

## **Why not abolish the laws of urinary segregation?**

Mary Anne Case

Public toilets are among the very few sex-segregated spaces remaining in our culture and the laws that govern them are among the very few in the United States still to be sex-respecting, meaning that they still distinguish on their face between males and females. It is this, rather than the experience of having to wait on one too many a long line for the Ladies' Room, that led me to put questions of sex discrimination in the provision of public toilets on my scholarly agenda. In examining the history of the development of the constitutional law of sex equality, I was struck by the vehemence with which Phyllis Schlafly and other opponents of the proposed Equal Rights Amendment ("ERA") in the 1970s insisted that passage of the ERA would mean a mandatory end to restrooms segregated by sex. Leaflets urging voters to reject the ERA even claimed it was "also known as the Common Toilet Law."<sup>i</sup>

Although the ERA did not pass, other prominent items in the ERA opponents' parade of horrors, such as an end to legal prohibitions on same-sex marriage and on women in combat, no longer seem far-fetched. For the most part, however, public toilets remain sex-segregated. Even in public spaces, such as restaurants, where two single occupancy, self enclosed toilet facilities are all that is provided to customers, signs designate one "Stallions" and the other "Fillies," one "Pointers" and the other "Setters," or, more prosaically, one "Ladies" and the other "Gents." Usually this is a product of the requirements of the law, as innumerable state and local ordinances specify that there be "separate free toilets for males and females, properly identified, on the premises...."<sup>ii</sup>

To be sure, some efforts to integrate toilets by sex have made headlines over the years. College student Wendy Shalit catapulted herself to national attention and a book contract by editorializing in 1995 against the vote of her Williams College classmates to make their dormitory bathrooms co-ed.<sup>iii</sup> A few years later, the use of a unisex toilet as a prominent plot device in *Ally Mc Beal*, a TV show set in a fictitious Boston law firm, led a few actual firms to experiment with unisex toilets of their own.<sup>iv</sup> More recently, transgender rights advocates have gained some traction on college campuses with calls for gender-neutral restrooms. Yet, as Olga Gershenson details in her essay for this volume, even when advocates ask only that a few, not that all, public toilets on a given campus be open on a gender neutral basis, their request stirs

up the sort of opposition that would delight Phyllis Schlafly. In 2004, for example, after administrators at the University of Chicago acceded to a request by the Coalition for a Queer Safe Campus that about a dozen of the hundreds of bathrooms on campus be made gender-neutral and that future construction on campus make provision for gender-neutral restrooms, Rush Limbaugh was one of several nationally prominent conservative commentators to express outrage. “Feminists support equality,” Limbaugh said. “Look what has to happen to institutions in order for these people to secure equality. You have to weaken the institution, in this case male and female bathrooms.”<sup>v</sup>

Contrary to Schlafly’s earlier prediction, however, the answer to Clara Greed’s question, “What would it mean to have a non-sexist restroom?” (Chapter XX in this volume) is not typically a call for mandatory unisex toilets. The call, instead, is more often for “potty parity,” a term of art for more equitable provision of separate toilet facilities for men and women. In response, states and municipalities throughout the United States have put into effect dozens of potty parity laws since 1987, when the California state legislature passed a bill State Senator Diane Watson “informally dubbed ... the 'parity in potties' measure.” This bill had been introduced by Watson’s colleague Senator Art Torres after his wife, Yolanda Nava, reported being stuck for over half an hour at the theater behind a restroom line of more than 50 women, some of whom had finally invaded a nearly empty men’s room.<sup>vi</sup>

Perhaps because he and his wife compared notes, Senator Torres understood quite clearly what so many regulators and users of public toilets still do not to this day: “Restrooms are the same size in most facilities, but urinals in men’s rooms take less space than” stalls.<sup>vii</sup> Urinals lead restrooms equal in square footage to offer more excreting opportunities to men than to women. When such features as fainting couches, full length mirrors, and vanities are added - as they sometimes are - to women’s but not to men’s rooms, the ratio of excreting opportunities given equal square footage gets even worse for women.

The fact that, as Jacques Lacan observed, our “public life [is] subject[ to] laws of urinary segregation” often keeps these inequalities from view.<sup>viii</sup> We cannot know how the other half lives or what is behind the door to the restroom we are forbidden from entering. But, notwithstanding the failure of the ERA, we do tend to assume in the modern United States some

measure of sex equality. Thus, too many people casually assume that behind the restroom door they cannot enter are facilities equal to those available to their own sex. For example, male students at the University of Virginia Law School were surprised to learn, in the mid-1990s, that their female counterparts had full length mirrors available in the restroom; these men then promptly demanded mirrors of their own, so they, too, could preen before a job interview.

The comparative paucity of excreting opportunities behind the door marked “Ladies” might become evident from observation of the comparatively longer lines often outside that door. Instead, both men and women tend to attribute those lines to the fact that women take longer once inside, perhaps simply because they spend so much more time on primping and powder room gossip. Studies carried out by researchers do offer some statistics in support of the assumption that women take longer, with one of the most widely quoted finding that women take an average of 79 seconds, men 45, in the restroom.<sup>ix</sup> Many of the available studies do not distinguish, however, between time spent waiting on line, time at a stall or urinal, and time at a sink or mirror.

There are many reasons why women might indeed take longer than men actually using the toilet. As Judge Ilana Rovner put it in her opinion dissenting from her colleague Judge Richard Posner’s holding that an electric company’s failure to provide “civilized bathroom facilities” for its only female lineman was not sexual harassment, “The fact is, biology has given men less to do in the restroom and made it much easier for them to do it.”<sup>x</sup> Culture works against women as much as nature does. While pantyhose slow women down, for example, the zipper front and center on a typical pair of pants only facilitates male urination. As Harvey Molotch observed, “If women truly want to relieve themselves as efficiently as men, they can take some initiative. Options do exist short of biological alteration,”<sup>xi</sup> among them changes in clothing styles.

In addition to nature and culture, the role of the law in creating those long lines should not be underestimated. At the time Senator Torres introduced his potty parity bill in the late 1980s, “the three major model plumbing codes (BOCA, Southern Standard, and Uniform) in the United States specif[ied] minimum elimination fixtures (water closets and urinals) for men’s restrooms that are often greater than the number for women’s restrooms...depending on the type of

facility, the specification formula used, [etc.].”<sup>xii</sup> These codes began with the nineteenth century premise that women were less likely to be out and about in public than men, a premise that could become something of a self-fulfilling prophecy, as women, “tethered close to home by the bladder’s leash,”<sup>xiii</sup> adjusted their movements accordingly. Thus, Clara Greed describes the urban women of today doing what blacks were forced to do in the Jim Crow South - carefully planning their day to take account of the very few places legally available for them to excrete.

As litigation against Jim Crow in the first half of the twentieth century demonstrated, a demand for facilities that are “separate but equal” is one possible response to blatant inequality. Inevitably, though, practical questions as to exactly what is to be equalized and how plague any regime of separate but equal. Just as segregated railroads had difficulty determining in advance exactly how many dining car seats to set aside for black and white patrons, so, for example, an ice rink that hosts a hockey game on one day and a figure skating competition on the next may face widely varying ratios of male to female patrons, and therefore widely varying demand for toilets. If equal square footage is indeed too empty and formal a measure of equality, should equal facilities or equal excreting opportunities be the goal? Or should the goal be to equalize waiting time? Should one then take into account that women may take longer? What allowance should be made for the fact that more young boys tend to accompany their mothers into the women’s room than girls accompany their fathers into the men’s room?

Torres’s bill sought to remedy inequity by requiring plumbing codes to take full account of the number of women likely to use a facility. Other early potty parity laws defined parity as a one to one ratio of excreting opportunities for men and women. Interestingly, long history provides more support than the recent past for such a ratio. The famous Whittington’s Longhouse, a public toilet built in medieval London with funds specifically bequeathed for the purpose by Lord Mayor Dick Whittington and kept in operation on the banks of the Thames until the seventeenth century, had 128 seats – 64 each for men and for women.<sup>xiv</sup>

Increasingly, the trend in potty parity has been to require the construction of more excreting opportunities for women than for men. The Texas potty parity law, for example, introduced in

the uproar following Denise Wells's 1990 arrest at a concert for entering and using a men's room after finding 30 women ahead of her in line for the women's room, mandated twice as many women's as men's toilets in new or renovated public spaces.<sup>xv</sup> But potty parity laws typically apply only to new construction or substantial renovations, leaving many existing inequalities in favor of men unremedied. And on the rare occasions when men perceive themselves to be the victims of inequality, they are less patient and long-suffering than women have been. When the renovation of Chicago's Soldier Field in accordance with local potty parity law led to longer wait times for men, who comprised more than two thirds of the audience at Bears' games, male protests led to the conversion of five women's rooms to men's rooms, and the re-establishment of wait times for women that were on average twice as long as those for men.<sup>xvi</sup>

Why isn't the simplest solution, then, to end sex segregation in public toilets? When I first began seriously to consider the question of sex equality in toilets, I assumed it would be. More specifically, I thought I would be recommending as a model something like the typical airplane bathroom, a facility used seriatim by members of both sexes, one at a time, in complete privacy. This would be consistent with the approach I have taken in my law journal writings to other situations in which sex distinctions have been abolished in law - instead of assuming that what was previously available to men is appropriate for everyone, I have urged consideration of sameness around a feminine standard.<sup>xvii</sup>

Unfortunately, the typical pattern when sex distinctions are abolished is that women are offered what had previously been available to men. For example, in recent decades, women have been encouraged to enter the work force in far greater numbers than men have become the primary caretakers of their children. Once on the job, women all too often find everything from the uniforms to the performance standards to the working hours tailored for the men for whom the jobs were once reserved.

The temptation to shoehorn women into an environment built to suit men plagues public toilet design as well. As the introduction to this volume notes, a number of more or less complicated devices are marketed to facilitate a woman's using a urinal like a man. An example is the She-

wee (Fig. xx), “a moulded plastic funnel” which, “when positioned securely under the crotch, and with underwear pushed to the side, ... directs urine away from the body to a suitable place, such as a toilet, a container or a conveniently located tree.”<sup>xviii</sup>

If devices designed to encourage a woman to urinate more like a man ever were to catch on, they might themselves generate cultural anxiety, as the toilet scene in the film “The Full Monty” indicates. In it, unemployed steelworkers spy on their wives, who have taken over the local Workingman’s Club for an evening of entertainment by male strippers. The steelworkers come upon women occupying the men’s room, cheering on one of their number as she hikes up her skirt and directs a stream of her urine into a urinal. Already threatened in their masculinity, the men conclude, “when women start pissing like us, that’s it, we’re finished, extincto... They’re turning into us. A few years and men won’t exist, except in zoos.... I mean we’re not needed no more, obsolete, dinosaurs, yesterday’s news.”

Devices like the She-Wee, She-Pee, She-inal, I-Pee, Brief Reliefs and Safety Urinette have yet to gain widespread acceptance, perhaps because they often involve complicated paraphernalia. Technologically simpler efforts to encourage men to adopt urination methods associated in the western world<sup>xix</sup> with women have also been seen as threats to masculinity. Feminists in Germany have been urging men to accustom themselves to urinate while sitting on a toilet seat by posting signs in restrooms with the imperative “Hier wird sitzend gepinkelt” (Here one pees sitting down) and by explaining that such a practice would be more sanitary and create less work for those responsible for cleaning toilets, who are most often women. While some men have taken pride in accommodating this demand, others have vehemently resisted, going on talk shows, publishing editorials and cartoons, and forming Facebook groups of “Stehpinkler” (“Those who pee standing up”). So vehement was the resistance that academic Klaus Schwerma, a proponent of Sitzpinkeln, could write an entire critical book entitled “Stehpinkeln – Die Letzte Bastion der Maennlichkeit?”<sup>xx</sup> (Peeing Standing Up - the Last Bastion of Masculinity?).

There might be some benefit to men in adopting more of the excreting practices now associated with women, however. If the model of the airplane toilet, a model much closer to the toilet stall in a typical women’s room than to the urinal in a typical men’s room, were to become the universal norm, ending sex segregation in the toilets need not mean a loss of privacy for women.

It could instead offer increased privacy to men, something that could appeal at least to those men who suffer from shy-pee, a pathological inability easily to urinate when at risk of being observed, as at the urinals in a public toilet. (It is worth asking why, except in rare cases such as Japan Air's specially equipped "Ladies' Elegance Rooms," airlines have not attempted sex segregation of their toilets. Even Japan Air acknowledged that men, too, can use the Elegance Rooms because "[t]here is probably no way we could enforce absolute discrimination on an aircraft."<sup>xxi</sup> Could it be that, especially in the days when norms of air travel were developing, men were the overwhelming majority of airplane passengers, such that reserving even one, let alone an equal number, of scarce airplane toilets for women would leave male passengers waiting on long lines, something that, unlike women, men would not quietly tolerate?)

Basic queuing theory confirms that making fully enclosed single user facilities available to either sex on demand, as airplane toilets are, would cut down on overall waiting times and promote the most efficient use of available toilet facilities. To some extent, a drive toward efficiency is indeed motivating the construction of such toilets. When fully enclosed single stalls are increased in size beyond the typical airplane size to the dimensions of a toilet accessible by the handicapped, the potential efficiencies increase exponentially, as do the number of disparate constituencies whose needs are met. Consider the increasingly popular creation of relatively spacious, single stall, fully enclosed public toilets labeled for use as Family/Handicapped/Unisex. Such toilets have the practical benefit of allowing family members or other caregivers (including paid nannies and attendants) of one sex to assist children or handicapped adults of the opposite sex. They relieve a number of anxious dilemmas, such as that of a mother sending her young son alone into the men's room without her, the adult son waiting outside the door of the women's room for his Alzheimer's afflicted mother to emerge, and the wheelchair bound husband left to navigate the handicapped stall in the men's room without the help his wife. When they also include a sink within their fully enclosed space, as they typically do, they facilitate the ritual ablutions that observant Muslims find more difficult to perform in stalls removed from access to running water.

Such toilets also relieve the anxious dilemmas of the transgendered or those who, whether or not intentionally, read as gender liminal or otherwise outside of a clear gender binary. After all, walking into a toilet segregated by sex requires that each of us in effect self-segregate by

hanging a gendered sign on ourselves – and I do mean gendered even more than sexed, given that the signs we are asked to choose between are typically pictograms of a stick figure with a skirt and one without (men and women identified by gendered dress) and rarely if ever ♂ and ♀ (males and females identified by their genitalia). Some individuals have profound objections to hanging any one of these binary signs on themselves; others would be challenged if they made the choice they wished. Of those who would be challenged no matter which of the two sex-segregated restrooms they used, some identify as transsexual or transgendered, but others, including, for example, some butch women, emphatically do not. Without a unisex restroom, all who do not clearly read as male or female are faced with the prospect of challenge, even of assault or arrest, no matter which door they walk through, with the result that many report that they do their best to forego use of public toilets altogether.

For those, like me, whose vision of sex equality includes an end to what the U.S. Supreme Court has called “fixed notions concerning the roles and abilities of males and females,”<sup>xii</sup> there are therefore feminist, as well as practical efficiency payoffs, from the increasing popularity of the Family/Handicapped/Unisex Restroom. Individuals will not be forced to conform to any standard of what it is appropriate for a man or for a woman to look like in order safely to enter a public restroom. Other forms of gender-non-conformity will be made easier as well. Fathers and other male caregivers will find it much easier to be out and about in public with young children if they have reliable access to a restroom to which they can accompany those children in comfort and privacy. Perhaps this will encourage them to do so more often. Exactly this mixing up of sex-roles in society at large was what ERA opponents most feared.

Notwithstanding my hope that the time for integrating toilets by sex may have come, a majority of men and women in the United States - not only retrograde opponents of women’s equality but many who themselves identify as feminist - would still oppose abolishing the laws of urinary segregation. There is apparently a vast distance between what I would prefer and what many other women prefer. Not only do many women object to sharing a restroom with men, whom they perceive as less tidy, as well as potentially more threatening, many women also value the women’s room as a site of female sociability.

Let me respond to each of these grounds for continued segregation in turn, beginning with the notion that sex-segregated toilets keep women safer from attack. My response here begins with the anecdotal observation that an awful lot of male on female crime already takes place in the supposedly safe space of the women's room. My perusal of sources ranging from newspapers to law reporters indicates that robbery, assault, molestation, rape, even murder is not infrequently perpetrated by men who have followed or lain in wait for women and girls in the toilet. Even male on male crime can occasionally take place in a women's public toilet.<sup>xxiii</sup> Nor are women safe in the segregated toilet from male bad behavior that may stop short of crime. For example, plaintiff Mechelle Vinson, whose case before the U.S. Supreme Court firmly established hostile environment sexual harassment as an actionable form of sex discrimination in employment, testified that, among many other bad acts, her male supervisor "followed her into the women's restroom when she went there alone" and exposed himself to her.<sup>xxiv</sup> Similar allegations appear in a number of other sex harassment cases.

When I sought to quantify the amount of male on female crime that took place in the women's room, I found myself stymied by the failure of even very detailed data sets of crime statistics to gather this information. (Let me digress for a moment to complain that the lack of readily available reliable data plagues almost every aspect of the study of public toilets. It can be almost as hard to find reliable information as it can be to find a public toilet when you need it.) In the unfortunate absence of data, I will turn to one particularly well known and horrifying incident to help make my case that what sex segregation provides to women may not be safety but instead the illusion of safety, an illusion that can itself prove deadly. In 1997, seven year old Sherrice Iverson was murdered in a stall of the Las Vegas casino women's room into which she had fled to escape from eighteen year old Jeremy Strohmeyer, who had been chasing her.<sup>xxv</sup> She must have been thinking, "I'll be safe here. The sign on the door means this is someplace he can't follow me." But, of course, he could and did; and there, in a locked stall, he molested and killed her. Although the sign on the door could deter some men with criminal intentions from entering a women's room and could draw immediate regulatory attention to others when they try to enter, the potential expected presence of both sexes in an integrated restroom could also on occasion act as a deterrent, by decreasing the likelihood a perpetrator will be alone with his

intended victim and increasing the chances a bystander able and willing to offer aid will be present

When women describe the women's room as a safe space, they generally have in mind much more than physical safety, however. They see it as a place to escape from a browbeating boss or importunate suitor, a place where they can cry without being seen and gossip with one another without being overheard by any man, a place where they can literally and figuratively let their hair down. The notion of women's restrooms as a haven may carry over from attitudes toward the far greater number of separate public spaces reserved in earlier centuries for women only, as Terry Kogan describes them in his essay for this volume. It is interesting to observe that, at least, for some, the colored restroom could serve much the same function in the Jim Crow South. Thus, John Howard Griffin, a white journalist who darkened his skin so as to report his experiences living as a black man in the segregated South of the late 1950s, repeatedly describes the colored restroom both as a place of sociability with others "black like me" and as a refuge from the insults of the white world. Griffin writes that when he "could stomach no more of this degradation," he "entered one of the cubicles [of the men's room] and locked the door. For a time, I was safe.... In medieval times, men sought sanctuary in churches. Nowadays, for a nickel, I could find sanctuary in a colored rest room."<sup>xxvi</sup>

This is only one of many reasons I am inclined to question those who rest their claim that separate but equal, an unacceptable solution for race segregation in toilets, might work for sex-segregation on the assumption sex-segregated toilets play a completely "different role in our culture than did racially segregated ones."<sup>xxvii</sup> The philosopher Richard Wasserstrom, for example, in an important early article comparing race and sex discrimination, insisted that, while racially segregated toilets were connected to an "ideology of racial taint" which held that blacks were "dirty and impure" and should not be permitted to "contaminate bathrooms used by whites," the ideology behind sexually segregated bathrooms contains "no notion of the possibility of contamination or even directly of inferiority or superiority" but merely a need to maintain "that same sense of mystery ... about the other sex's sexuality which is fostered by the general prohibition on public nudity."<sup>xxviii</sup>

It may be true that the fear of contamination flows in both directions for sexually segregated toilets in a way it doesn't for racially segregated ones - women, after all, cite the mess men make in the toilet as a reason not to integrate - but to deny any notion of contamination behind sex segregation of the toilets is to blink reality, as I learned while observing the integration of women into the hitherto all male Virginia Military Institute ("VMI") in the late 1990s. In litigation opposing the admission of women to VMI, the school made much of the educational benefits afforded by "total lack of privacy," with male cadets under constant observation even while in "gang bathrooms."<sup>xxxix</sup> Admitting women, the school successfully convinced a lower court judge, would have one of two unacceptable consequences: either the women, too, would "lack... privacy," thereby "destroy[ing] any sense of decency that still pervades the relationship between the sexes"<sup>xxx</sup> or "[a]daptations would have to be made, in order to provide for individual privacy" thereby destroying equality, transparency, and the VMI honor code, which depended, according to Judge Jackson Kiser, on "the principle that everyone is constantly subject to scrutiny by everyone else."<sup>xxxi</sup> Although she noted that the educational system in Plato's Republic featured both sexes exercising together in the nude,<sup>xxxii</sup> Supreme Court Justice Ruth Bader Ginsburg, acknowledged for a Court majority that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex."<sup>xxxiii</sup> VMI officials went Justice Ginsburg one better in giving the women the Supreme Court required be admitted some privacy even from their own sex. In fact, even before the advent of women, the school's lack of privacy was less than total: the men's toilets at VMI did not feature just one large trough, but separate stalls with waist high wooden partitions, stalls which lacked doors mainly because the school got tired of replacing those broken off their hinges by rowdy cadets. But the women not only got toilet stalls with doors that closed, they got individual curtained showers stalls rather than open, communal showers like the men. When I asked why this difference, a male cadet muttered something to me about "health reasons," while his commanding officer amplified with reference to "blood-borne diseases."<sup>xxxiv</sup> The indefinable expressions of distaste in the voices and faces of both these men confirmed for me that that women to them, like blacks to their Jim Crow predecessors, were "dirty and impure" and, if anything, segregation of the toilets, perhaps by preserving precisely that mystery about the bodies of the opposite sex on which Wasserstrom focuses, fostered the conviction that sharing space with women threatened the possibility of contamination.

Moreover, women who seek refuge in the women's room, as John Howard Griffin did in the colored washroom, do so in part because the men's room in some environments can function as something like the executive washroom, a point reinforced in those academic institutions which, years after the admission of women, still had a sign reading simply "Faculty" on the door of a men's room. A woman can only escape her boss in the office women's room if the bosses are men. The flip side of this safe space for female subordinates is a safe space for male bosses, free from the intrusion of women seeking professional advancement. Popular culture reinforces this, as in film after film, the uppity professional woman gets her comeuppance when she is stopped at the door of the men's room. "I'd love it if you weren't here," says the newspaper publisher played by Jason Robards to Glenn Close in the role of his high level subordinate in the film *The Paper*. She has followed him through an open doorway into a large men's room at a black tie function to protest his refusal to renegotiate her contract. As the other men turn and stare, she is forced to retreat in ignominy. Separate public toilets are one of the last remnants of the segregated life of separate spheres for men and women in this country, now that the rules of etiquette no longer demand that the women leave the men to their brandy and cigars after dinner in polite company. Although the spaces can be made separate but equal, then and now, the access to power offered by an all male and an all female space continue to differ enormously.

A few years ago at a conference, I presented a paper on the cultural uses made of sex-segregated restrooms with the title "On Not Having the Opportunity to Introduce Myself to John Kerry in the Men's Room." I got the title from 2004 Democratic Presidential Candidate John Kerry saying to Daily Show host Jon Stewart that what most surprised him in his presidential campaign was the number of people who tried to introduce themselves to him in the men's room, an opportunity I will never have. More generally, given the repeated insistence by men that conversation in the restroom is taboo for them, I find it noteworthy how much networking does seem to go on in the men's room. Several junior male lawyers, for example, have told me of getting assigned to major cases as a result of restroom conversations with senior male partners. And one senior male litigation partner at the major New York firm at which I used to work was notorious for beginning business conversations with male subordinates with the

invitation, "Come pee with me." It is worth noting that the Bohemian Grove, the ultimate men's power club, whose membership in recent years included U.S. Presidents, Cabinet officials, and other male power brokers, defines the ability of members to urinate freely together on the trees in the Grove as both the core of their bonding experience and the principal reason why female members would be unthinkable.<sup>xxxv</sup> Maybe the reason why some male journalists complained that women had an unfair advantage covering Hillary Clinton and some male comics write routines suggesting that women use the restroom as a power center is because each is projecting from his men's room experiences.

It is clear that one answer to the question, "What if anything important might we lose if the laws of urinary segregation were to be abolished?" is "the opportunity to be alone with one's own," with one's own now defined by sex in a way that it once also was by race and class. (There was, after all, a time when "Ladies" and "Gentlemen" were elite subsets of and not mere synonyms for "Women" and "Men") But is the opportunity to be alone with one's own, when one's own are defined by sex, a cost or a benefit of the laws of urinary segregation? Many people, among them many women, clearly continue to see it as a benefit. I am, I must admit, even after careful consideration of the competing arguments, more inclined to see it as a cost. In this, somewhat perversely, I may see eye to eye with Phyllis Schlafly - we each suspect that to achieve equal rights for women may entail an end to sex segregation in the public toilet.

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<sup>i</sup> Jane J. Mansbridge, *Why We Lost the ERA* (1986) p. 113. See p. 11 of Gershenson chapter in this volume for further discussion.

<sup>ii</sup> The quoted language is taken from the Sec. 61.43 of the Texas Alcoholic Beverage Code, but is typical of that found in a large number of other codes.

<sup>iii</sup> Wendy Shalit, "A Ladies' Room of One's Own, Commentary, August 1995; Wendy Shalit, *A Return to Modesty: Discovering a Lost Virtue* (1999).

<sup>iv</sup> . See e.g. , 'Ally,' Access Laws Make Stalls for All, *Businesses Follow Unisex Toilet Trend*, USA Today, May 4, 1998, at 1D.

<sup>v</sup> See Rush Limbaugh Show, "Feminist Groups Can't Choose Bathrooms," 11-26-03, available at [http://mfile.akamai.com/5020/wma/rushlimb.download.akamai.com/5020/clips/03/11/112603\\_6\\_feminists.asx](http://mfile.akamai.com/5020/wma/rushlimb.download.akamai.com/5020/clips/03/11/112603_6_feminists.asx).

<sup>vi</sup> Associated Press, "Potty Parity' Bill Wins 6-0 in State Senate Women Testify About Restrooms in San Jose Mercury News p. 2E, April 9, 1987.

<sup>vii</sup> Associated Press, "Potty Parity' Bill Wins 6-0 in State Senate Women Testify About Restrooms in San Jose Mercury News p. 2E, April 9, 1987.

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- viii Jacques Lacan, P. 118, Jacques Lacan, "The agency of the letter in the unconscious or reason since Freud" *Yale French Studies*, No. 36/37, Structuralism (1966), pp. 112-147. Lacan imagined a boy and girl seated across from one another looking out the window of a train as it came to a stop on a station platform. The boy exclaims, "'Look we're at Ladies.'" Imbecile!' replies his sister. Can't you see we're at 'Gentlemen.'" Like the brother and sister Lacan describes, each of us when in public is brought to a stop directly opposite a door we may not enter. By contrast with public spaces, few private homes in the western world rigidly segregate toilet facilities by sex: Even when invited to a home with multiple bathrooms, for example, dinner party guests are rarely directed to different ones depending on their sex.
- ix See e.g. Syracuse Post Standard, POTTY PARITY TIME TO QUIT STALLING ON THIS ISSUE May 13, 1988 at A10 (citing study by Cornell student Anh Tran).
- x DeClue v. Central Ill. Light Co., 223 F.3d 434, 438 (7<sup>th</sup> Cir. 2000) (Rovner, J., dissenting).
- xi Harvey Molotch, The Rest Room and Equal Opportunity, 3 Sociological Forum 128, 129 (Winter 1988)
- xii Rawls, Sandra K. 1988. *Restroom usage in selected public buildings and facilities: A comparison of females and males*. PhD diss., Department of Housing, Virginia Polytechnic Institute and State University p. 6.
- xiii Clara Greed Chapter p. 13. Terry Kogan's essay for this volume sets out some of the ideology of separate spheres that led to both sex segregation in public spaces and limitations on women's access to public space.
- xiv See e.g. Phillip E. Jones. Whittington's longhouse, London Topographical Record, 23 (1974 for 1972), 27-34. Publisher: London Topographical Society.
- xv See Mary Anne Case, Changing Room? A Quick Tour of Men's and Women's Rooms in U.S. Law Over the Last Decade, Public Culture, Winter 2000.
- xvi Andrew Hermann, Soldier Field evens the score with more men's restrooms, Chicago Sun-Times August 29, 2004 p3.
- xvii See e.g. Mary Anne Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L. J. 1 (1995).
- xviii <http://www.shewee.com/index.html>
- xix For Muslims, the associations are somewhat different. As one adviser to Muslims in Berlin put it "men should urinate sitting – because the prophet Mohammed did so." Amir Zaidari, quoted in Ian Johnson, A Course In Islamology: Everyday Dilemmas of Muslim Life in Berlin. 11 Berlin Journal 47, 48 (Fall 2005).
- xx Klaus Schwerma, Stehpinkeln – Die Letzte Bastion der Maennlichkeit?: Identitaet und Macht in einer maennlichen Alltagshandlung, Bielefeld, Kleine (2000).
- xxi On a Lighter Note, Travel Trade Gazette Europa January 9, 1997 p. 2 (quoting a Japan Air spokesman).
- xxii Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
- xxiii See e.g. State v Deckard, 2000 Ohio App Lexis 2683 (sustaining conviction for importuning of man who told a male undercover cop "he wanted to go into the women's restroom or behind the building" so as to decrease the chances they would be interrupted in proposed oral sex acts).
- xxiv Meritor Savings Bank v. Vinson, 477 U.S. 57, 60 (1987).
- xxv See e.g. GAMBLING WITH FATE LITTLE SHERRICE IVERSON DIDN'T BET ON DEATH AT A CASINO The Toronto Sun November 1, 1998, p. 52.
- xxvi John Howard Griffin, Black Like Me, (Penguin 1996) p. 130.
- xxvii Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. REV. 581, 594 (1977)
- xxviii Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. REV. 581, 594 -5 (1977).
- xxix United States v. Virginia, 766 F. Supp. 1407, 1424 (W.D. Va. 1991).
- xxx United States v. Virginia, 518 U.S. 515, 528 (1996).
- xxxii United States v. Virginia, 766 F. Supp. at 1438.

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<sup>xxxii</sup> United States v. Virginia, 518 U.S. at 556.

<sup>xxxiii</sup> United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994), *rev'd*, 518 U.S. at 551, n.19.

<sup>xxxiv</sup> Mary Anne Case, Changing Room? A Quick Tour of Men's and Women's Rooms in U.S. Law Over the Last Decade, *Public Culture*, Winter 2000, citing U.S. v. Virginia, 766 F. Supp. 1407, (W.D. Va. 1991), U. S. v. Virginia, 518 U.S. 515 (1996) and U.S. v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994).

<sup>xxxv</sup> See e.g. Inside the Bohemian Grove, *Spy Magazine*, November 1989 p. 59.; G. William Domhoff, *The Bohemian Grove* Date xxxxxx.