk/Agendas/February%2022,%202016.pdf#search=nondiscrimination%20ordinance%20february>.

5. City of Charlotte, Meeting Agenda, Feb. 22, 2016, 50, <https://charlottenc.gov/CityClerk/Agendas/February%2022,%202016.pdf#search=nondiscrimination%20ordinance%20february> [<https://perma.cc/KPD4-5CCD>].

6. See Greg Lacour, *HB2: How North Carolina Got Here (Updated)*, CHARLOTTE MAG., Mar. 30, 2017, <https://www.charlottemagazine.com/hb2-how-north-carolina-got-here-updated/> [<https://perma.cc/XD3U-TQHV>] for a complete timeline of the development of H.B. 2 and its subsequent effect on North Carolina.

7. See Joellen Kralik, National Council of State Legislators, “Bathroom Bill” Legislative Tracking, 2017 State Legislation, <https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/X57X-56BN>].

8. Maria L La Ganga, *From Jim Crow to Transgender Ban: The Bathroom as Battleground for Civil Rights*, THE GUARDIAN, Mar. 2016, <https://www.theguardian.com/world/2016/mar/30/transgender-ban-bathrooms-north-carolina-civil-rights> [<https://perma.cc/C849-SK77>].

9. See Shannon Price Minter, “Déjà Vu All Over Again”: *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1190 (2017).

10. See generally Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 DUKE J. GENDER L. & POL’Y 33, 51–58 (2016) (discussing the two justifications).

11. See Alexander K. Davis, *The Hidden Privilege in “Potty Politics”*, 16 CONTEXTS 34, 41 (2017).

12. See Brian S. Barnett et al., *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science*, 46 THE J. OF THE AMERICAN ACAD. OF PSYCHIATRY AND THE L. 232, 235 (2018).

group of people from having access to the restroom.<sup>13</sup> That is, exclusively but for one group at least: homosexuals (most specifically, gay men). Those defending racial and gender segregation of public bathrooms have couched the discussion of privacy and safety in terms of threats to the health and safety of those “allowed” or “meant” to use the assigned bathroom (e.g., people assigned women at birth using the “women’s room,” white people using bathrooms marked “whites only”) from those meant to be excluded. But even though the justifications remain identical in the context of the civil rights battle surrounding gay men in the bathroom, the general issues are troubled by the fact that the concern is no longer about *access* as men already have access to the gender-segregated bathroom. The concern is rather about use—or more accurately, misuse.

In this article, I explore how the repressive legal regimes that excluded gay men from having sex safely and in the privacy of their homes pushed the private act into the public space and caused gay men to transform and “misuse” that space. Part II sets out the history of the public bathroom generally, with a focus on how the twin justifications of privacy and safety operated to regulate access on the basis of race, sex, and gender. Part III discusses how, although the justifications remain, many of the issues surrounding them are upended when considering gay men’s transformation of the public bathroom into a space not for urination or defecation, but fornication, and how that transformation illuminates the problem that gay men have faced in keeping their intimate lives intimate. Finally, Part IV describes and analyzes the debate over whether a post-*Lawrence*<sup>14</sup> legal landscape leaves a place for sex in the public bathroom as a revolutionary act still central to the civil rights concerns of gay men.

## II

### BARELY A REST: A HISTORY OF THE RESTROOM AT THE CENTER OF CIVIL RIGHTS

People have generally considered any bathroom not in the home to be public, including those in commercial spaces.<sup>15</sup> Truly public bathrooms, for instance those in parks, train stations, and subway stations, became popular in the late nineteenth century, providing “safe access to the public realm.”<sup>16</sup> In addition to safety, given the inherited “moral charge of hygiene,” these public restrooms were also promoted as a way to remove the health risk of human waste in the

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13. Examples of unintended denial of access, for instance in the case of physical access for people with disabilities, are outside the scope of this discussion.

14. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding Texas sodomy law violated the Due Process Clause of the Fourteenth Amendment and privacy interests of the parties; overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

15. Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L. J. 145, 152–53 (2017).

16. Bryant Simon, *The Trouble with Bathrooms*, in MODERN AMERICAN HISTORY 1, 7 (2021). In this Article, “public” will be used in conjunction with restroom or bathroom to describe them as facilities in non-commercial spaces.

streets, and the dignity risk of public exposure.<sup>17</sup> From the beginning, the success of these spaces was directly related to their promise of safety and privacy.

With racial desegregation, however, fiscal support for the public bathroom began to decline, as did the availability of such spaces.<sup>18</sup> Using New York City as an example, Bryant Simon tracks a decades long reduction in subway bathrooms from 708 in 1972, to 175 in the early 1980s, to approximately half that number by the early 1990s. By that time, bathrooms that were accessible were “so grimy and dirty that they were unusable.”<sup>19</sup> No longer were any of them the glamorous spaces with “marble finishes and up-to-date plumbing” that cities had previously lauded.<sup>20</sup> As these public bathrooms were physically lost, or members of the public found themselves unable to use them without fear or disgust because they had become, in essence, the opposite of what they were designed to be, local governments also enacted ordinances preventing “fully” public urination and defecation, creating a “Catch-22” for anyone finding themselves in need of relief.<sup>21</sup>

To be able fully to participate in public life, *everyone* needs to be able to access spaces in which relief is at least permissible if not also safe, sanitary, and private. It is this access issue that is central to civil rights battles that surrounding the public bathroom; and we often forget, perhaps purposefully, how much time we spend in this space. According to congressional testimony in 2010 on the subject of gender parity in federal buildings, “[t]he average person uses a toilet about six to eight times a day, as many as 2,920 times per year [and by] age 80, we will have taken 200,000 trips to the toilet and spent 2 years of our life in restrooms.”<sup>22</sup> Without public bathroom access, other activities at the core of our participation in public life, such as attending school, going to work, or shopping for groceries, become impossible to do, or at least as they are tainted with the fear of discrimination, impossible to do with any real dignity.<sup>23</sup> Unless they live off the grid, those who lack of access are put in the position where they

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17. Davis, *supra* note 11, at 37. In fact, at least in part, “facilities were intended to stop men from stinking up the streets and exposing their genitals while urinating against convenient walls. Many nineteenth century facilities did not accommodate women, who were not known for such indiscreet behavior.” Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869-1932*, 48 J. OF SOCIAL HISTORY, 264, 266 (2014).

18. Simon, *supra* note 16, at 7.

19. *Id.*

20. *Id.*

21. See Heath Fogg Davis, *Why the “Transgender” Bathroom Controversy Should Make Us Rethink Sex-Segregated Public Bathrooms*, 6 POL., GROUPS, AND IDENTITIES 199, 206 (2018).

22. *Restroom Gender Parity in Federal Buildings Act, Hearing on H.R. 4869 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 37 (2010) (statement of Kathryn H. Anthony, Professor of Architecture, University of Illinois at Urbana-Champaign).

23. Monica Hesse, *How the Bathroom Became a Political Battleground for Civil Rights*, WASHINGTON POST, Apr. 1, 2016, [https://www.washingtonpost.com/lifestyle/style/why-america-cant-stop-fighting-over-the-politics-of-public-restrooms/2016/04/01/16af2f94-f6b6-11e5-a3ce-f06b5ba21f33\\_story.html](https://www.washingtonpost.com/lifestyle/style/why-america-cant-stop-fighting-over-the-politics-of-public-restrooms/2016/04/01/16af2f94-f6b6-11e5-a3ce-f06b5ba21f33_story.html) (last accessed Jan. 9, 2022).

have to develop strategies to control their need to urinate and defecate.<sup>24</sup> Even effective strategies do physical harm given that the natural bodily processes involved in discharging waste are necessary for healthy human functioning. If the strategies don't work, they result in humiliation.<sup>25</sup>

### A. Racing The Restroom

“When I was growing up in Huntsville, Alabama. . .we used to take car trips to my birth home of Kansas. Most of the time, we couldn't use the restrooms in the gas stations along the way. The signs were clear: ‘Whites only’ or ‘No Colored.’ At that time, we were Negroes or colored.

So we carried toilet paper and went on the side of the road.”<sup>26</sup>

– Elizabeth Ann Thompson

On June 25<sup>th</sup>, 1941, President Franklin D. Roosevelt signed Executive Order 8802.<sup>27</sup> The order prohibited racial discrimination in employment in industries with defense contracts.<sup>28</sup> The Order pointed to the war effort as the main motivation for moving to an inclusive employment policy, explaining that, “[T]he democratic way of life within the nation can be defended successfully only with the help and support of all groups.”<sup>29</sup> It also cited reports showing evidence of overt discrimination based on race in these industries.<sup>30</sup> The Order was part of a list of demands from the March on Washington Movement, which had scheduled march on Washington, D.C. later that year; and shortly after the Order was released, the march was cancelled.<sup>31</sup>

While potentially avoiding one public conflict, the Order ignited another. In accordance with the Order, that year, Western Electric began slowly to hire Af-

24. Joshua Rothman, *The Politics of Bathrooms*, THE NEW YORKER, May 14, 2016, <https://www.newyorker.com/news/news-desk/the-politics-of-bathrooms> [<https://perma.cc/3ADE-G4SY>]. For example, when asked about their relationship to public bathrooms, one transgendered individual stated: if you can't use the bathroom, it's harder to go to school, to go to work, to buy groceries, to do things that many of us who are cisgender take for granted. It's a real issue. I have discovered that a lot of people who are transgender don't drink enough water over the course of the day. Because of the obstacles they face, they'll go to great lengths to avoid using public bathrooms. *Id.*

25. *Restroom Gender Parity in Federal Buildings Act, Hearing on H.R. 4869 Before the H. Comm. on Oversight and Government Reform*, 111th Cong. 41 (2010) (prepared statement of Kathryn H. Anthony, Professor of Architecture, University of Illinois at Urbana-Champaign). “Emergencies happen. Accidents happen. Urinary tract infections happen. Delaying voiding can result in serious medical conditions. Unsanitary, unsafe restrooms in our nation's schools force thousands of children to wait to use their bathroom at home, and ‘holding it in’ can take its toll.” *Id.* (prepared statement of Kathryn H. Anthony, Professor of Architecture, University of Illinois at Urbana-Champaign).

26. *The Long, Ugly History of Bathroom Segregation*, PROGRESSIVE (May 31, 2016), <https://progressive.org/op-eds/long-ugly-history-bathroom-segregation/> [<https://perma.cc/HJS2-UQQD>].

27. Exec. Order No. 8,802 June 25 1941, Fair Employment Practice in Defense Industries.

28. *Id.*

29. *Id.*

30. *Id.*

31. CATHERINE M. LEWIS & J. RICHARD LEWIS, *JIM CROW AMERICA: A DOCUMENTARY HISTORY* 169 (2009).

rican American workers.<sup>32</sup> Between 1942 and 1943, the number of African American employees at the company increased from 103 to 7,000 out of approximately 50,000 total employees across three plants.<sup>33</sup> As part of this desegregation effort, in the summer of 1942, the company removed race designations from its bathrooms.<sup>34</sup> When an African American woman was moved into an inspection department that had previously only employed white women, those white women employees protested.<sup>35</sup> With the help of the Point Break Employees Association (PBEA), they attempted to have her removed.<sup>36</sup> Western Electric refused to take any action, and work went on as usual for a short time; until, that is, the PBEA presented the company with a petition signed by 1,500 employees demanding the re-segregation of the bathrooms.<sup>37</sup> When the company again rejected the demands, they called for a strike vote.<sup>38</sup>

Importantly, it was not desegregation generally that pushed the boundary of the white employees' sense of decency; instead, it was the desegregation of the bathroom specifically. As Bryant Simon puts it:

This was no accident. Public bathrooms have played a unique role in modern societies. As broad notions of privacy took shape, and as work and home became physically and ideologically separated in the last decades of the nineteenth century, access to a bathroom became an absolute requirement. It was the essential entry point to the public. And quickly, those in favor of exclusion, of upholding caste systems, recognized that cutting off access to a bathroom translated into cutting off access to the public and social equality.<sup>39</sup>

White objections to desegregating bathrooms were ostensibly based on the "cleanliness taboo."<sup>40</sup> Black bodies were described as "dirty" and "foul smelling" and workers stated outright that "[i]t goes without saying that among the colored race venereal disease is greater than among whites."<sup>41</sup> Beyond alleged concerns about basic cleanliness and disease, the white women workers claimed to be concerned that the "mixing of bodily fluids [would pollute their] purer white bodies [with] over-sexed Black bodies."<sup>42</sup> This set of rationales had a long tail. Years later, in *Turner v. Randolph*, the City of Memphis used these very arguments in its attempt to derail the movement to desegregate its public librar-

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32. STEPHEN B. ADAMS & ORVILLE R. BUTLER, *MANUFACTURING THE FUTURE: A HISTORY OF WESTERN ELECTRIC* 144 (1999).

33. *Id.*

34. *Id.*

35. *Id.* at 145.

36. *Id.*

37. *Id.* at 144.

38. *Id.*

39. Simon, *supra* note 16, at 1.

40. *Id.* at 3.

41. *Id.*

42. *Id.* at 4. These concerns became so prominent that Western Electric had to inform their employees that venereal diseases could not be contracted from toilet seat, and even offered to test employees for them. 42.

*Id.*

ies.<sup>43</sup> And literature distributed in the South warned that school desegregation would result in white children contracting venereal diseases like syphilis.<sup>44</sup> These public restrooms were still private spaces where races were not meant to mix; and if one engaged in such taboo behavior, their health (and reputation) were at risk.

Beyond public health concerns, racial desegregation of public bathrooms was presented as a risk to the physical safety of white women in particular. Black men have been presented as sexual predators so frequently and consistently throughout American history that “the trope is self-sustaining.”<sup>45</sup> This fear was heightened in the areas where privacy was of particular concern, such as public pools, changing rooms, and of course bathrooms, where the risk exposing white women to the “Black Body” was at its highest.<sup>46</sup> At this point bathrooms were already separated by sex; however, black women were seen as the “accomplices” of black men, and racial integration was said to give black men access to white women “by proxy.”<sup>47</sup>

Throughout the civil rights movement in the 1950s and 1960s, access to the bathroom was central to the fight, although it rarely is recognized in writing by white people as the “critical site” that it was and is.<sup>48</sup> Bryant Simon lays out some of the more seminal moments:

It happened in Little Rock in 1956. After the National Guard marched out of the city, the nine Black students enrolled at Central High School faced daily confrontations over access to washrooms. White students vowed to keep them out, saying, like the PBEA had in Baltimore, that they would not share toilet seats with Black students because they needed to protect themselves from venereal diseases. Five years later, Black Freedom Riders walked into “whites only” bus station restrooms in Virginia and South Carolina and were promptly arrested. This same wave of protests led to the savage beating of Fannie Lou Hamer in Winona, Mississippi in 1963.<sup>49</sup>

In 1965 in Tuskegee, Alabama, Sammy Younge Jr., a college student and Navy veteran, refused to use the “Blacks Only” bathroom at the back of a gas

43. *Turner v. Randolph*, 195 F. Supp. 677 (W.D. Tenn. 1961). “The defendants introduced proof at the hearing showing that the incidence of venereal disease is much higher among Negroes in Memphis and Shelby County than among members of the white race.” *Id.* at 679–80.

44. Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO MAGAZINE, May 18, 2016, <https://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902/> [<https://perma.cc/FUJ3-ALGE>].

45. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL’Y REV. 201, 217 (2012).

46. *Id.* at 203.

47. Young, *supra* note 44. This argument becomes more interesting when one considers that often during the segregation era, bathrooms marked “Blacks Only” were often not further segregated by sex: men and women were forced to use the same space. Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over That Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. OF WOMEN & L. 133, 183 (2000).

48. Simon, *supra* note 16, at 6.

49. *Id.*

station, and instead headed to the “Whites Only” one at the front; he was shot in the face and killed, the first official casualty of the civil rights movement.<sup>50</sup>

Privacy and safety were used in the battle over bathroom access as rationales for excluding Black men and women from white spaces. The excluded minority in this case demanded that the spaces be truly public, and that access to bathrooms for men and women not be limited based on race. The justifications for public bathrooms remain the same in the case of gender; however, the arguments from the excluded minority (in this case, people assigned women at birth) ends up being rather different.

## B. Gendering The Restroom

“[G]ender is a kind of imitation for which there is no original.”<sup>51</sup>

– Judith Butler

Bathrooms segregated by sex have not always been the standard practice. Prior to and through much of the nineteenth century, “unisex” bathrooms were common in private homes. In poorer contexts, these would tend to be “communal privies.”<sup>52</sup> Where residents had greater resources, “it was common to find two-seat privies with men and women . . . relieving themselves in the view of others.”<sup>53</sup>

As white women began to participate more in public life, it became necessary to find solutions to deal with their infiltration of places that had previously been uniquely manly. For example, as library leaders began to advocate for women’s access to that place which had previously been reserved for men only, separate “women’s only” spaces were created.<sup>54</sup> These were built to reflect the private space from which women were “stepping out”: “common feature[s] of such rooms was a hearth, which combined with the furniture, carpets and window treatments to reflect the domestic spaces associated with women’s separate sphere.”<sup>55</sup> These spaces also provided discrete access to a private ladies’ bathroom.<sup>56</sup> Beyond libraries, as women took advantage of public transportation, train cars were designated for them only.<sup>57</sup> These were generally at the back of the train because, it was said, they were less likely to be damaged during accidents and had the cleanest air.<sup>58</sup>

50. *Id.*; JAMES FORMAN, SAMMY YOUNGE, JR.: THE FIRST BLACK STUDENT TO DIE IN THE BLACK LIBERATION MOVEMENT 192–93 (1968); Hesse, *supra* note 23.

51. Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER 307, 313 (Henry Abelove, Michele Aina Barale, David M. Halperin eds., 1993).

52. Colker, *supra* note 15, at 153.

53. *Id.* As referenced earlier, part of the reason for the push for public bathrooms was the *too* public use of the streets for relief: “Urinating men, like defecating horses, were an everyday sight on the street.” Peter C. Baldwin, *supra* note 17, at 267.

54. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 30 (2007).

55. *Id.* at 31.

56. *Id.*

57. *Id.* at 32.

58. *Id.*

As the nation became more industrialized, women were increasingly present in the workplace. The bathroom became a specific focus of those whose work it was to try maintain women's privacy and hygiene in the transition, by ensuring that women's private "domestic space" was brought into the "public space."<sup>59</sup> This work was viewed as essential to many who were committed to ensuring that men and women maintained their proper gender roles as both began to mix more in the public sphere:

For men, the practice of good personal hygiene was imagined to yield a strong and masculine citizenry that could readily protect the nation from the perils of effeminacy. For women, learning how to maintain clean and respectable bodies for themselves and for their families formed the foundation of successful "republican motherhood."<sup>60</sup>

This concept of "domestic public spaces" relates directly to "separate spheres ideology."<sup>61</sup> As women were entering the workforce, industry and legislative forces began justifying the separation of male and female bathroom spaces not only based on the privacy and hygiene concerns of and for women, but also on concerns about their mental and physical safety.<sup>62</sup> Suddenly, women were doing the jobs of men: "[t]hey toiled in factories and office buildings, and this rattled people[.]"<sup>63</sup> some of whom believed that the pressure of the workplace would cause the "weaker sex" to "decompensate," making necessary the creation of a separate space within the public space that mimicked to some degree the private domestic space.<sup>64</sup>

These concerns and claims led state legislatures to pass laws requiring separate spaces for women in the workplace. In 1887, Massachusetts became the first state specifically to mandate separate bathrooms for women.<sup>65</sup> Within a few decades, every state had a similar law.<sup>66</sup> As Terry Kogan explains, "[t]he sex-separated water closet was necessary [1] as a haven to protect the weaker body of the woman worker; . . . [2] as one aspect of a factory's providing its workers with sanitary – 'clean and adequate' - toilet accommodations; . . . [3] to protect a worker's interest in privacy; and . . . [4] to protect and vindicate social morality, a morality rooted in the early nineteenth century separate spheres ideology."<sup>67</sup> The first and second justifications are closely related to safety generally, both physical and mental, where the third is focused on privacy.

59. Davis, *supra* note 11, at 36. "[T]he nineteenth century ushered in an unprecedented valorization of the sanitary body. *Id.*

60. *Id.*

61. Barnett et al., *supra* note 12, at 233.

62. Young, *supra* note 44. As public restrooms emerged in the nineteenth century, American men and women both viewed ladies' rooms as a public extension of the home— a safe spot where women could escape the outside world and its dangers. As the number of women working in factories and mills increased, so too did cultural anxieties about ladies leaving the protection and privacy of the domestic sphere. *Id.*

63. Hesse, *supra* note 23.

64. *Id.*

65. Barnett et al., *supra* note 12, at 232. *See also* Kogen *supra* note 54, at 30; Colker, *supra* note 15, at 160–61; Hesse, *supra* note 23.

66. Barnett et al., *supra* note 12, at 233.

67. Kogan, *supra* note 54, at 41.

The sex-segregation of bathrooms, by reproducing the separate spheres, also by definition created access restrictions to public facilities that in turn created restrictions to participation in the public sphere generally. For example, women's bathrooms were not installed in the U.S. Supreme Court until 1981; they followed the appointment of Associate Justice Sandra Day O'Connor.<sup>68</sup> This was despite the fact that the first woman to serve as a Supreme Court clerk, Lucile Lomen, was hired by Associate Justice William O. Douglas for the 1944-1945 term.<sup>69</sup> The dozens of women clerks that followed, as well as other women employees, had no building access to a sex-segregated bathroom until the 1980s.<sup>70</sup> It took even longer on the floor of the Senate: women's bathrooms were not present there until 1992, even though the first woman Senator to serve a full term, Hattie W. Caraway, began that term in 1931, and fourteen women served after her and prior to 1992.<sup>71</sup> Prior to this change in infrastructure, women Senators, unlike the men, had to use public restrooms much further from the floor, potentially risking missing votes to do so.<sup>72</sup>

Even where there is access to separate men's and women's facilities with equal convenience, the segregated nature of these spaces can potentially limit women's mobility in the workplace. As much as it is not a primary use of the bathroom, the men's side is often still used for social and business interactions for men, potentially reinforcing the "old boys' network."<sup>73</sup>

It is ironic that sex-segregated bathrooms, justified by privacy and safety arguments, can potentially limit mobility of women in the public work sphere. However, a greater and more concrete irony becomes evident when these arguments, meant to stoke fear in the population, arise in the context of the debates surrounding the Equal Rights Amendment (ERA) made by Phyllis Schlafly and others on the anti-ERA campaign. Among the main arguments that the ERA would actually be dangerous for women (and society in general) was that its passage would lead to the requirement of "unisex" bathrooms.<sup>74</sup> First, such unisex environments would threaten the physical safety of women, opening them up to the risk of harassment, sexual assault, and rape, as men could walk in on women in the bathroom without recourse.<sup>75</sup> Young daughters

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68. Colker, *supra* note 15, at 156.

69. Ruth Bader Ginsburg, Assoc. J. Sup. Ct. of the U.S., *The Supreme Court: A Place for Women*, Address to Sw. Univ. of L. (Feb. 6, 2002), in 32 Sw. U. L. REV. 189, 193 (2003).

70. *Id.* at 195 ("[f]rom 1973 through 1980, the Justices engaged 34 women and 225 men as law clerks").

71. Rebecca L. Felton was technically the first woman Senator; however, she only served for 24 hours. *Women Senators*, U.S. Senate, [https://www.senate.gov/artandhistory/history/common/briefing/women\\_senators.htm](https://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm) [<https://perma.cc/4PF9-YJFB>].

72. Bonnie J. Morris, *What Changed from Anita Hill to Christine Ford? Capitol Hill Bathrooms, Believe it or Not*, USA TODAY, Oct. 19, 2018.

73. Colker, *supra* note 15, at 167-68.

74. *Id.* at 57.

75. Davis, *supra* note 11, at 40. Schlafly popularized the claim that the ERA would "integrate public toilets," meaning to raise the specter of racial integration of public toilets with southern voters. Young, *supra* note 44.

would also find themselves at the mercy of pedophiles.<sup>76</sup> Second, they would be a threat to the dignity of women and, indeed, the very family unit, as the femininity of women was at risk because they would be forced into close proximity of men while engaging in some of the most private of acts.<sup>77</sup> These very words made it into debates on the floor of Congress regarding the ERA,<sup>78</sup> and the threats of the unisex bathroom were taken so seriously that some state legislatures created bathroom exceptions when drafting nondiscrimination laws.<sup>79</sup> Regardless of the legitimacy of these concerns, or whether those using them to support their arguments against the ERA were earnest, in the end they were effective in maintaining the status quo in the bathroom; unfortunately, they were also effective in maintaining the status quo in the rest of the public sphere, at least partially blocking the passage of the ERA.

Although the same justifications for segregation are at play in relation to race and gender, unlike Black people and their allies, women and their approved of, rather than fought against, segregation in their spaces. The access concerns, rather, were not that bathrooms be open to all members of both the majority and the minority, but rather that there be parity in segregated bathrooms available for women in order to support full participation in public life. Arguments for excluding gay males from the bathroom turn on similar themes, and as with those relating to women are on the basis of sex. . . just sex of a very different kind.

### III

#### QUEERING THE PUBLIC: SEX IN THE BATHROOM

“Never wait or play around toilets. Always leave immediately[.]”<sup>80</sup>

– Popular 1954 Pamphlet

Safety and privacy were central to the civil rights arguments for access coming from gender, race, and sex. The civil rights focus for gay men is troubled. Although safety and privacy remain central, there concern is not access concerns but rather the use-misuse-transformation of space. The transformative aspect of the gay man’s use of the space as erotic undermines and potentially

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76. Young, *supra* note 44. At an ERA Rally in 1977, Clay Smothers, an African American Texas legislator, stated: “Some of my black friends ask me why I am working with this movement, when most of the blacks are on the other side of town. I have enough civil rights to choke a hungry goat. I ask for public rights. . . I ask for victory over the perverts of this country. I want the right to segregate my family from these misfits and perverts.” Ruth Murray Brown, *FOR A CHRISTIAN AMERICA: A HISTORY OF THE RELIGIOUS RIGHT* 113 (2013).

77. Young, *supra* note 44.

78. Kogan, *supra* note 54, at 56.

79. Colker, *supra* note 15, at 159.

80. Henry O. Reno and George Southworth, *More Than 30 Men Quizzed; 40 Others Face Questioning*, *THE MIAMI HERALD*, July 8, 1954, at 8-A.

usurps the primary use of public bathrooms by the general population, marking it in a way that most can only view as dangerous.

The safety of the public is portrayed as “at risk” in relation to gay men not because they are attempting to access forbidden places, but rather because they are *already there* . . . a much more frightening proposition. The claims are often that gay men’s use of the spaces for sexual activity ruins them for the “respectable community” of heterosexuals. As with arguments against allowing transgender men access to men’s bathrooms and ERA-based claims about unisex bathrooms, the focus of this risk is often specifically children. In a survey of headlines covering public park bathrooms as cruising spots, titles such as “Beauty Spots are ‘Dogged’ by Pervs,” “Lewd Behaviour Behind Loo Closure,” and “People Investigation: Park & Writhe; Car Pervs’ Naked Lust Infests the Haunts of Innocent Children.”<sup>81</sup> Anita Bryant made the supposed danger to children even more explicit with her “Save Our Children” campaign, claiming “since homosexuals cannot reproduce, they *must* recruit, *must* freshen their ranks.”<sup>82</sup>

A focus of the “Save Our Children” campaign was preventing gay men from having teaching positions, based on these “recruitment” fears. These same fears were in play during the “Lavender Scare” of the 1950s. The imagined link between homosexuals and other “subversives,” especially communists, was emphasized repeatedly.<sup>83</sup> The Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Department openly stated that “there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.”<sup>84</sup> Such individuals might be especially vulnerable to blackmail, of course, but also, “normal” or “young and impressionable” people might “come under the influence of a pervert.”<sup>85</sup>

Underlying these positions was the view, enshrined in the law at the time, that sex acts between men were “crimes against nature.”<sup>86</sup> In the middle of the

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81. Sean Hennelly, *Public Space, Public Morality: The Media Construction of Sex in Public Places*, 31 LIVERPOOL L. REV. 67, 75 (2010). The irony of the last headline becomes clear when Hennelly goes deeper into the text of the article: “THIS is the sordid scene as a couple of doggers emerge from their car after putting on a sex show that only hours earlier was thronging with families and children.” *Id.* at 76. The implication is of course that children are at risk of exposure, as it simultaneously demonstrates that such activity is taking place only when there is in fact an absence of those families and children for hours at least. *Id.*

82. Scott De Orio, *The Invention of Bad Gay Sex: Texas and the Creation of a Criminal Underclass of Gay People*, 26 J. OF THE HISTORY OF SEXUALITY 53, 74 (2017). The use of the term “ranks” should not be overlooked, not so subtly suggesting that there is in fact a war for children’s dignity, souls, and perhaps even lives.

83. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1565–66 (1993).

84. *Id.*

85. De Orio, *supra* note 82, at 59.

Allan Bérubé, *The History of Gay Bathhouses*, 44 JOURNAL OF HOMOSEXUALITY 33, 34 (2003). For a comprehensive list of laws covering such laws, see APPENDIX, *The Evolution of State Sodomy Laws*,

twentieth century, it seemed there would be no movement on such laws, as even members of the bar committees of various states, when surveyed, expressed concern about legalizing even private sex acts between men for fear that it was a slippery slope to pedophilia.<sup>87</sup> Crackdowns reached their heights in the 1950s, driven by recruitment rhetoric which often concentrated on the alleged risk that vulnerable youth would be targeted by older gay men.<sup>88</sup> Between 1940 and 1970, appellate court decisions regarding sodomy doubled, most of which dealt with sodomy between men.<sup>89</sup>

Considering the portrayal of public restrooms as predatory spaces, and the very real risk to reputation, employment, and freedom that attended any perceived misuse, why would these spaces become a center of the erotic for gay men?

### A. The Bathroom as Erotic Space

The arguments against the public bathroom as an erotic space generally involve access to alternatives.<sup>90</sup> During the mid twentieth century there were, after all, bars and other commercial spaces available to gay men (and women) to meet, socialize, and make plans, if need be, to find a more private place.<sup>91</sup> The problem with such spaces, however, was that they were *known*. For instance, by the late 1950s in San Francisco alone, “20 gay bars had their licenses challenged and hundreds of bar patrons had been arrested.”<sup>92</sup> Even as court rulings and public opinion turned against raids on these spaces, they continued unabated.<sup>93</sup>

If known commercial spaces are deemed risky because they are known, not only by state authorities but likely by the general public, then why not the home? After all, “[t]he core of both ‘privacy’ and ‘property’ involves the same abstract right: the right to exclude unwanted interference by third parties.”<sup>94</sup> The home is where, historically, this right to exclude has been nearly irrefutable.<sup>95</sup> Sexual conduct has long been considered one of the most private acts.<sup>96</sup>

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*Colonial Times to Lawrence v. Texas*, in WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* 388–407 (2008).

87. De Orio, *supra* note 82, at 71.

88. *Id.* at 59.

89. ESKRIDGE, *supra* note 86, at 85.

90. A blunt response to this comes from a participant: “[l]ots of folk don’t admit to [cruising bathrooms] or they just never do it because it’s seen as dirty because it’s a publicly sexual thing. ‘*Why would you look for sex in a stinking public toilet?*’ But at the same time, for a guy like me, that’s where the cocks are so it makes sense. People just see it as dirty and dangerous because you never know who you are going to meet. It’s just for sex. There’s no relationship – there’s no bond. The only reason you’re there is to spunk. You’ll never see that person again.” Grant Anderson, “*Why Can’t They Meet in Bars and Clubs Like Normal People?*”: *The Protective State and Bioregulating Gay Public Sex Spaces*, 19 *SOCIAL AND CULTURAL GEOGRAPHY* 699, 709 (2018) (emphasis in original).

91. Bérubé, *supra* note 86, at 34.

92. *Id.* at 48.

93. *Id.*

94. Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 *COLUM. J. GENDER & L.* 1, 3–4 (2008).

95. *Id.* at 14. Perhaps the strongest expression of the rights associated with the home is the “castle doctrine,” “[a]n exception to the retreat rule allowing the use of deadly force to protect one’s own

This space and its connection to sexual conduct, however, is also inextricably connected to concepts of family, marriage, and reproduction.<sup>97</sup> Not only did homosexual relationships lack the legal and social infrastructure associated with classic notions of family and marriage,<sup>98</sup> but in many cases the home represented a heightened risk of exposure. Taking advantage of commercial public spaces where gay men could be found meant weighing the risk of going to a *place* that is known. Bringing another man to your home meant exposing yourself where *you* were known: to neighbors, potentially even family. Further, it meant revealing that most personal and private of spaces to your partner, casual or otherwise.

The irony is, of course, that regulations of both the commercial private spaces and the home necessarily pushed sexual intimacy, this “most private of acts,” into more public spaces. Such public spaces offered greater opportunity to protect anonymity, as the space was not considered to be, specifically, coded as gay, and so the status of the place offered a cover of sorts. Further, the brevity of the encounters meant that neither partner would likely be able to identify the other. Gay men became adept at “stealing moments of privacy and at finding the cracks in society where they could meet and not get caught.”<sup>99</sup> The state’s regulation of commercial public and private spaces required the acquisition of this skillset.<sup>100</sup>

The public bathroom, in contrast with other public venues where sex acts may occur (for example, parks, piers, or commercial bathhouses), is traditionally a place where the “unspeakable” happens. It is arguably a place of filth: “even the cleanest of public toilets, culturally speaking, [is] a ‘dirty space.’”<sup>101</sup> This either makes the public bathroom an unlikely candidate for an erotic space . . . or only an erotic space for the self-loathing. It is also a place, though,

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home and its inhabitants from attack, esp. from a trespasser who intends to commit a felony or inflict serious bodily harm.” BLACK’S LAW DICTIONARY (11th ed. 2019). The expansion of this exception outside the home with the recent advent of “Stand Your Ground” laws has created significant debate, demonstrating the concern with moving rights traditionally exerted within the home past the front door. See generally Wyatt Holliday, *The Answer to Criminal Aggression is Retaliation: Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407 (2012).

96. Ball, *supra* note 94, at 1.

97. Zaid Al Baset, *Section 377 and the Myth of Heterosexuality*, 4 JINDAL GLOBAL L. REV. 89, 101 (2012).

98. Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 562 (1998).

99. Bérubé, *supra* note 86, at 34.

100. Anderson, *supra* note 90, at 712. Part of this skillset included a learned code of conduct in terms of use of space, so that secrecy and anonymity can be maintained. *Id.* at. Violations of the code disrupt the normal erotic flow: “[a] friend of mine. . . had a young guy sucking him off at the urinal when an old guy came in and proceeded to stand and watch. After a while the young guy was like, ‘fuck this!’ and he pulled his trousers up and left. I was furious. There are rules. You just don’t stand and watch someone. You give them privacy and let them get on with it.” *Id.* at 713.

101. Ruth Barcan, *Dirty Spaces Separation, Concealment, and Shame in the Public Toilet*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 25 (Harvey Molotch & Laura Noren eds., 2010).

of disappearing—waste is flushed away, the unseeable made literally unseen.<sup>102</sup> In this way, it appeals to the hidden.

Public bathrooms are also permeable, and because concerns regarding the space here are not about access but rather misuse, the privacy-safety justifications are flipped. Privacy, instead of being an expectation, is manufactured through venue selection and indoctrination. Space is chosen carefully to ensure privacy, as much as this is possible in public. An additional layer of privacy is added by keeping verbal communication to a minimum, as it entails multiple risks. For instance, “[w]hen one speaks, one conveys more information than the mere content of one’s words.”<sup>103</sup> Express statements regarding sexual activity in public spaces also open up the possibility of soliciting the wrong person, especially someone in law enforcement. Finally, there is simply the risk of being overheard, and being held accountable.

#### B. Secret Public Spaces, Unspoken Language, And Creating a Strange Society: Privacy And Sex in The Bathroom

The main difference between privacy in the home and the public space is that privacy in the home is “subject to protection through legal means,” where those seeking sex in public spaces self-regulate, choosing spaces that can be considered not public so much as semi-public.<sup>104</sup> The main purpose of both non-verbal communication and the appropriate choice of place is to ensure that only insiders are a part of and participating in the space – outsiders are excluded.<sup>105</sup>

Laud Humphreys has described the “ideal” public restroom as being isolated on an “island of grass,” a flat, clear view all around, with a getaway car near.<sup>106</sup> In addition to location, characteristics of the space can make it more amenable as a cruising spot: for instance, “[d]oors that lead into the restrooms which squeak or stick. . .protect privacy by alerting the sexual actors of the imminent arrival of visitors.”<sup>107</sup> Timing is also essential: hours that are considered “family time” (in other words, times when it is likely that public restrooms will be used by straight men or children) are generally off limits; and if one is determined to engage in sexual activity during those hours, he should seek a space that is even more secluded than normal.<sup>108</sup>

When engaging a partner in these spaces, verbal communication is most often nonexistent, requiring an understanding of “the language of the body.”<sup>109</sup> This nonverbal form of communication often occurs in multiple stages. In one breakdown, there are four main stages:

102. *See id.* at 34.

103. Richard Tewksbury, *Cruising for Sex in Public Places: The Structure and Language of Men’s Hidden, Erotic Worlds*, 17 *DEVIANANT BEHAV.* 1, 10 (1996).

104. Ball, *supra* note 94, at 24.

105. *Id.* at 13–18.

106. *Id.* at 17.

107. *Id.* at 17–18.

108. Tewksbury, *supra* note 103, at 9.

109. Ball, *supra* note 94, at 30.

1. Approaching: this occurs outside the space, and often involves driving around the restroom, parking, and remaining in the car before entering. As straight men simply park, enter, and leave, this is the first indicator;
2. Positioning: standing in such a way to indicate that one is not there for the primary use of the restroom, and looking around in a manner uncommon (for example, most straight men will simply look down);
3. Signaling: stepping back from a urinal or otherwise ensuring that one's penis is easily viewable;
4. Contracting: physical genital contact, which if not rejected, seals the sexual contract.<sup>110</sup>

A more recent study verifies that this multistep process remains much the same:

1. The function of protected territories in facilitating the arrangement of (sexual) encounters between strangers;
2. The screening processes by which a potential partner is selected as an acceptable risk;
3. The negotiation of the "scenario" itself, so that the risks to be taken are clarified, and agreeable limits set;
4. Control of interaction during the actual scenario (the sex act) so that the limits are not exceeded, real "consent" is maintained, and withdrawal possible at any point where one of the participants finds "the action too much to handle."<sup>111</sup>

Positioning and signaling can involve various "motions and signals."<sup>112</sup> As these are mirrored more and more, they can progress from "[r]ubbing one's chest or lips, or stroking the inside of one's thighs, or, most obviously, stroking, massaging, or caressing one's genitals."<sup>113</sup> Perhaps most important to the ability to maintain safety and anonymity, these forms of communication must be learned, and so are the privilege of the initiated.<sup>114</sup>

The success of this language is at least partially based on how its structure upends known standards of heterosexual behavior in the space. As much as aspects of positioning involve a subtle flaunting, heterosexual men in the bathroom using it for its primary purpose find themselves in a position where their actions are constantly tested.<sup>115</sup> As Ruth Barcan puts it: "[t]he semiotics of the men's room is underpinned by a fundamental paradox: men are forced to put extreme effort into the appearance of insouciance."<sup>116</sup> The threat of potential physical contact, or even the male gaze, falling even casually on the phallus of

110. *Id.* at 18–20.

111. Tewksbury, *supra* note 103, at 5 (citing John Alan Lee, *The Social Organization of Sexual Risk*, 2 ALTERNATIVE LIFESTYLES 69, 77–78 (1979)).

112. *Id.* at 13.

113. *Id.*

114. *Id.* at 5.

115. Barcan, *supra* note 101, at 39.

116. *Id.* In pop culture, a Halloween episode of the sitcom "Roseanne" has a surprisingly clear example of this forced indifference. The title character dresses, rather convincingly, as a man for the holiday. While in the local bar, she decides this is her opportunity to explore the men's room. At the urinal, she attempts to engage the man next to her in conversation several times. Receiving little response, and then nothing but a grunt and a look of frustration, she says "Oh, I get it. It's like an elevator." *Roseanne: Trick or Treat* (Wind Dancer Productions & Carsey-Werner Company Oct. 30, 1990).

another or on one's own means one often behaves in an "extra homophobic manner."<sup>117</sup> Gay men, of course, are intimately familiar with this script, as such familiarity is necessary to maintain privacy (secrecy) in daily life,<sup>118</sup> which makes the behavior involved in signaling and the other methods of nonverbal communication necessary to consummate the "bathroom cruise" all the more inevitable.

Reactions to discovered or suspected transformative use of the bathroom have, at times, created unintentionally amusing results that, although effective in reducing the privacy afforded and constructed in the bathroom, also undermine the standard heterosexual script and its primary use. When rumors circulated at Harvard that the Science Center men's room was being used for homosexual activity, the solution was to remove the stall doors, destroying the semi-private aspect of the space and, essentially, exposing the entire space to anyone accessing it.<sup>119</sup> Of course, this exposure threatens that part of the heterosexual script that reads "active disinterest," as the physical barriers that make it effective are removed. Harvard's effort had a predictable effect: the bathroom was all but abandoned even for its primary purpose.<sup>120</sup> The architecture of the space also created an additional erotic element as each of the stalls faced a urinal: "While one man is situated on the toilet (perhaps holding his penis so that he can urinate while defecating), he is compelled, if for no other reason, since the man urinating is the only animated object within his scope of vision, to watch the backside of the man holding his penis while urinating before him."<sup>121</sup>

### C. Dangerous Liaisons: Safety and Sex in the Bathroom

"Visibility is a trap," wrote Michel Foucault in his now famous discussion of the invention and uses of the Panopticon, that circular, all-seeing prison mechanism designed by Jeremy Bentham in nineteenth-century England. The visibility trap understands the ways looking, within a political and governmental structure, confers a powerful position for those who are looking, while it is meant to control those who are subjected to the gaze of surveillance. Visibility in this sense depends upon the act of looking as a controlling suspicion, creating an unbalanced experience of looking between the visible subject and the invisible observer (hidden behind screens, two-way mirrors, or video cameras connected to distant monitors). In such surveillance, being visible depends upon the subject not being able to look back. His or her visibility becomes available precisely by the viewer's invisibility.<sup>122</sup>

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117. Bryan Reynolds, *Erotics at Harvard*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 44 (Harvey Molotch & Laura Noren eds., 2010).

118. After all, gay men do also use the public bathroom for its primary purpose as well as its transformative one.

119. Reynolds, *supra* note 117. Harvard is not the only university or other entity to take or suggest such action. See, e.g., Jordan Blair Woods, *Don't Tap, Don't Stare, and Keep Your Hands to Yourself - Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER, RACE & JUST. 545, 576 (2009) (discussing similar actions taken by the University of Pittsburgh).

120. Reynolds, *supra* note 117, at 45.

121. *Id.*

122. James Polchin, *The Men in the Bathroom: Reflections on William E. Jones's Tearoom*, in *ON NOT LOOKING: THE PARADOX OF CONTEMPORARY VISUAL CULTURE* 80 (Frances Guerin, ed., 2015).

Other forms of enforcement in reaction to the transformative use of the bathroom as an erotic space are not nearly as amusing. Much surveillance in this setting is an aspect of self-enforcement and transformative use of the space. Individuals participating in sex acts in the bathroom are expected to follow the rules, especially those rules focused on privacy and third party viewing. They are expected to respect the anonymity central to the use of the space when venturing back into the outside world (e.g., responding to a former sex partner as if they were a complete stranger if met on the street).<sup>123</sup> Where there are third party invitees, they often serve a role other than direct participants, they are engaged to be “watch queens” responsible for *enforcing* the privacy (and therefore safety) of the participants, scanning through windows and watching doors for “intruders.”<sup>124</sup> Where there is no watch queen, surveillance is the responsibility of the direct participants:

[P]articipants are all watching the door, anticipating *another* kind of surveillance to which they have already developed a disposition. . . [the public bathroom] is already a surveillance space, and so it is not the surveillance *itself* that provides the ‘shock’ or ‘surprise’ at the invasion of privacy. It is that the *form* of surveillance is unanticipated. Covert filming [for example] is a form of surveillance to which these men have not yet developed a disposition.<sup>125</sup>

Outside or external surveillance creates an entirely new set of concerns. Evidence of surveillance, particularly by law enforcement, can be traced back to the late nineteenth century.<sup>126</sup> Arguably the most exhaustive surveillance project remains to this day, however, the sociological study done by Laud Humphreys.<sup>127</sup> Humphreys, taking on the role of a watch queen, spent several months in bathrooms where men engaged in anonymous sex. His role was ironic, considering that the very nature of his presence disrupted, although not visibly, the very privacy of the space,

Humphreys conclude[d] that whether a public bathroom serves as a . . . site where men can potentially have anonymous sex with other men, depend[ed] on the extent to which the site afford[ed] them privacy. If a particular site can protect the sexual actors

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123. “You need to give people their privacy. If someone is sucking you off, you expect the person upstairs to be keeping an eye. Another unwritten rule is that, if you see that person in the pub the next week, you don’t start waving over and talking to them. You just don’t do that. Even if a guy was my friend, I would never go over and speak to him in there.” Anderson, *supra* note 90, at 713. “The knocks and coughs aren’t meant to be noticed by people who aren’t listening for them. Anything more than oral is a bit dodgy. It’s difficult to get away with and I won’t have anal without a condom now, so that all takes preparation and that sort of ruins the moment a bit. Also, if you get caught doing it then you’re in bother. Someone will have a go at you for that now.” *Id.* “In the toilets too, don’t do stuff like have your trousers round your knees and you’re not expected to just stand about because that’s not normal. People say that you shouldn’t have full anal in toilets either because that’s just asking for trouble. Other guys don’t like you doing that. If you’ve done something seriously wrong, then you’ll be told. You just have to kind of learn and hope that you don’t make a mistake.” *Id.*

124. See Katherine Biber & Derek Dalton, *Making Art from Evidence: Secret Sex and Police Surveillance in the Tearoom*, 5 CRIME, MEDIA, CULTURE 243, 252–53 (2009).

125. *Id.* at 256.

126. Polchin, *supra* note 122, at 88.

127. Ball, *supra* note 94, at 16–17.

from unwilling gazers and unwilling gazers from the sexual actors, then it can be transformed from a mundane bathroom into a sexualized site.<sup>128</sup>

Barring ethical arguments regarding Humphrey's methods, his surveillance, although unnerving, does not present the same threat as surveillance by law enforcement. In his work, he references a 1962 police action in Mansfield, Ohio.<sup>129</sup> Law enforcement had a two way mirror installed in one of the men's room in Mansfield Central Park, and installed a camera behind it to film all activity.<sup>130</sup> The footage was used to secure 38 arrests, and 31 convictions for sodomy, a felony in Ohio at the time.<sup>131</sup> It was then re-edited to create a training video for law enforcement, the voice over running through the images of the sex acts saying: "We must know the sex deviates in our community. Know them, and watch them. The acts of depravity you are about to witness occurred in the public restroom operated by this city."<sup>132</sup> Although not its intention, the video extended the humiliation caused by the initial surveillance and reproduced it *ad infinitum*. Beyond the harms to the individual this type of surveillance engenders,<sup>133</sup> it also undermines the very privacy and therefore safety of the place itself, which participants in these sex acts work hard to construct.

A central problem with subsequent raids based on direct or casual surveillance is that laws defining violations related to public sex are often unclear, and so subject to interpretation and relatively unfettered exercise of discretion by law enforcement.<sup>134</sup> J. Kelly Strader and Lindsey Hay, using California Penal Code § 647 as an example, point out the five elements that must be proved in order to find someone guilty of "lewd or dissolute conduct":

1. The defendant willfully engaged in the touching of defendant's own or another person's genitals, buttocks, or a female breast;
2. With the intent sexually to arouse or gratify the defendant or another person, or to annoy or offend another person;
3. In a public place or a place open to the public or to public view;
4. Someone else who might have been offended was present; *and*
5. Defendant knew or reasonably should have known that another person who might have been offended was present.<sup>135</sup>

The fourth and fifth elements are the fulcrum, the places where the tension comes clearly into play between the efforts of those using the public bathroom for sex to make it as private as possible, and those attempting to regulate and eliminate this "misuse" of the space. For example, sexual encounters are most

128. *Id.*

129. Biber & Dalton, *supra* note 124, at 252–53. This technique was later utilized in other states as well, including Florida and California. *Id.*

130. Biber & Dalton, *supra* note 124, at 243–44.

131. *Id.*

132. *Id.* at 247.

133. Which, beyond arrest and incarceration, can mean loss of job, home, and-or family. Hennelly, *supra* note 81, at 72.

134. Anderson, *supra* note 90, at 712.

135. J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 478–79 (2019) (emphasis in original).

often limited by space and time rules to ensure that someone who “might have been offended” is distinctly *excluded* from the “transformed” space. And because of this, most often there would be no expectation that the participants “should have known that another person who might have been offended was present.” In fact, the case is therefore quite the opposite: the act of participation assumes that such individuals were completely absent.<sup>136</sup>

Much evidence points to the fact that “crimes” in this category result in over-prosecution and under-conviction. Looking at New York City Department of Corrections statistics from the 1960s, the vast majority of men and women detained on sodomy charges not only escaped prosecution, but also even official arrest.<sup>137</sup> Many of those detained then and now claim further that they were pursued by “handsome, aggressively flirtatious, and provocatively dressed undercover officers.”<sup>138</sup> Arrests occurred even where targets suggested they move from the public space to a private one before engaging in any sex acts.<sup>139</sup> At times, however, the skillsets involved in the learned unspoken communication used by those cruising public spaces can undermine these attempts to infiltrate the community:

Eye contact for me is ultimate. By being able to catch a person’s eye and the way that—well, I can tell whether they’re really comfortable or not. Even cops aren’t comfortable enough to hold your gaze, you know—I mean ‘cause they are just not to the point of doing it. That’s one of the biggest clues for me.<sup>140</sup>

“Public safety” is, of course, an added – often pretextual – concern for law enforcement.<sup>141</sup> In addition to the fact that the police are [were?] expressly tasked with preventing gay men from using public bathrooms for sex on the basis of the (im)moral view that gay sex is “a crime against nature” – rather than on the basis that they are a menace to public safety in the usual sense of that term – there is related evidence supporting the discriminatory enforcement of rules that proscribe sex in public spaces and the distinct anti-gay bias of a lot of

136. Many argue, in fact, that the only risk of detection in these scenarios is because of the efforts of law enforcement to detect them, and that the more effort and money spent to uncover these “subversive behaviors” serves as evidence that these public spaces had, in many ways, been fully transformed into private ones. See Ball, *supra* note 94, at 49.

137. Woods, *supra* note 119, at 553. These raids are not a thing of the past: similar recent raids have been recorded in California, Florida, Louisiana, and Texas. Strader & Hay, *supra* note 135, at 507–09; see also Mark Joseph Stern, *The Stingers Get Stung*, SLATE, May 4, 2016, <https://slate.com/news-and-politics/2016/05/long-beach-police-rebuked-for-illegal-anti-gay-stings.html> [<https://perma.cc/3C8V-VZMT>].

138. Woods, *supra* note 545. These operations depend on these decoy officers, without which there might not be any “crime” in the first place. Strader & Hay, *supra* note 135, at 483.

139. Woods, *supra* note 119, at 555.

140. Tewksbury, *supra* note 103, at 12.

141. Even where the arguments from law enforcement are for the safety of gay men engaging in public sex, one can detect pretext. Two such arguments are that such men are targets for violent crime, particularly because they are unlikely to report it, and often participants are not taking precautions to avoid STIs; however, as J. Kelly Strader and Lindsey Hay point out, the appropriate target for those committing violent crime is in fact those committing the violent crime not the victims of it, and that anyone having unsafe sex will not stop doing so because they are arrested doing it in public – at best, the risky behavior will likely just be subject to a change in venue. Strader & Hay, *supra* note 135, at 488–89.

individual officers. For example, officers admit to witnessing heterosexual public sex acts (which most often occur without the privacy-building aspects of gay men using spaces for sex), but comparatively speaking, arrests are rare.<sup>142</sup> These officers may point to the fact that they get more complaints about gay sex than they do about straight sex, but this ignores the fact that such complaints may themselves be the result of bias against homosexual acts.<sup>143</sup> Again, such bias is endemic in many police forces, where, for example, raids and stings targeting public sex between men were deemed “bag a fag” operations.<sup>144</sup>

Policing the public bathroom to ensure that it would not be used as a space for gay sex was only necessary in the first instance because the normative private space for this purpose – the home – was hoarded away from gay men (and women). The home has now been desegregated and is no longer a legally taboo space for gay sex. Does this mean that gay men today are in the position of Black people and women following their respective desegregations: without group-specific interests – if not legal rights claims – associated with public bathrooms?

#### IV

##### INTO THE BEDROOMS, OUT OF THE STREETS: AFTER DECRIMINALIZATION AND *LAWRENCE*, A CONTINUED DIVISION

Beginning in Illinois in 1961, states began to decriminalize sodomy generally (including both heterosexual and homosexual sodomy).<sup>145</sup> Those laws that remain on the books have been invalidated by *Lawrence v. Texas*.<sup>146</sup> From a legal perspective, this would seem to put gay men in the position of Black people and women, with their essential civil rights already won. For gay men, this means they no longer need to transform the public bathroom because now they have access to the private space. . .to the bedroom. Logically then, the bathroom should be abandoned (except for its traditional uses). Nevertheless, public bathrooms continue to be a site for gay sex. The question, of course, is “Why?”

To some, it is advocacy, a direct action response to the newest entry into a long history of respectability politics at play both within and without the gay community. In the mid-1960s, Frank Kameny, a founding member of the Mattachine Society (one of the earlier “homophile” organizations pushing for what we now refer to as gay rights), engaged in what many at the time considered a militant protest stand to bring recognition to the agenda, arguing that homo-

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142. Strader & Hay, *supra* note 135, at 481. *New York Magazine* featured a recent story where a heterosexual

couple stated they had engaged in public sex in nearly every venue imaginable. . .many of the venues that were targets of gay sex stings. Woods, *supra* note 119, at 566.

143. Strader & Hay, *supra* note 135, at 485.

144. Woods, *supra* note 119, at 567.

145. ESKRIDGE, *supra* note 86, at 393.

146. 539 U.S. 558 (2003).

phile groups should engage in picketing activities.<sup>147</sup> Demonstrating in front of the White House, however, Kameny enforced a strict dress code: “men [were] conservatively attired in suits and the women in skirts.”<sup>148</sup> A poster boy for another gay civil rights organization in Texas was presented in the least “offensive” way possible to the general public: emphasizing very much that gay men and women are “just like you,” he was “pretty much a middle-of-the-road, typical Dallas man . . . a schoolteacher, a Vietnam veteran—and a homosexual.”<sup>149</sup> What could, in fact, be more normal and nonthreatening than a southern gentleman veteran educator? The fact that he was a homosexual came, of course, dead last. More radical queer theorists claim that much of this effort is designed to erase the fact of sex from homosexuality, “[stripping the movement] of the radical potential it once held as [it] came to pursue more conservative goals like gay marriage.”<sup>150</sup>

The strategy of respectability politics meant weaving an appropriate standard of constitutionally protected sexual behavior into the social consciousness, with the goal of eventually having it legally coded. From the founding of the Mattachine society, this standard eventually became “consenting adults in private.”<sup>151</sup> To the likely joy of the more conservative elements of the gay rights movement, this is the standard that began to take hold. For example, the final draft of the Model Penal Code of 1962 utilized this very standard, differentiating sex in private residences from sexual acts in public, which were to remain criminal.<sup>152</sup> This is also how the Supreme Court in *Lawrence v. Texas* limited the constitutional right in its decision invalidating the Texas sodomy statute in place at the time, stating that gay sex is protected when: (1) it is consensual; (2) it is between adults; and (3) it takes place at home.<sup>153</sup> Many within the gay community were more than happy to rest on this legal success.

Others, however, viewed this as an attack on a history that celebrated difference in the gay community. . . especially perhaps when it comes to sex itself. Beyond thrill seeking associated the danger of public sex,<sup>154</sup> this Article has argued that gay men evolved a distinct culture as a result of the law’s refusal to recognize and protect private gay sex as it did private heterosexual sex. Thus, *Lawrence*, by separating out only private sex acts for protection, creates a “new underclass of gay people, a criminal underclass—composed of ‘bad homosexu-

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147. Cain, *supra* note 83, at 1562.

148. *Id.* at 1562–63.

149. De Orio, *supra* note 82, at 74.

150. *Id.* at 80.

151. *Id.* at 55.

152. *Id.* at 60 (citing MODEL PENAL CODE (AM. L. INST., Proposed Official Draft 1962)).

153. 539 U.S. 558, 578 (2003). Those that “choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives still retain *their dignity as free.*” *Id.* at 567 (emphasis added).

154. Some former participants in bathroom cruising wax nostalgic about the excitement and danger of the act itself: “I had some great times. The danger meant I had some of the horniest times I’ve ever had.” Anderson, *supra* note 90, at 711.

als.”<sup>155</sup> Viewing public sex as a productive element in gay culture, queer theorists have argued that the continued crackdown is a literal attempt to “domesticate” queer sexual liberty.<sup>156</sup> As much as pushing gay sex out into the public was a way to expose its shamefulness, and control the members of the community, restricting sex to the bedroom suggests that it remains shameful by putting it out of view, control only of a different flavor.<sup>157</sup>

The radical nature of public sex and its proposed connection to the rights movement aside, queer theorists propose not only that such sex is not abhorrent, but also that it should be celebrated because it is accessible, even democratic. In the way that they argue that calls for the rights of “consenting adults in private” creates an underclass of “bad gays,” they say that prohibiting what’s left of public sex reinforces social divisions and subordinations that exist outside the public bathroom. For example, homelessness is rampant in the gay community, particularly among minors who don’t have “a bedroom to call [their] own.”<sup>158</sup> The public bathroom, partly (and ironically) because of its promise of privacy, but also its promise of anonymity, serves as an equalizer across many identifiable divides: class, race, etc. Laud Humphreys’ study is notable in revealing the extent of this barrier breakdown:

[t]here is a range of diversity in the men, their clothing serves as signs of social class: T-shirts and jeans on some, white starched shirts and ties on others. Similarly, there is a range of age differences, young men and older men, as well as racially different men. Often the camera fixates on the erotic couplings that cross these differences, where race or class lines are threatened by sexual encounters, for example. These couplings that transgress social order further an anxiety about the implications such encounters have beyond the sexual activity itself in small town Ohio in the early 1960s. The film in this sense conjures a set of social transgressions where homosexual sex is implicated in a larger breakdown of class and racial boundaries.<sup>159</sup>

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155. De Orio, *supra* note 82, at 85. “If you’re promiscuous and if you don’t practice safe sex, there’s a lot of finger wagging. That’s why a lot of guys don’t actually admit to what they get up to or how many people they get up to it with. I think that it’s gay people themselves that are judging. The good guys judge the bad ones . . . because they think that you are a dirty person.” Anderson, *supra* note 90, at 708.

156. Ball, *supra* note 94, at 6-7. “From this perspective, the home, as a sexual site, can serve as an extension of the closet, a place where sex is permitted (or tolerated) precisely because it is hidden from view.” *Id.* Because many in our society would argue that they support LGBT rights but are still uncomfortable seeing it in public, this is perhaps an intellectual way of saying “Do whatever you want, just don’t shove it in my face.”

157. Ball, *supra* note 94, at 6-7. The division between the “good” and “bad” gays in the context of sex acts is most recognizable in the transition between the late 1970s and the 1980s during the outbreak of AIDS. This conflict, which existed very much within the gay community, is perhaps most poetically described in Larry Kramer’s *The Normal Heart* (1985). The semi-autobiographical work takes place during the beginning of the epidemic, focusing on the founding of the Gay Men’s Health Crisis and the tension among founders and members about the proper strategies to confront the disease. Ned Weeks’ (the character based on Larry Kramer) focus on demanding gay men avoid public, anonymous, unprotected sex was seen as an affront to many in the community who viewed these acts as a form of liberation. Closing down the bathhouses and other places of public sex was a direct form of shaming. What they saw as the reward for a fight long fought was something now held against them, viewed as dirty.

158. Ball, *supra* note 94, at 9.

159. Polchin, *supra* note 122, at 84.

## V

## CONCLUSION

[G]ay baths evolved during the 1970s to provide a wider array of non-sexual activities, attesting to their growing role in defining gay cultural practice. The Continental Baths on Manhattan's Upper West Side had a dance floor, a Saturday night cabaret, and a pool, as well as hosted entertainment by Bette Midler and Barry Manilow. Bathhouses scheduled movie nights where campy cult classics were screened. They hosted benefits for the Gay Activists Alliance and provided onsite STD testing; the New St. Mark's Bath in the East Village also worked with the League of Women Voters to register gay men to vote in the 1984 election. The baths were sites of community and kinship formation that included a variety of ways for gay and queer men to interact beyond the carnal encounter.<sup>160</sup>

It is difficult for many to believe that places built or used for the primary goal of engaging in anonymous sexual encounters can be culturally productive in other ways, even foster community. Prior to the express privacy protections offered by decisions like *Lawrence*, however, these places of anonymous encounters were quite often the only place where one's community, whether such person would admit it or not, actually was. Unlike how privacy and safety concerns played out in the civil rights timelines of battles surrounding race, gender, and other groups related to bathroom access, gay men had to take the basic necessary and transferable elements of the private space of the home, and use those transferables to transform some of the most unlikely spaces into ones that were, to some degree, private and safe. Without any legal protections remotely close to those linked to the home, this expulsion into the "public sphere" made participants keenly aware that each private act was always subject to public scrutiny. The mixture of fear, vigilance, excitement, and even eroticism that such awareness brings remains to this day. The restroom, in the end, is anything but: it has become and remains a place of distinct unrest.

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160. Stephen M. Engel & Timothy S. Lyle, *Dignity Takings and Dignity Restoration: Fucking with Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking*, 92 CHI.-KENT L. REV. 961, 966 (2017).