

October 2024

Public Men's Rooms and the Legal Construction of Gender and Privacy

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Recommended Citation

Steven J. Macias, *Public Men's Rooms and the Legal Construction of Gender and Privacy*, 93 U. Cin. L. Rev. 100 (2024)

Available at: <https://scholarship.law.uc.edu/uclr/vol93/iss1/3>

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PUBLIC MEN’S ROOMS AND THE LEGAL
CONSTRUCTION OF GENDER AND PRIVACY

*Steven J. Macias**

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“What an ugly horrible world we live in that that happened to a child. What a nightmare it is that this child has now become the mouthpiece of a movement countering hatred against his very personhood, the validity of his happiness and joy and who he is.” – Gavin Grimm¹

I. THE CONFUSION OVER GENDER AND PRIVACY

The law is constantly reinforcing socially dominant conceptions of gender and privacy while simultaneously responding to novel challenges as modern culture alters those conceptions to varying degrees. The public bathroom is a location where one can see this phenomenon at work—it is a place that is segregated by sex (or perhaps gender) and is public (but also private). That is to say, at present, there is confusion about ruling concepts within this location. Is the door marked “Men” or “Boys” referring to sex or gender? Is it a public space or a private space? In part, this confusion is due to lack of clarity in the concepts themselves. However, the confusion is also due to the ambiguous nature of the location. The men’s room—or “little boys’ room”²—seems to defy categorization, perhaps revealing deeper levels of cultural doubt as to the values beneath the underlying concepts of gender and privacy.

These confusions came to the surface in a number of recent public school cases involving bathroom policies regarding transgender (trans) rights. Examining these cases reveals these issues in bold relief. But the goal of this Article is not to resolve or define gender and privacy problems. Instead, the goal is to show that these problems have lay hidden behind the scenes of the formal law of the men’s room for a very long time in cases not involving trans issues.

1. Zoe Tillman, *Gavin Grimm Won A Huge Battle For Trans Student Rights. He Said It's a "Nightmare" That a Child Had to Fight It*, BUZZFEED NEWS (June 28, 2021), <https://www.buzzfeednews.com/article/zoetillman/gavin-grimm-transgender-student-rights-supreme-court> (quoting Gavin Grimm). See also Sheryl Gay Stolberg, *Bathroom Case Puts Transgender Student on National Stage*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/gavin-grimm-transgender-rights-bathroom.html> (describing Grimm’s fight for trans student bathroom rights in the national spotlight). For more on the activist work being done by trans youth, see Mary Hawkesworth, *Existential Activism: The Complex Contestations of Trans Youth*, in *YOUNG PEOPLE SHAPING DEMOCRATIC POLITICS* 211, 215-16 (Ian Rivers & C. Laura Lovin eds., 2023) (discussing Grimm’s activism as a form of “existential activism”).

2. The *Oxford English Dictionary* records the earliest written use of the euphemism, “little boys’ room,” to be from 1934. *Little Boys’ Room*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/little-boys-room_n?tab=factsheet&tl=true#38987251100. A euphemism is generally used to blunt the harshness of an unpleasant or otherwise embarrassing topic. Famous mid-century comedian, Lenny Bruce, who himself faced several obscenity trials, see, e.g., *People v. Bruce*, 202 N.E.2d 497 (Ill. 1964) (including a joke about “a gas station attendant in a rest room [sic]”), critiqued what he called the “corrupt façade” of the term “little boys’ room,” LENNY BRUCE, *HOW TO TALK DIRTY AND INFLUENCE PEOPLE* 152 (1965). There is a sense in which the invocation of youth blunts whatever unpleasantness one comes to associate with bathrooms. Part of Bruce’s critique included cultural association of toilets with dirt, such that they needed cleaning up or blunting in polite conversation. *Id.* at 122-23, 152.

The very concept of a public bathroom is rife with contradiction. It is at once public, in the sense that it is seemingly available to all passersby. At the same time, members of the public who use the bathroom have an expectation of privacy within its confines. Unlike private residential bathrooms, public bathrooms also have the unique feature of being segregated along the male/female binary. Recent litigation over trans individuals' ability to use public bathrooms that align with their gender identity has focused to a great extent on the issue of privacy.³ In particular, conservative activists have claimed that allowing trans individuals the ability to use a public bathroom that does not match their birth sex violates the privacy rights of the cisgender public.⁴ This argument has failed in most of the federal courts in which these activists have raised it.⁵ However, it often feels as if both sides in this litigation talk past each other. Indeed, it seems as though each side employs different concepts under the headings of privacy and gender.⁶

A focus on the men's room, as opposed to the women's room or all public bathrooms, contributes to the understanding of gender and privacy in new ways. Scholars have noted that a common trope in anti-trans messaging focuses upon the specter of a disguised man harassing little girls and vulnerable females in the women's bathroom. This false belief that trans women are "sexual predators" makes an occasional appearance in legal briefs,⁷ but more frequently in political debates.⁸ However, the

3. See *infra* Section IV.C. See also HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 70-72 (2017) (discussing and critiquing the concept of privacy in bathroom debates).

4. Conservative activists claim that the use of the terms trans and cis, especially cis, is itself a political maneuver worthy of condemnation. See, e.g., RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT* 10, 45, 116 (2018) (putting scare quotes around "cisgender" the few times the term is used); Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL'Y 309, 314-15 (2018) (referring to pronoun usage as "politically charged," and claiming, "Gender identity policies quickly become politically correct speech codes."). See also Sofia Andrade, *Elon Musk Says "Cis" Is a Shur. It's Basic Latin*, WASH. POST, (June 30, 2023), <https://www.washingtonpost.com/lifestyle/2023/06/30/cisgender-twitter-musk-suspension/>.

5. See *infra* text accompanying notes 211-215 (discussing trans rights cases in which privacy was used as the predominant justification for non-inclusive bathroom policies).

6. See DAVIS, *supra* note 3, at 70 (explaining that, from the trans perspective, conservative uses of privacy often lack "contextual definition and qualification").

7. See, e.g., Brief of Amicus Curiae Safe Spaces for Women Supporting Neither Party at *2, *Gloucester Cnty. Sch. Bd. v. G.G.*, 580 U.S. 1168 (2017) (No. 16-273), ("While Safe Spaces for Women bears no animus toward the transgendered community, it is deeply concerned that true sexual predators may take advantage of such policies to victimize women."); Brief of Military Spouses United as Amici Curiae in Support of Petitioner at *28, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Opportunity Emp. Comm'n*, 140 S. Ct. 1731 (2019) (No. 18-107), ("Male and female adults and parents have come to rely on the historic and inherent privacy of these uniquely private places such as dressing, changing or bathroom facilities to provide safety for themselves and their children from sexual predators of the opposite sex by excluding the opposite sex.").

8. Nicole Erin Morse, *"Where Do Aliens Pee?": Bathroom Selfies, Trans Activism, and Reimagining Spaces*, in *MEDIA CROSSROADS: INTERSECTIONS OF SPACE AND IDENTITY IN SCREEN CULTURES* 21, 26-27 (Paula J. Massood et al. eds., 2021). See also Campaign for Houston, *Campaign for*

most prominent trans rights bathroom cases have involved trans male students being denied access to boys' bathrooms at public schools.⁹ By focusing on the men's room, this Article brings unique concerns about gender and privacy to light. Perhaps it is not possible to easily separate the two concepts when it comes to public bathrooms. Privacy in the men's room might mean something very different than privacy elsewhere.

Indeed, some scholars have argued that privacy may well be more vulnerable in the men's room than in a women's public bathroom. To see why, consider the work of Joel Sanders, a scholar of queer architectural theory, who has explained that architecture and interior design have generally been segregated along the gender binary.¹⁰ Architects concern themselves with the durable, the practical, the intellectual.¹¹ By contrast, interior designers are concerned with the ephemeral, the ornamental, and the corporeal. The men's room is very much constructed—both physically and culturally—to be practical, with minimal design considerations for the corporality of the male body.¹² Urinals are a durable, practical response to male needs, whereas privacy has historically been a product of the intellect—a mere idea—in the men's room.¹³

The legal documents of conservative activists, litigants, and judges discuss a sense of men's room privacy that easily succumbs to the mere presence of femaleness in the room. By contrast, trans litigants and the judges who have ruled in their favor discuss an idea of privacy that can be considered much thinner in the sense that it solely focuses upon the visual dimensions of privacy. The conservative understanding of privacy can be considered thicker in that it imagines privacy as bound up with social expectations of gender. The thicker sense of privacy includes the ability to shed the social pressures of gendered interaction which is violated when someone forces a reflexive understanding of the self as gendered in a location where it is unexpected.¹⁴

Houston TV Commercial, YOUTUBE (Oct. 12, 2015), <http://youtu.be/WYpko86x6GU> (urging voters to defeat a nondiscrimination ordinance in order to “protect women’s privacy” against men); Ben Colliver, *Claiming Victimhood: Victims of the “Transgender Agenda”*, in THE EMERALD INTERNATIONAL HANDBOOK OF TECHNOLOGY-FACILITATED VIOLENCE AND ABUSE 189, 193 (2021) (finding the theme of male “sexual danger” to predominate negative YouTube comments on videos about gender-neutral toilets).

9. See discussion *infra* Section IV.C.

10. See Joel Sanders, *From STUD to Stalled! Embodied Identity Through a Queer Lens, 1996–2021*, in QUEERING ARCHITECTURE: METHODS, PRACTICES, SPACES, PEDAGOGIES 141, 148-49 (Marko Jobst & Naomi Stead eds., 2023).

11. *Id.* at 149.

12. *Id.*

13. *Id.* (contrasting the tradition of interior design’s concern with “the material body[,] considered a female principle” and architecture’s concern with the “immaterial male intellect”).

14. On the concepts of thick and thin descriptions, see CLIFFORD GEERTZ, THE INTERPRETATION

Trans rights bathroom cases involving transgender boys are of two varieties. First, there are the cases where a transgender student is denied access to the bathroom that matches their gender identity, and they sue for unconstitutional sex discrimination. Second, there are cases where cisgender students and parents sue a school district that has instituted a trans-inclusive bathroom policy on the theory that the school is violating the cisgender students' constitutional right to privacy. Both types of cases allow us to see how the concepts of gender and privacy cause confusion for courts and litigants alike.

Nearly everyone involved in these cases—litigants, judges, and commentators—accepts the sex/gender dichotomy. That is, all agree that there is a difference between the concepts of sex and gender such that one can talk about them meaningfully without strict dependence of one on the other. Even a judge hostile to trans rights pointed out approvingly that one school district asked students to “report their sex, not their gender identity.”¹⁵

While some might consider this discursive move to be a progressive victory,¹⁶ others are not so sure. For example, writer Dara Blumenthal challenges the notion that sex and gender are merely discursive concepts to be talked about.¹⁷ Instead, for her, sex and gender are embodied practices that one experiences simultaneously.¹⁸ Thus, Blumenthal would have us speak of “sex-gender” (or even “sex-gender-sexuality”) as more fully indicative of the human experience, especially in the public bathroom.¹⁹

Perhaps for a similar reason as that described above by Blumenthal, privacy and publicness are themselves sources of linguistic confusion. In looking at the work of another bathroom scholar, one can see that “public” and “private” are complex, interdependent concepts, especially as they are experienced in the public bathroom.²⁰ Indeed, this scholar (Alexander

OF CULTURES 3-30 (1973) (explaining how ethnographers provide “thick” descriptions of a culture by taking into account the cultural meaning of particular social actions).

15. *Adams v. Sch. Bd.*, 3 F.4th 1299, 1324 (11th Cir. 2021) (Pryor, C.J., dissenting). On Judge Pryor's history of hostility to gay rights, see Opinion, *An Extremist Judicial Nominee*, N.Y. TIMES, July 23, 2003, at A18; Press Release, Lambda Legal, *Saying William Pryor Is the “Most Demonstrably Antigay Judicial Nominee in Recent Memory,” Lambda Legal Opposes Nomination to Federal Appeals Court* (Apr. 26, 2005), https://legacy.lambdalegal.org/news/ny_20050426_william-pryor-is-most-demonstrably-antigay-judicial-nominee.

16. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995) (arguing that “great gains both in analytic clarity and in human liberty and equality might well result” from treating “gender” and “sex” as distinct concepts).

17. DARA BLUMENTHAL, *LITTLE VAST ROOMS OF UNDOING: EXPLORING IDENTITY AND EMBODIMENT THROUGH PUBLIC TOILET SPACES* 55 (2014).

18. *Id.* at 54.

19. *Id.* at 56.

20. See generally ALEXANDER KIRA, *THE BATHROOM* (1976).

Kira, an architecture professor) was specifically interested in how people experience the space of the bathroom.²¹

Kira described publicness, as it relates to bathrooms, as a concept composed of three separate features: the degree of social difference between the users, the extent of usage of the facility, and the facility's level of cleanliness and maintenance.²² In particular, the first aspect of publicness is concerned with the implied or felt affinities among fellow users based on their perceived social differences.²³ Other scholars have also provided valuable ways to think about privacy.

For example, a trio of scholars—Deirdre Mulligan, Colin Koopman, and Nick Doty—have explained that privacy is an essentially contested concept and have developed a useful analytic for mapping privacy along several dimensions.²⁴ By “essentially contested,” they mean that adversarial discourse is central to the concept of privacy itself.²⁵ The contestation over the meaning of the concept is itself generative and productive in ways that “reduce the role power inherently plays in defining privacy in contemporary contests.”²⁶ Although their concern is motivated by the privacy concerns that arise with technology and big data, their analytic is useful to present purposes as it recognizes the capaciousness of the concept. They map out privacy along five dimensions: theory, protection, harm, provision, and scope.²⁷ With the variety of bathroom cases considered in this Article, privacy is contested within at least the first four dimensions.

Besides having a sense of how scholars and courts think about gender and privacy in the bathroom from a theoretical perspective, it is also important to have a historical sensibility in considering modern cases. A historical consideration allows us to see whether these concerns have existed throughout the history of public accommodations, or whether the concerns are new and perhaps caused by some cultural matter that is peripheral to the facility itself.

II. THE LEGAL HISTORY OF THE MEN'S ROOM

Understanding the legal history of the men's room requires one to understand the social origins of public facilities in order to better

21. *Id.* at 191-237.

22. *Id.* at 201.

23. See Alexander Kira, *Privacy and the Bathroom*, in ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 269, 269-75 (Harold M. Proshansky et al. eds., 1970).

24. Deirdre K. Mulligan et al., *Privacy Is an Essentially Contested Concept: A Multi-Dimensional Analytic for Mapping Privacy*, 374 PHIL. TRANSACTIONS ROYAL SOC'Y A 1, 3, 10-15 (2016).

25. *Id.* at 3-4.

26. *Id.* at 15.

27. *Id.* at 10-15.

appreciate the subsequent intervention of the law as a regulatory force. Notably, when looking to social histories of public bathrooms, one can find a distinct lack of American-centered works. However, there are a significant number of works focused on Britain and other commonwealth nations which serve as useful background sources given the cultural similarities between these nations and the U.S. Although the development of public facilities cannot be wholly divorced from the various contexts in which they arose, this Article focuses squarely on the implications of those facilities for the history of sexuality, gender, and privacy.

Although public toilet facilities began to appear in major European cities in the mid-nineteenth century, the act of public urination certainly did not begin then. The history of bodily waste is far too complex for a comprehensive discussion in this Article. It is bound up with public health, the legal regulation of sanitation, and the history of manners, among multiple other headings. For example, according to one historian, public urination in Elizabethan London “was fairly widespread,” so much so that commercial leases included requirements that tenants prevent “pissing in at the windows.”²⁸

As historian H. G. Cocks explains, modern studies of historical sexuality make full use of insights from critical theorists while simultaneously resisting those theorists’ sweeping generalizations in favor of localized studies.²⁹ The work of critical theorist Michel Foucault argues that new forms of knowledge and discourse can themselves produce human desires, and that those desires in turn often become regulated by the very discourse that produced the desire in the first place.³⁰ As Cocks further explains, “Sexual desire does not remain essentially the same while its meanings change within a bounded repertoire of stories and acts.”³¹ Thus, with the advent of public facilities, one could expect to have seen new forms of sexual desire arise due to new technology and new social settings. At the same time, one should also expect to have seen the legal and cultural regulation of this new space organize and control those newly produced desires. Therefore, one might expect to find the very architecture of men’s bathrooms designed to bring

28. LIZA PICARD, *ELIZABETH’S LONDON: EVERYDAY LIFE IN ELIZABETHAN LONDON 185* (2004). Presumably, a contractual provision of this sort was meant to require tenants to assist in the general prevention of public urination by strangers who might take advantage of the material façade of their leasehold.

29. See H. G. Cocks, *Modernity and the Self in the History of Sexuality*, 49 *HIST. J.* 1211, 1226 (2006) (presenting a historiographical review of a number of works on sexuality).

30. See, e.g., 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 42 (Robert Hurley, trans., Vintage Books 1990) (1978) (explaining how, in the failed attempts to combat childhood masturbation, early modern educators and doctors participated in an ostensibly repressive system whose failure “leads one to suspect that what was demanded of it was to persevere, to proliferate to the limits of the visible and the invisible, rather than to disappear for good”).

31. Cocks, *supra* note 29, at 1213.

forth certain sexual desires in order that those very desires, once produced, may be subject to the state's regulation.

One scholar traced the origins of public restrooms to the introduction of "Halting Stations" at the 1851 Great Exhibition of London.³² For the first time, these new restrooms combined both "privy space with a lavatory space," i.e., both toilet and washing facilities were compartmentalized into one private room in an otherwise public space.³³ However, even before the introduction of this dual-use space, major cities provided public urinals for men as open-air public urination became increasingly associated with bad manners.³⁴ Thus, by 1840, Paris had about five hundred urinals, increasing to over 3,500 by century's end.³⁵ According to another localized study, the first publicly provided urinals were made available to men in Dunedin, New Zealand by 1862, while women would have to wait another sixty years for comparable facilities.³⁶

The male-centered nature of the earliest public facilities should come as no surprise considering the cultural expectations of these nascent commercial and industrial societies.³⁷ During this time of separate spheres for the sexes, men were expected to be out and about in public, while women remained in the private setting of the home. Even as women's public roles increased over the course of the late nineteenth century, social understandings of sex and privacy influenced the provision of public bathrooms for the sexes. For example, because "women were construed as having greater bodily self-discipline," the perceived need for female facilities was diminished.³⁸ When female facilities were finally provided, privacy became a more conscious concern, manifested, for example, in the desire that men not see women entering the bathroom.³⁹

The history of public bathrooms, and men's rooms in particular, also requires acknowledgment of their use as locations for sexual meetups

32. Eliza V. Stoner, *Commodifying Convenience, Cleanliness, and Privacy: American Public Restroom Design Since 1851* (Spring 2006) (M.A. thesis, University of Delaware) (on file with UDSpace), <https://udspace.udel.edu/server/api/core/bitstreams/335e0872-cf6d-4cec-9d73-8d048453eae4/content>.

33. *Id.* at 6-7.

34. Annabel Cooper et al., *Rooms of Their Own: Public Toilets and Gendered Citizens in a New Zealand City, 1860-1940*, 7 *GENDER PLACE & CULTURE* 417, 418 (2000) ("[T]he nineteenth century saw public urination become indecent"); Andrew Israel Ross, *Dirty Desire: The Uses and Misuses of Public Urinals in Nineteenth-Century Paris*, 53 *BERKELEY J. SOCIO.* 62, 68 (2009) (describing an 1850 Parisian ordinance that outlawed public urination as both a public hygiene problem and a "bad habit").

35. Ross, *supra* note 34, at 67-68.

36. Cooper et al., *supra* note 34, at 418.

37. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977).

38. Cooper et al., *supra* note 34, at 426; see also Stoner, *supra* note 32, at 57 ("Male users, already identified as habitual public urinaters [sic], did experience the restroom space differently from women.").

39. Cooper et al., *supra* note 34, at 422.

between men.⁴⁰ This subversive use meant that men's rooms could be potentially dangerous locations for boys, who might inadvertently be assaulted or taken advantage of. As historian Stephen Robertson noted in his study of sexual violence in turn-of-the-century New York, suspicion was not usually centered on boys as victims. The reason for this lack of suspicion was not because boys were incapable of being victims of sexual assault. Instead, “[i]t was a lack of opportunity, not a lack of inclination, that made such action against men who assaulted boys an infrequent occurrence in New York City.”⁴¹ However, “[i]t was around bathrooms that New Yorkers became most suspicious of a man with a boy.”⁴²

The anonymous, democratic nature of the public restroom is also what has made it an ideal space for gay men to find sexual connections. There is much scholarship, from numerous disciplines, that examines the phenomenon of the “tearoom”—a public men's room known for same-sex activity.⁴³ However, because this Article is largely about how the law regulates boyhood experiences with public bathrooms, it does not engage heavily with this literature. It is enough to note that this reality has informed a multitude of responses from varying quarters, including legal responses, in considering how to understand minors' positionality in the men's room.

In addition to acknowledging the sexual activity that has historically been associated with men's rooms, one must appreciate the realm of psychology as a field that mediates children's developmental well-being and the biological functions that occur in the men's room. As recently as 1971, a psychoanalyst described a case involving “a 22-year-old male homosexual patient who also had difficulty passing urine in public toilets.”⁴⁴ The therapist explained to the patient the “sexual significance of the urinary symptoms,” which stemmed from his teenage relationship with his father.⁴⁵

40. See Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 20-21 (2008); Wickliffe Shreve, *Stall Wars: Sex and Civil Rights in the Public Bathroom*, 85 LAW & CONTEMP. PROBS. 127, 137-38 (2022).

41. STEPHEN ROBERTSON, *CRIMES AGAINST CHILDREN: SEXUAL VIOLENCE AND LEGAL CULTURE IN NEW YORK CITY, 1880-1960*, at 60 (2005).

42. *Id.*

43. See, e.g., AARON BETSKY, *QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE* 150-52 (1997); ANNA LVOVSKY, *VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL* 180-219 (2021). The most famous sociological study of tearooms is LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* (1970) (Aldine Transactions ed. 2005).

44. Thomas Kraft, *A Case of Homosexuality Treated by Combined Behaviour Therapy and Psychotherapy*, 19 PSYCHOTHERAPY & PSYCHOSOMATICS 342, 342 (1971).

45. *Id.* at 353. See also NICK HASLAM, *PSYCHOLOGY IN THE BATHROOM* 45-49 (2012) (explaining that in the mid-twentieth century, bedwetting by boys “was sometimes taken to reveal a passive and effeminate personality”).

Psychoanalysts continue to view public urination as a measure of masculinity, and boyhood experiences as central to the development of that masculinity. One psychoanalyst described a patient who “hadn’t been able to urinate in the presence of other men at public urinals since he was fourteen.”⁴⁶ The patient described “dreams involving urinals” that were, according to the psychoanalyst, an “expression of his longstanding desire to freely urinate in public.”⁴⁷

Although various histories of the different aspects of public men’s rooms exist, there is no history that fully appreciates the cultural insights discussed below as applied to the changes in U.S. public spaces over the past century and a half. Additionally, there are many interesting and useful historical works that shed light on the “logic of the men’s room,” but none that take a critical stance as its primary interpretive theory.⁴⁸

III. THE CULTURE OF THE “LITTLE BOYS’ ROOM”

To further understand the cultural significance of the men’s room in the lives of boys and young men, one must understand the basic cultural significance men’s room’s activities have had on emergent masculinity. As sociologist Sheila Cavanagh noted, “Bathroom teachings mirror contemporary anxieties about gender, sexual difference[,] and heteronormativity instilled, in part, by toilet training.”⁴⁹ These anxieties are observed both historically and up through the present day.

When privacy is invoked in relation to childhood, it becomes clear that a history of concerns regarding sexuality and gender lurks below the surface.⁵⁰ A law with which many students and teachers have at least a passing familiarity is the Family Educational Rights and Privacy Act (FERPA).⁵¹ Privacy in educational records is usually thought to only concern grades and other matters of academic consequence. Thus, it is curious to look back at media coverage of FERPA’s origins in 1974 to see how the public came to understand the law’s catalysts.

46. Michael J. Diamond, *Masculinity Unraveled: The Roots of Male Gender Identity and the Shifting of Male Ego Ideals Throughout Life*, 54 J. AM. PSYCHOANALYTIC ASS’N 1099, 1105 (2006).

47. *Id.* at 1111.

48. *See generally* SHEILA L. CAVANAGH, *QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION* (2010); Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869–1932*, 48 J. SOC. HIST. 264 (2014); W. Burlette Carter, *Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex*, 37 YALE L. & POL’Y REV. 227 (2018).

49. Sheila L. Cavanagh, *Toilet Training: The Gender and Sexual Body Politics of the Bathroom*, in *QUEERING THE INTERIOR* 172, 183 (Andrew Gorman-Murry & Matt Cook, eds., 2020).

50. *See* Maxine Wolfe, *Childhood and Privacy*, in *CHILDREN AND THE ENVIRONMENT* 175, 189 (Irwin Altman & Joachim F. Wohlwill, eds., 1978) (explaining how “privacy experiences are an important aspect of this socialization process” surrounding sexuality and “may have a significant impact on the way in which, as adults, we eventually come to understand these behaviors”).

51. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g).

As historian Sarah Igo explains, media coverage of FERPA at the time of its passing focused on the more salacious aspects of school records rather than those of pure academics.⁵² The *New York Times* described the law as “intend[ing] to end abuses such as the case of a young boy who allegedly returned hurriedly and unzipped from the bathroom and had the observation put into his file that he showed ‘exhibitionist’ tendencies.”⁵³ A day later, *Time* described FERPA as “an attempt to eliminate abuses of personal files in grade schools—such as the note citing ‘homosexual tendencies’ that was allegedly inserted in the files of one nine-year-old after he hugged a classmate.”⁵⁴ Whether or not these two media stories are reflective of FERPA’s legislative motivation, they indicate a belief that harm is caused by adults’ mistaken views of boyhood sexuality. Each example highlights how a particular action was misread by school authorities. Consequently, a certain amount of publicity was likely necessary to correct such misreadings. Although walking around deliberately “unzipped” might be a sign of exhibitionist behavior,⁵⁵ when contextualized as a hurried oversight, the school’s conclusion becomes ridiculous. Likewise, while same-sex physical contact might be the result of sexual attraction, two nine-year-olds hugging hardly seems like sufficient evidence to conclude that “tendencies” of any kind were afoot.⁵⁶

A. *The Biological Activity*

In theorizing the men’s room as a simultaneously social and legal space, one should also have some understanding of the cultural significance of the action that occurs within—what Simone de Beauvoir called “the most striking sexual difference”—urination.⁵⁷ In her chapter on childhood, in which Beauvoir famously declared, “One is not born, but rather becomes, woman,”⁵⁸ she posited that initial socialization into gender difference starts with urination.⁵⁹ She described several

52. See SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 250-51 (2018) (discussing the origins of FERPA).

53. Donald Johnston & Caroline Rand Herron, *Ideas & Trends: Education, Religion, Privacy*, N.Y. TIMES (Dec. 15, 1974), <https://www.nytimes.com/1974/12/15/archives/ideas-trends-school-files-the-law-went-too-far.html>.

54. *The Nation: Open Sesame Street*, TIME, (Dec. 16, 1974), <https://content.time.com/time/subscriber/article/0,33009,911529,00.html>.

55. Johnston & Herron, *supra* note 53.

56. *The Nation: Open Sesame Street*, *supra* note 54.

57. SIMONE DE BEAUVOIR, *THE SECOND SEX* 335 (Constance Borde & Sheila Malovany-Chevallier trans., 2010).

58. *Id.* at 330.

59. *Id.* at 334.

psychological case studies in which women came upon their first realization that boys and girls had differences when they saw their brothers urinate while standing. The women associated standing with pride and contrasted it to the shame they felt came with female crouching.⁶⁰

Architectural theorist Paul Preciado explained, “The aim of public hygiene policies is not only to bring order to our organic wastes, but also and more importantly[,] to bring order to gender.”⁶¹ If this is considered historically, it evidences that “[s]ince the beginning of the 20th century, the only common architectural law in the construction of bathrooms for men is the separation of functions: pee standing up/defecate sitting down in a toilet.”⁶² For Preciado, this means that the urinal is not merely a technology of waste disposal; it is “a technology of gender that participates in the production of masculinity in a public space.”⁶³ Later, this Article will develop this idea to show how Preciado’s understanding manifests itself in instances where the state attempts to remove or limit the use of urinals in public school bathrooms.⁶⁴ In these instances, the logic of the men’s room is undermined by the omission or restriction of urinals at a time of adolescent development when, perhaps, gender differentiation is foremost on students’ minds.

There is an ongoing concern with socializing boys to urinate standing up, and society’s interest in proper urination technique can manifest during early childhood. For example, at least one company manufactures plastic training urinals in the shape of open-mouthed frogs.⁶⁵ The product detail for the urinal explains that it “allows boys to train standing up from the start, and [is] designed for the little man who aspires to be like Daddy.”⁶⁶ Critics of the product’s early advertising seized upon the tagline, “Don’t Let Your Boy Pee Like a Girl!”⁶⁷ Women’s magazine

60. *Id.* at 335.

61. Paul B. Preciado, *Trashgender: Urinate/Defecate, Masculine/Feminine*, FUNAMBULIST (Sept. 6, 2017), <https://thefunambulist.net/magazine/13-queers-feminists-interiors/trashgender-urinatedefecate-masculinefeminine-paul-b-preciado>.

62. *Id.*

63. *Id.*

64. See *infra* text accompanying notes 209-10 & 216-41 (discussing instances of schools attempting to limit boys’ uses of urinals due to transphobia cloaked under the veil of privacy).

65. Rebecca Reid, *Is Masculinity Really So Fragile That We Need Kids to Pee in Frog Mouths?*, METRO (Sept. 5, 2017), <https://metro.co.uk/2017/09/05/is-masculinity-really-so-fragile-that-we-need-kids-peeing-in-frog-mouths-6903865/>.

66. *Cute Potty Training Urinal for Boys with Funny Aiming Target Game (Green)*, WALMART, <https://www.walmart.com/ip/Cute-Potty-Training-Urinal-for-Boys-with-Funny-Aiming-Target-Game-Green/290296159>. The same ad can be found on Amazon. *Frog Pee Training, Cute Potty Training Urinal for Boys with Funny Aiming Target, Green Urinals for Toddler Boy*, AMAZON, <https://www.amazon.com/Training-Urinal-Aiming-Urinals-Toddler/dp/B07VBKZ643/>.

67. Lucia Peters, *This Sexist Children’s Ad Just Got Shredded By Twitter & It’s Too Salty for Your Eyes*, BUSTLE (Sept. 7, 2017), <https://www.bustle.com/p/this-sexist-ad-for-childrens-urinals-is-exactly->

Bustle ridiculed the ad for “teaching kids to disparage things coded as ‘feminine’ from an early age and tell boys that it’s shameful or embarrassing to do anything ‘like a girl,’ let alone pee like one.”⁶⁸

Teaching boys to stand while urinating has potentially more implications than just socializing children toward stereotypical gender characteristics. As a group of scientists hypothesized, the differential methods of gendered urination might also explain something as unexpected as academic performance in physics.⁶⁹ The study of physics usually begins with projectiles in motion in order to introduce the basics of Newtonian mechanics. Studies have shown that “the largest gaps in performance [in physics] between girls and boys arise in questions that involve projectile motion—things that have been thrown, kicked, fired, etc.”⁷⁰ The scientists opined that urinary position, experienced from early boyhood, might explain this particular male advantage. “This self-directed, hands-on, intrinsically (and sometimes extrinsically, and socially) rewarding activity must have a huge potential contribution to learning, resulting in a deep, embodied, material knowledge of projectile motion that’s simply not accessible to girls.”⁷¹ The idea that early toilet training has long-lasting impacts is not an idea unique to physics.

To show just how strong the connection is between the ability to urinate while standing and masculinity, consider the medical diagnosis of hypospadias. Notably, “Hypospadias is a medical term that refers to when the ‘urethral meatus’ (or ‘pee-hole’) appears not exactly at the tip of the penis, but rather on the underside.”⁷² An infant diagnosed with hypospadias typically receives surgery that “is often justified as necessary in order to enable the child to be able to urinate standing up.”⁷³ But as gender studies researcher David Andrew Griffiths explains, these medically dubious surgical procedures are often grounded in a logic of psychology that imagines a “trauma of having a penis deemed abnormal, and possibly not being able to urinate standing up.”⁷⁴

Manifestations of this gender-based anxiety also appear in the realm of custody cases. Fathers without primary custody express concern when

where-toxic-masculinity-takes-root-81476.

68. *Id.*

69. Anna Wilson et al., *Taking the Pee out of Physics: How Boys Are Getting a Leg-Up*, *TIMES EDUC. SUPP.* (Sept. 15, 2017), <https://www.tes.com/magazine/archive/taking-pee-out-physics-how-boys-are-getting-leg>.

70. *Id.*

71. *Id.*

72. David Andrew Griffiths, *Hypospadias and the Performative, Psychological and Perfect Penis*, in 2 *TALKING BODIES* 143, 143 (B. A. Ashton et al. eds., 2020).

73. *Id.*

74. *Id.* at 155. Griffiths also discusses how such surgeries have been a “disaster” for many individuals that “required multiple follow-up surgeries through life.” *Id.* at 160.

they learn that their sons do not urinate in a gender-normative manner. Beyond the fathers, the concern can be shared by male social workers, lawyers, and judges. Thus, in one case, a noncustodial father argued that there was a “substantial change of circumstances” that merited a change in custody of his fifteen-year-old son.⁷⁵ In agreeing with the father, the trial court pointed out that the son’s development was “disturbingly retarded” in that he “possessed unreasonable fears for his age, and had ‘unmanlike’ toilet behavior.”⁷⁶ Specifically, the boy “would sit to urinate and was self-conscious about urinating in the woods during excursions with the father.”⁷⁷ In the course of another contentious custody dispute, a male social worker reported that the nine-year-old boy at the heart of the dispute “seemed apprehensive about using a public urinal in [his father’s] presence.”⁷⁸ However, that observation was made in the context of the mother’s accusation of the father’s sexual inappropriateness around the boy.⁷⁹ In both cases, courts gave credence to the idea that it is a social deficit for a boy to urinate in public in a gender nonnormative way.⁸⁰ More importantly, the likely cause of these boys’ problems was improper socialization.

Consider controversial social critic Camille Paglia’s explanation of male sexuality as “compartmentalized,” which is most clearly seen in the act of urination.⁸¹ As she explains, “Male urination really *is* a kind of accomplishment, an arc of transcendence. A woman merely waters the ground she stands on. Male urination is a form of commentary. It can be friendly when shared but is often aggressive.”⁸² What Paglia means by

75. *Mesibov v. Mesibov*, 16 So. 3d 890, 892 (Fla. Dist. Ct. App. 2009).

76. *Id.* at 892.

77. *Id.* at 892 n.2.

78. *Terri L. v. Gary S.*, No. D061533, 2013 WL 1408762, at * 9-10 (Cal. Ct. App. Apr. 9, 2013).

79. *Id.* at *1.

80. *Id.* at *9-10; *Mesibov*, 16 So. 3d 890 at 892.

81. CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 19 (1990).

82. *Id.* at 21. The “friendly” nature of male urination can be seen most frequently in the public restrooms of hyper-masculine events, usually sporting events. See Al Yellon, *Wrigley Renovations: The Men’s Room Troughs Will Stay*, <https://www.bleedcubbieblue.com/2013/6/3/4392266/wrigley-renovations-mens-room-troughs>; Peggy Saturday, *Wrigley Field Troughs Are More than Just Urinals and the Ladies Need a Counterpart*, <https://web.archive.org/web/20160824045109/http://www.chicagonow.com/mars-venus-game/2013/06/wrigley-field-troughs-urinals/> (describing how “communal relieving” at a baseball game “seems to inspire a sports bonding social ‘party room’”). Surveys taken by the Chicago Cubs organization further confirm this understanding. See Rex W. Huppke, *Wrigley trough urinals will stay, despite renovation*, CHI. TRIB., (June 2, 2013), <https://www.chicagotribune.com/2013/06/02/wrigley-trough-urinals-will-stay-despite-renovation/> (explaining that trough urinals would remain in the stadium after renovation because their “communal nature” was “part of enjoying the game”). As explained below, it is only in hyper-heteronormative social spaces, like baseball stadiums, that “friendly” urination can take place. By contrast, there can be “aggressive” urination in situations where masculinity needs to be reinforced. A prime example of this occurs in adolescent bullying situations in which the victim is perceived to be a gay male. See Nabozny

“compartmentalization” is that men can more easily “dissociate sex and emotion” because the penis is often viewed as separate from the self and as external to otherwise inward emotions. Paglia provides an example of this genitally motivated dissociation in the “modern male homosexual” who “has sought ecstasy in the squalor of public toilets, for women perhaps the least erotic place on earth.”⁸³ In a sense, this may help explain why one would sexualize a public space where men routinely, and with social approval, expose their genitals.⁸⁴

B. The Social Space

The public men’s room both reflects and creates social expectations of gendered behavior. This Part is devoted to understanding those expectations, which allows us to explore how the law is complicit in maintaining this gendered ordering of public space.

Before examining those expectations in depth, one should understand the men’s room as a site that requires a sort of situational gender performance for those who do not instinctively maneuver in the space—at least if the man does not want to be challenged as to his spatial belonging. A useful analogy might be made to border crossings. Consider Jessica Tellez, a Mexican national whose first attempt to cross the U.S. border resulted in an immigration officer becoming suspicious and singling her out for a secondary screening, at which point she admitted to her lack of belonging, and to her attempt to impersonate the sort of person who could legitimately cross into the U.S.⁸⁵ However, in her second attempt at entry, she was successful.⁸⁶ As Tellez explained in her removal proceedings, she “‘dressed up in a nice, pretty dress,’ and ‘smile[d] at the immigration officer’ from the passenger seat of a car.”⁸⁷ As a result of this performance, the immigration officer waved her car through the crossing without suspicion and, thus, without challenge to her spatial and social belonging.⁸⁸

v. Podlesny, 92 F.3d 446, 452 (7th Cir. 1996) (gay ninth-grade student was physically assaulted while using a urinal and urinated upon by one of his assaulters); *see also* Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1070 (D. Minn. 2001) (“[A] student’s car was keyed and urinated upon, and the school believes that this occurred because the student was perceived to be homosexual”); *see also* Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 816, 816 n.6 (S.D. Iowa 2004) (student perceived to be gay was “urinated on in the shower room” after wrestling practice).

83. PAGLIA, *supra* note 81, at 21.

84. Craig v. State, No. A07-1949, 2008 WL 5136170, at *5 (Minn. Ct. App. Dec. 9, 2008) (upholding conviction of U.S. Senator from Idaho for soliciting sex in an airport men’s room during undercover police sting).

85. Tellez v. Lynch, 839 F.3d 1175, 1177 (9th Cir. 2016).

86. *Id.*

87. *Id.*

88. *Id.*

Tellez's stay in the U.S. came to an end after five years, when she applied to adjust her status to lawful permanent resident, i.e., when she admitted to her foreignness but asked the state to bless her belonging.⁸⁹ Unfortunately for Tellez, Judge Kozinski dashed her hopes when he mockingly ended the court's opinion by noting, "A pretty dress and charming smile are not substitutes for a visa."⁹⁰ One might be tempted to read the analogy too narrowly, substituting "penis" for "visa" and seeing a parallel to the modern conservative argument against trans-inclusive bathroom policies. However, what should specifically be appreciated is that those doing border policing—whether they are officials at the national border or conservative activists at the men's bathroom door—are most interested in entrants' social performance, especially when that performance fails expectations and jars the monitors from their humdrum slumber. The analogy also works to show how, just as with bathroom situations, the state is often unaware of individuals' lack of belonging until they choose to reveal themselves in an attempt to test the strength of the existing social boundaries with hope of achieving full and authentic belonging.

1. The Reaffirming Nature of the Men's Room

As law professor Mary Anne Case observed, "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."⁹¹ In arguing that sex segregation in public restrooms be abolished, Case has "urged consideration of sameness around a feminine standard."⁹² That is, she argues for multiple single-stall toilets that both men and women can use interchangeably—airplane toilets, but on a larger scale.⁹³ Case also expressed surprise at the resistance she has received from her ideas over the years from both men and women.⁹⁴ Men and women alike describe to her the value they find in the single-sex sociability associated with restrooms as currently (and segregatedly) constructed.⁹⁵ To certain critical theorists, however, social investment in binary public restrooms comes as no surprise.

89. *Id.*

90. *Id.* at 1179.

91. Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 223 (Harvey Molotch & Laura Norén eds., 2010).

92. *Id.* at 216.

93. *Id.* at 217-18.

94. *Id.* at 219-20.

95. *Id.* at 220-25.

“Entering a public toilet is not only a mundane embodied experience,” Professor Ruth Barcan tells us, “it is also a public and often unconscious reaffirmation of one’s gender identity and of the rigid cultural demarcation between two polar sexes.”⁹⁶ Even though men’s and women’s restrooms are separate, there is a superficial appearance of equality to them as seen from the outside, as each room is entered through a space of identical size and shape. In a sense, public bathrooms mask their segregative qualities around a façade of equality.⁹⁷ It is only after one walks past the appropriate stick-figure signage and reaffirms one’s gender identity that the space reveals itself as not only unequal, but far from benign. Scholar Cristyn Davies explains that the interior space is “where one’s sex and gender identity should be transparent—an act most obviously staged at the urinal in men’s toilets, or at the mirror in women’s toilets where some users reapply make-up and re-do their hair.”⁹⁸ The men’s room in particular “constitutes a social technology in itself to necessitate a certain relation between the male subject and his body.”⁹⁹ As academic Lee Edelman puts it, the design of the men’s room “has palpable designs on men; it aspires . . . to design them.”¹⁰⁰ Filled with “anxiety and unspoken rules” as it is, the men’s restroom provides an interesting area of “cultural study of gender, space, and the body” for Barcan.¹⁰¹

Here, it is now beneficial to note that the men’s public restroom is also an interesting and ideal subject of *legal* study for understanding how law shapes, and is shaped by, cultural notions of masculinity, sexuality, and the male body.

On the one hand, this Article tests the critical insights of Edelman and Barcan through an examination of men’s room case law. At the same time, this Article aims to give some insight into the legal distinctions between “the public” and “the private.” Although the public and private distinction figures heavily in the historical and critical studies of public restrooms, the legal understanding of the categories of public and private seems more unstable in the men’s room, where at once someone might be arrested for *public* indecency, while the man several urinals away might

96. Ruth Barcan, *Dirty Spaces: Communication and Contamination in Men’s Public Toilets*, 6 J. INT’L WOMEN’S STUD. 7, 13 (2005).

97. See Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 9-10 (2007) (explaining the “appearance of architectural equality”).

98. Cristyn Davies, *Queering the Space of the Public Toilet*, in QUEER SPACE: CENTRES AND PERIPHERIES (Faculty of Design, Architecture & Building, University of Technology, Sydney, Broadway, NSW, 2006).

99. Lee Edelman, *Men’s Room*, in STUD: ARCHITECTURES OF MASCULINITY 152, 152 (Joel Sanders ed., 1996).

100. *Id.*

101. Barcan, *supra* note 96, at 7-8.

be liable for a *privacy* invasion.

2. Its Fear-Inducing Nature

While public bathrooms reaffirm majoritarian gender identities and allow for desired same-sex sociability, they, particularly the men's room, also produce social fears and anxieties. Social scientists have documented that urinals especially cause anxiety for boys and men.¹⁰² Numerous studies, both quantitative and qualitative, focus on this perspective of the men's room.

A 2012 British study contrasted men's and women's experiences in public toilets. Whereas women see the public restroom as "a place of communality," men see them as "nightmarish spaces."¹⁰³ The researchers described public toilets as liminal spaces, "in between 'here' and 'there,' and peripheral to the main sites of social life."¹⁰⁴ This is important in explaining male fear because the public bathroom is a space in which ordinary gendered hierarchy is notably absent. According to scholars Moore and Breeze, watching and being watched are "core levers of patriarchal social control."¹⁰⁵ Thus, when one's only potential victim of the "male gaze" is another male, and likewise, when one is himself the potential victim of the male gaze, gendered unrest takes over the social space. But it is not just this sort of existential anxiety that can pervade the men's restroom; it is a fear of real violence.

The fear of violence arises in two potential ways. First, an unwanted gaze, whether real or misperceived, can lead to physical retaliation from the gaze victim. Because being subjected to the male gaze is often equated with being made the object of male sexual interest, the "victim" may respond to his potential objectification by reasserting his social dominance in what he perceives as the most efficient way possible: through violence.

The second sort of violence might arise not directly from the perception of sexual objectification, but indirectly, from criminals who would take advantage of men's vulnerable states. This vulnerability arises from the fact that average male restroom users are engaged in a studied indifference to others around them, precisely so that they will not rouse

102. See SCOTT MELZER, *MANHOOD IMPOSSIBLE: MEN'S STRUGGLES TO CONTROL AND TRANSFORM THEIR BODIES AND WORK* 103 (2018) (describing a study that examined how "[b]oys and men suffering from locker-room syndrome, especially those with smaller-than-average penises, internalize their anxieties by finding ways to conceal their flaccid penises in intimate and public settings," including "urinals—especially the pig trough-style urinals").

103. Sarah E. H. Moore & Simon Breeze, *Spaces of Male Fear: The Sexual Politics of Being Watched*, 52 *BRIT. J. CRIMINOLOGY* 1172, 1178 (2012).

104. *Id.* at 1176.

105. *Id.* at 1179.

suspicion that they are engaging in, or seeking out, the forbidden male gaze. Combine this deliberate blindness with the fact that actual urinal users find themselves occupied with relieving themselves, and a potential criminal finds the perfect target.¹⁰⁶

C. *The Gendered Technology*

Culturally speaking, most western cultures instinctively accept that men's differential method of urination—standing up—requires technological adaptation in public.¹⁰⁷ But technology alone is not the sole lens through which one can understand the pervasiveness of public urinals. In many instances, the law mandates urinal installations.

The most significant distinction between men's and women's public restrooms is the presence of urinals in the men's room. As Edelman suggests, “the men's room marks a critical stage both for and in the solicitation of masculine subjectivity.”¹⁰⁸ It is the presence of urinals in the more public, open areas of the restroom that, as Barcan explains, “recalls, dramatizes, and ultimately calls into question a division imagined for the penis itself—that between its urinary and sexual functions.”¹⁰⁹ “The law of the men's room,” Edelman tells us, “decrees that men's [genitals] be available for public contemplation at the urinal precisely . . . allow a correlative mandate: that such contemplation must never take place.”¹¹⁰ Further, “the logic of the men's room compels the normative enactment of a vigilant nonchalance that responds to the disciplinary pressure that the men's room exerts upon visual relations.”¹¹¹ So how is “the logic of the men's room” reaffirmed in the legal arena?¹¹²

106. Reported cases in which criminals have victimized men at the urinals are numerous. *See, e.g.*, *Thompson v. State*, 904 S.E.2d 409, 410 (Ga. Ct. App. 2024) (victim “faced the wall as he used the urinal, and while he was zipping up his pants, [an] individual . . . walked up behind him and put a gun to his neck”); *State v. Carter*, No. A17-0412, 2018 WL 700244, at *1 (Minn. Ct. App. Feb. 5, 2018) (victim stabbed in back while using urinal at a bar); *Berrioz v. Giroux*, No. 16-cv-01613-TJS, 2017 WL 977862, at *6 (E.D. Penn. Jan. 31, 2017) (in searching for a robbery victim, perpetrator targeted man at urinal).

107. It is particularly noteworthy that cultural expectations of urinal presence are limited to public facilities. Their absence in private residences might be read as signifying that in their home, men do not need special toilets to reinforce their maleness precisely because no one is there to notice, except perhaps the wife and children whose social subordination has not needed reestablishing in recent times.

108. Edelman, *supra* note 99, at 152.

109. Barcan, *supra* note 96, at 10.

110. Edelman, *supra* note 99, at 153.

111. *Id.* at 154.

112. On the concept of a “logic,” as that term is used here and in critical theory more generally, see JASON GLYNOS & DAVID HOWARTH, *LOGICS OF CRITICAL EXPLANATION IN SOCIAL AND POLITICAL THEORY* 134-37 (2007).

IV. MINORS AND THE LOGIC OF THE MEN'S ROOM

If men's rooms have the cultural significance claimed above, then one might expect to find that when boys are involved in some men's room misuse or misunderstanding, the law would strictly hew to the cultural baseline so as to reinforce proper gendered behavior for the man-in-training. Teaching proper men's room etiquette to boys is usually a task that is socially delegated to fathers or other male guardians.¹¹³ The significance of these lessons can be great. Teaching boys to follow expected norms in this locale may not only keep them in good social standing, but can also keep them out of legal trouble caused by unintentionally cultivating unnecessary suspicion by breaking the logic of the men's room. However, the methods of communicating these etiquette lessons are not always so clear cut. Sometimes fathers or other authority figures can raise suspicions themselves.¹¹⁴ This Section primarily considers cases in which courts must decide if the state needs to assume the role of the father and maintain the logic of the men's room for the boys involved in the disputes.

*A. Sexual Affront or Childish Misunderstanding:
Judicial Enforcement of Gendered Expectations of Privacy*

This Part begins with a case in which a group of schoolboys, in the court's eyes, failed to understand proper men's room behavior and consequently received a lesson from the court on appropriate urinal etiquette. The state of Missouri prosecuted elementary school counselor James Beine for "sexual misconduct involving a child by indecent exposure."¹¹⁵ In the first of two incidents, three boys alleged that Beine entered the restroom while they were using it and that he stood three to four feet away from the urinal and "urinated into it in an arc," and that they could thus see his "private part."¹¹⁶ In the second instance, Beine was using the urinal when some boys entered the restroom and began to cause a ruckus.¹¹⁷ According to the complaining boy, who at the time was

113. See Heath Fogg Davis, *Why the "Transgender" Bathroom Controversy Should Make Us Rethink Sex-Segregated Public Bathrooms*, 6 POL. GRPS. & IDENTITIES 199, 211 (2018) (explaining how sex-segregated public bathrooms "pose logistical problems for caregivers who are in the public sphere with children [of the opposite sex] . . . who need assistance using toilets" due to the cultural expectation that mothers take daughters to the bathroom and fathers take sons).

114. See, e.g., *In re Derek E.*, No. B285635, 2018 WL 5003449, at *4 (Cal. Ct. App. Oct. 16, 2018) (in proceeding against a father for sexual abuse, father admitted that he would "hold [his son's] private part to show him how to aim at the urinal").

115. *State v. Beine*, 162 S.W.3d 483, 484 (Mo. 2005).

116. *Id.*

117. *Id.*

washing his hands at the sink, Beine “turned from the urinal and told the boys to ‘shut up’” thus exposing his penis, but he “quickly turned back and zipped up his pants.”¹¹⁸ The statute under which Beine was convicted criminalized anyone who “knowingly expose[d] the person’s genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct [was] likely to cause affront or alarm to a child less than fourteen years of age.”¹¹⁹

The Missouri Supreme Court in a four-to-three opinion reversed Beine’s conviction and invalidated the statute.¹²⁰ “There is no question that appellant knowingly exposed his genitals to persons under the age of fourteen,” the court explained.¹²¹ However, “[t]his is often necessary in a men’s restroom.”¹²² It is quite clear from the majority’s opinion that the boys, and perhaps the prosecutors, legislators, and the jury that convicted Beine, needed to be reminded of how a man uses a restroom.¹²³ The court went on, “It is quite common for men and boys to use a common facility at sporting events, Boy Scout camps, horse shows, and other public events. In so doing, it is necessary for the users to expose their private parts. Fathers regularly take their pre-K sons into public restrooms.”¹²⁴ Here, the majority invoked settings of hyper-masculinity to justify the commonality and necessity of exposing the penis to urinate.¹²⁵ If sports fans, Boy Scouts, and fathers (all three categories that are culturally coded as heterosexual) do it, then there is nothing remotely sexual in the actions Beine undertook.¹²⁶

Beine’s actions, like urinating into an arc, “cannot reasonably be construed as likely to cause affront or alarm.”¹²⁷ Thus, one must assume the majority’s statement was from the point of view of one operating under the predominating logic of the men’s room, as seen in its statement:

Even if a reasonable person might think that in some of these restroom

118. *Id.*

119. *Id.* at 484-85 (quoting MO. REV. STAT. § 566.083.1(1) (2004)).

120. *Id.* at 487-88.

121. *Id.* at 485.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See Rachel Allison & Chris Knoester, *Gender, Sexual, and Sports Fan Identities*, 38 SOCIO. SPORTS J. 310, 310 (2021) (“U.S. sports fan cultures have historically been disproportionately (hetero)masculine and male-dominated domains”); Jeffrey P. Hantover, *The Boy Scouts and the Validation of Masculinity*, 34 J. SOC. ISSUES 184, 189 (1978) (“Scouting’s program and structure would counter the forces of feminization and maintain traditional manhood.”); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 263 (2009) (challenging the “patriarchal concerns about the role of fathers in the production of masculine, heterosexual boys”).

127. *State v. Beine*, 162 S.W.3d 483, 484 (Mo. 2005).

situations a child is likely to suffer affront or alarm from witnessing such exposure, that alone cannot make the exposure criminal. If that were the case, no person would ever be able to use a public restroom without risking a criminal charge.¹²⁸

The more troubling concern for the court, however, was the children's reactions.¹²⁹ "The boys used such phrases as 'embarrassed' and 'funny' when talking about their reaction to the incident, but these hardly equate to 'affront' or 'alarm,'" the majority explained.¹³⁰ The reader can strongly suspect that the majority's primary concern was that the boys noticed Beine's penis in the first place. As Edelman explained through the logic of the urinal space, a working assumption for heteronormative expectations is that the display of the penis "contemptuously . . . declares its refusal to allow that such a space could possibly be one where gay men, or gay male desire, might appear."¹³¹ Thus, it can be assumed that it was really the complaining boys who failed such heteronormative men's room social protocol in taking any notice of another man's genitals, when the man himself apparently carried forth with the requisite nonchalance.

Indeed, the boys' visual reaction is what the majority tried to downplay. By contrast, in Judge Laura Stith's opinion, in which she concurred in part and dissented in part, she pointed out how the boys "disclosed these incidents to their teacher and later to their mothers"—women.¹³² In a sense, the boys drew women into the all-male precinct. During the trial, one of the boys said he had never seen anything like that before, in response to direct examination.¹³³ The boys' attorney asked for further detail about viewing Beine's penis.¹³⁴ But it is precisely this sort of conscious analysis and publicity of urinal usage that is not permitted by the logic of the men's room. Thus, in Beine's victory, the boys lost legal status as victims. No heterosexual male, in this case, was a victim of another male's performance of his own heterosexuality.

But it was not only Beine who was vindicated in his heterosexual performance via the invalidation of the statute—it was all heterosexual male actors. The law posed a direct threat to urination in the restroom. The majority explained its invalidation:

Because a person's right to use public restrooms is about as fundamental a right as one can imagine, probably equal to or more fundamental than

128. *Id.* at 486.

129. *Id.* at 485-86.

130. *Id.*

131. Edelman, *supra* note 99, at 154.

132. *State v. Beine*, 162 S.W.3d 483, 484 (Mo. 2005) (Stith, J., concurring in part and dissenting in part).

133. *Id.* at 494-95.

134. *Id.*

speech rights, the overbreadth doctrine should extend to this case and permit Mr. Beine to contest [the statute] even if he had no right to engage in the conduct he engaged in.¹³⁵

The majority declared the right to normative masculine performance—the exposure of one’s penis at the urinal with all the cultural complexity it brings—to be the first among fundamental rights.¹³⁶

However, when men’s gendered performances deviate from the norm, especially in the presence of minors, then it is the court’s job to disapprove the performance and reward the boys’ correct assessment of non-normative urinal behavior. In a case similar to *Beine*, David Swan, a janitor at an elementary school, was accused of indecent exposure, lewdness, and voyeurism.¹³⁷ A fourth-grade victim described Swan’s behavior: he “would stand far away from the [short] urinal, exposing his penis, which was sometimes erect.”¹³⁸ Another boy complained that Swan would use the adjacent urinal even when others were empty and talk to him and that he would “stand back far enough so that [the boy] could see his penis.”¹³⁹

In *Swan*, the court upheld the lewdness and indecent exposure convictions. The majority explained that it was Swan’s specific actions that could lead a reasonable jury to find that he had intentionally and recklessly exposed himself for the purpose of causing shock or alarm.¹⁴⁰ But Swan had not behaved like Beine. Any one of Swan’s individual actions standing alone might not have caused alarm, but taken together, they led to reasonable suspicion: the use of the adjacent urinal when others are open, the use of the short urinal, standing too far back, talking to draw attention to yourself, and taking these actions while having an erection.¹⁴¹

Even though Swan’s actions with his own genitals allowed for criminal

135. *Beine*, 162 S.W.3d at 487.

136. The U.S. Supreme Court developed the overbreadth doctrine as an element of its First Amendment speech methodology. See ERWIN CHERMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1030-35 (7th ed. 2023). However, as Chemerinsky explains, the doctrine is regarded as “strong medicine,” even within the First Amendment realm because its application “involves the facial invalidation of a law and because it permits individuals standing to raise the claims of others not before the Court.” *Id.* at 1033. Thus, the *Beine* court’s privileging of the right of males to urinate in public facilities really does take on unique legal and constitutional significance when one appreciates the stretching of this doctrine to this new area of law. The Court itself recognized this innovation in noting that the overbreadth doctrine is “rarely applicable” outside of the speech realm. See *Beine*, 162 S.W.3d at 487.

137. *Commonwealth v. Swan*, 897 N.E.2d 1015 (Mass. App. Ct. 2008).

138. *Id.* at 1017.

139. *Id.*

140. *Id.* at 1018.

141. *Id.* at 1017-18.

conviction, his voyeurism charge could not stand.¹⁴² The court explained this holding as resting on the fact that one does not have a reasonable expectation of privacy at the urinals: “The portion of the lavatory containing the urinals . . . is not such an area” where people have “purposely closed themselves off from public view in an enclosed space or area.”¹⁴³ In furthering this objective notion of privacy:

The fact that five urinals stood side by side, the fact that anyone could walk through the lavatory door at any moment and observe those standing at one or more of the urinals, and the fact that anyone using the lavatory could immediately see its open character, all combine to remove any expectation of privacy that a person might have when using the urinals in that lavatory.¹⁴⁴

Moreover, it did not appear that Swan’s actions demonstrated any particular interest in the boys’ own exposure or normative use of the urinal. When such an interest exists, all discussion of lack of privacy disappears.

For just that reason—a socially discernable interest in minors’ exposure—William Caldwell’s conviction of voyeurism was upheld for his conduct of watching twelve- and thirteen-year-old boys use the urinals at a swim meet.¹⁴⁵ Caldwell attempted an argument like that employed by the Massachusetts court in reversing Swan’s voyeurism conviction.¹⁴⁶ Caldwell argued that because the urinals were not enclosed and because anyone could walk up to them, a user had no reasonable expectation of privacy. The court, however, held that even though there was:

no physical barrier, such as a partition, to afford the young boys *complete* privacy . . . under the facts of this case, the victims did in fact have an expectation of privacy such that there is evidence Caldwell was on the premises of another [i.e., a third-party’s premises] for the purpose of invading that privacy.¹⁴⁷

The facts that the *Caldwell* court claimed created an expectation of privacy at the urinals all revolved around the defendant’s behavior. Three boys participating in the swim meet testified that when they went to the restroom to use the urinal, Caldwell was inside and deliberately looked at their private parts.¹⁴⁸ In one instance, the three boys testified that Caldwell spat in the urinal and turned his head sideways to get a better view.¹⁴⁹ It

142. *Id.* at 1020-21.

143. *Id.* at 1020.

144. *Id.* at 1020-21.

145. *State v. Caldwell*, 662 S.E.2d 474, 477, 487 (S.C. Ct. App. 2008).

146. *Id.* at 486.

147. *Id.*

148. *Id.* at 477.

149. *Id.*

was the evidence of such non-normative behavior that could lead a reasonable jury to convict Caldwell, said the court.¹⁵⁰ This evidence also included the frequency of encounters with the boys, his returning to the urinals only when the boys began to use them, and his obvious staring at their genitalia.¹⁵¹ Moreover, each boy testified that “no one had ever made him feel the way [Caldwell] did that day.”¹⁵² In other words, Caldwell’s actions made the boys self-conscious of their urinal performance. But, unlike the schoolboys in *Beine*, these boys’ self-consciousness of their urinal exposure was not of their own making. Rather, it was Caldwell’s visual objectification that transgressed the heteronormative logic of the men’s room and, thus, these boys were true victims of improper men’s room usage.

Another voyeurism case demonstrates how, due to the predominating logic of the men’s room, certain behavior can cause alarm in those who are not even the subject of the behavior. In 2006, Jeffrey Ulmer was convicted of interference with privacy.¹⁵³ As the court explained, “This case involves disturbing behavior—an adult stranger’s peering over a urinal partition to watch a seven-year-old boy urinate.”¹⁵⁴ Here, however, it was not the boy who complained (and it is not clear if the boy was ever aware of what was happening).¹⁵⁵ Instead, it was a Walmart employee who noticed. The employee specifically observed that Ulmer’s hands were in his pockets, and he did not see Ulmer use the urinal for urination.¹⁵⁶

This case is noteworthy because it shows how men can come to have an interest in others’ proper urinal usage. In other words, all men who perceive themselves as culturally normative have a stake in maintaining the logic of the men’s room. Moreover, it shows how someone might be a victim of improper usage (in addition to, of course, a genuine crime) even without his own awareness of it. Along those same lines, a concurring judge in *Caldwell* thought the majority should not have allowed testimony about how the boys felt after being stared at because such subjective feelings are not legally part of victimization; in some cases, “the victim is unaware of the peeping tom’s presence and the invasion of privacy.”¹⁵⁷

Recalling Caldwell’s failed argument that there could be no reasonable

150. *Id.* at 486.

151. *Id.*

152. *Id.* at 477-78.

153. *State v. Ulmer*, 719 N.W.2d 213, 214 (Minn. Ct. App. 2006).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Caldwell*, 662 S.E.2d at 487 (Kittredge, J., concurring).

expectation of privacy at open urinals in a public bathroom at a youth swim meet, how should one understand Father Paul Monahan's successful argument in another case about what happened at a high school track meet?¹⁵⁸ Monahan, then eighty-two years old, was charged with five counts of invasion of privacy when he allegedly "viewed the genitals of five members of the same track team while they were using the urinals in the public restroom at the track meet."¹⁵⁹ Monahan, a Catholic school chaplain, regularly attended athletic events to photograph them for the school.¹⁶⁰

Monahan's alleged victims, who ranged in age from fifteen to eighteen, all recounted a similar narrative of events. Monahan would take the urinal next to the one occupied by a student.¹⁶¹ At some point while standing at the urinal, he would "take a step back and then look down" in the direction of the boy's penis.¹⁶² All five boys discussed Monahan with each other.¹⁶³ Some claimed to watch these events unfold from the mirrors as fellow students were victimized.¹⁶⁴ The boys also claimed to be hyperaware of Monahan as he approached the urinal next to them because of their "awareness of other incidents."¹⁶⁵ One student even shouted, "Put your eyes on the wall, f***er."¹⁶⁶

Although Monahan was convicted at a bench trial, the Iowa Court of Appeals reversed the conviction due to insufficient evidence.¹⁶⁷ The Iowa invasion of privacy statute required the defendant to "knowingly view[] . . . another person, for the purpose of arousing or gratifying . . . sexual desire."¹⁶⁸ It also required the viewing to occur in a place where the victim had "a reasonable expectation of privacy while in a state of full or partial nudity."¹⁶⁹ The court found the evidence lacking on both elements.¹⁷⁰

In rejecting the State's argument that the teens had an objectively reasonable expectation of privacy, the court said, "Considering the character of the area in which the claimed privacy interest is asserted, a public restroom, and the way in which the area is used, by anyone who

158. See Joey Aguirre & Kelly McGowan, *Catholic Priest Faces Invasion of Privacy Charges in Council Bluffs*, DES MOINES REG. (Aug. 26, 2016), <https://www.desmoinesregister.com/story/news/crime-and-courts/2016/08/26/catholic-priest-facing-invasion-privacy-charges/89443464/>.

159. *State v. Monahan*, 919 N.W.2d 635 (Table), at *1 (Iowa Ct. App. 2018).

160. *Id.* at *1-2.

161. *Id.*

162. *Id.* at *2.

163. *Id.* at *1-2.

164. *Id.*

165. *Id.*

166. *Id.* at *1.

167. *Id.* at *6.

168. *Id.* at *7 (quoting IOWA CODE § 709.21(1)).

169. *Id.* at *4 (quoting IOWA CODE § 709.21(1)(c)).

170. *Id.* at *7-8.

walk[s] into the restroom, we find there would be a diminished expectation of privacy.”¹⁷¹ Additionally, because the particular restroom at issue had partitions between the urinals, “there was limited evidence as to what [Monahan] would have been able to see,” even if he had been purposefully looking at the boys’ genital regions.¹⁷²

Does the logic of the men’s room help explain the court’s decision in Monahan’s case? Unlike Caldwell, Monahan had a believable explanation for his frequent trips to the urinal—as an eighty-two-year-old man with an enlarged prostate who took a diuretic for high blood pressure, frequent urination was merely a fact of life.¹⁷³ Moreover, the court noted that Monahan “did not make any remarks to the teenage witnesses . . . nor [was] there any other evidence to show that he was interested in viewing the genitals of teenage boys.”¹⁷⁴

Finally, the court observed that “the use of urinals in a public restroom at a track meet where people were walking in and out[] does not give rise to an inference of sexual arousal and gratification” as required by the statute.¹⁷⁵ In essence, the court had difficulty imagining an eighty-two-year-old priest taking an illegal sexual interest in teenage boys in a men’s bathroom. The court was also likely suspicious of the seemingly coordinated actions of the complaining boys.¹⁷⁶

The law was not necessary to maintain the logic of the men’s room on this occasion. Regardless of what Father Monahan was actually doing in the bathroom on the day of the track meet, even the most condemnable interpretation of his geriatric actions was harmless to a pack of athletic teenage boys, who seemed fully in control of the situation. In fact, when one boy explicitly yelled at Monahan and told him to avert his eyes, the boys claimed that Monahan “looked startled and left the restroom.”¹⁷⁷

Importantly, just as in *Swan*,¹⁷⁸ the two-member majority in the *Monahan* case were men, while the sole female judge specially concurred. Although Judge Anuradha Vaitheswaran agreed that there was insufficient evidence of Monahan’s sexually-motivated intent, she disagreed with the majority that the boys did not have an objectively

171. *Id.* at *6.

172. *Id.*

173. *See id.* at *2.

174. *Id.* at *7.

175. *Id.* (alteration in original).

176. *See id.* at *1 (A pair of boys appears to have deliberately set up one interaction, where one boy “pretended to be washing his hands while [the other] used the urinal.” (alteration in original)). The court also pointed to the former sheriff’s critique of the investigation in that no effort was made “to determine the extent to which the witnesses discussed the incident with each other before they were interviewed.” *Id.* at *2.

177. *Id.* at *1.

178. *Commonwealth v. Swan*, 897 N.E.2d 1015 (Mass. Ct. App. 2008).

reasonable expectation of privacy.¹⁷⁹ As precedent for her disagreement, Judge Vaitheswaran cited *Ulmer*.¹⁸⁰ However, *Ulmer* concerned a seven-year-old boy in a Walmart store, not a group of teenagers at a track meet.¹⁸¹ Context makes all the difference, according to the logic of the men's room. This explains why one can maintain that the victim in *Ulmer* had his privacy violated while the teenagers in *Monahan* did not, even though, from an outsider's perspective, the images look the same—minors using a partitioned urinal while an older man peers around the barrier. In calling out Monahan to his face and in reporting him to the authorities, the teenagers proved themselves capable of maintaining that logic, while a seven-year-old needed the assistance of the state.

It is not just courts that have been enforcing the hegemonic logic of the men's room; state legislatures have done the same. In 2008, the Louisiana House of Representatives adopted a concurrent resolution, requiring “the installation of urinal privacy partitions” in all new construction.¹⁸² It is the resolution's “whereas” clauses that prove most insightful. Nearly every clause mentions the protection of children from “child predators” who “violate the privacy of children and others, thereby stripping them of their innocence.”¹⁸³ The one clause that does not mention children, however, acknowledges that “the victim is typically unaware of the violation of his privacy or may feel powerless to act.” The resolution allows exceptions, interestingly, for stadiums, arenas, jails, and prisons—locales of notable hyper-masculinity.¹⁸⁴

A critical reading of the Louisiana resolution suggests a fear that minors are not vigilant enough, and perhaps not powerful enough, to maintain the logic of the men's room. Thus, there must be physical barriers in place to perform the work typically accomplished through cultural norms—which can apparently still be accomplished at sporting events and in jails.

179. *Monahan*, 919 N.W.2d at *8 (Vaitheswaran, J., concurring).

180. *See id.* (citing *State v. Ulmer*, 719 N.W.2d 213 (Minn. Ct. App. 2006)).

181. *See supra* text accompanying notes 153-156.

182. H.R. Con. Res. 4, 2008 Reg. Sess. (La. 2008), as reprinted in Historical & Statutory Notes, LA. STAT. ANN. § 40:4 (2024). *See also Louisiana Lawmakers Approve Urinal "Privacy Dividers,"* WAFB9 (Apr. 24, 2008), <https://www.wafb.com/story/8184481/louisiana-lawmakers-approve-urinal-privacy-dividers/>.

183. Nicholas Persac, *House Resolution Recommends "Privacy Partitions" Between Urinals,* REVEILLE (Apr. 19, 2008), https://www.lsureville.com/house-resolution-recommends-privacy-partitions-between-urinals----4-18/article_b9c5884d-8e0e-5292-92be-0ab986a2d367.html.

184. H.R. Con. Res. 4, 2008 Reg. Sess., *supra* note 182.

*B. School Bathrooms: When Boys Enforce the
Logic of the Men's Room for Themselves*

Another lineage of cases shows the effect of unsupervised boys' bathrooms in the school setting. The amount of supervision that should occur in the confines of a school's boys' bathroom is an interesting question that is largely unexplored and, instead, is often subject to the usual gendered logic of the men's room. The first rule of this logic is that women do not belong. When women constitute a disproportionate majority of a school's staff, especially at younger ages when boys might be in the most need of supervision, significant problems occur that make their way to the courts. Boys have reason to be justly concerned about the school bathroom as a site of bullying and other antisocial behavior.¹⁸⁵

However, these specific cases reveal problems at all levels of education. For example, parents unsuccessfully sued the Hollister School District in California for negligence "in connection with a restroom incident during which five-year-old Jonnie's genitals were grabbed by a six-year-old kindergarten classmate" while Jonnie was using the urinal.¹⁸⁶ A child psychiatrist testified that Jonnie was "suffering from posttraumatic stress disorder . . . as a result of the incident in the bathroom during which G.P. touched Jonnie's penis" and that Jonnie would require five additional years of psychotherapy to deal with the trauma.¹⁸⁷

This incident is quite distinct, in both its nature and its consequences, from a case that occurred in a San Diego high school bathroom. While Matthew Burdette was not a victim of inappropriate touching in the bathroom, he was the victim of a social media post of a cell phone video recorded inside the bathroom.¹⁸⁸ Although Matthew surely suffered from mental distress, as five-year-old Jonnie did, Matthew tragically took his own life before he could seek therapy.

In the fall of 2013, Matthew Burdette was a freshman at University City High School in San Diego when another student recorded him in the

185. *See, e.g.*, Thomas R. Waldron, Do I Matter? Exploring Student Perceptions of Mattering to Inform Equitable Discipline Practices in a Traditional High School Setting 19 (May 2023) (Ed.D. dissertation, University of Massachusetts, Lowell) (ProQuest) (listing student concerns of "vaping, skipping, fighting" in the bathroom, in addition to the lack of urinals, as the primary problems facing that particular high school campus). *See also* Brown v. S.F., No. 2011-CA-001898-MR, 2013 WL 1697766, at *5 (Ky. Ct. App. Apr. 19, 2013) (male student physically assaulted by a bully while female teacher stood outside the "boys' bathroom door where she could see the stalls, but not the urinals, so as not to violate the boys' privacy").

186. *Roe v. Hollister Sch. Dist.*, No. H043658, 2019 WL 4686986, at *1, *3 (Cal. Ct. App. Sept. 26, 2019).

187. *Id.* at *5.

188. *See* Tony Perry, *Bathroom Video, Bullying Led to Teen's Suicide, Parents Say*, L.A. TIMES (July 14, 2014, 5:08 PM), <https://www.latimes.com/local/lanow/la-me-ln-bathroom-video-bullying-suicide-20140714-story.html>.

bathroom.¹⁸⁹ One Friday afternoon, Matthew's fourth-period teacher kicked him out of class for, according to Matthew, eating sunflower seeds.¹⁹⁰ With no particular place to go upon being removed from the classroom, Matthew and a friend, Erik, entered the boys' bathroom.¹⁹¹ It is unclear how Matthew met up with Erik between being kicked out of class and entering the bathroom.

The main door to the boys' restroom was always propped open in order to deter vandalism.¹⁹² Running along one wall of the bathroom were the sinks, and along an adjacent wall were eight urinals and two stalls.¹⁹³ Only the stall farthest from the front door had a door on it; the other stall was doorless.¹⁹⁴ Because of the configuration of the bathroom, no one at the sinks or the urinals could see inside the doorless stall.¹⁹⁵ Erik went into the stall with the door and Matthew went into the doorless stall.¹⁹⁶ Upon entering the stall, Matthew stood in front of the toilet and began making audible, orgasmic moans.¹⁹⁷ Erik described Matthew's behavior as "a joke," and testified that Matthew "was like that. Like, he would just mess around."¹⁹⁸

Unbeknownst to either Matthew or Erik, an eleventh-grade student, Marwan,¹⁹⁹ entered the bathroom in the middle of Matthew's "joke."²⁰⁰ Marwan's first instinct was to take out his smartphone and begin recording what he saw.²⁰¹ From a distance of, in one court's estimate, sixteen to twenty-five feet away from Matthew's stall, Marwan recorded a video that depicted the exterior of the side of the stall.²⁰² The most one could see in the ten-second video was Matthew's distinctive Adidas socks and shoes in the gap between the stall wall and the floor; one could also hear the moans.²⁰³ Neither Matthew nor Erik was ever aware that Marwan

189. *Id.*

190. Complaint at 3, *Burdette v. San Diego Unified Sch. Dist.*, No. 37-2014-00039812-CU-PO-CTL (Cal. Super. Ct. Nov. 19, 2014).

191. *Id.*

192. *In re M.H.*, 205 Cal. Rptr. 3d 1, 4 (Cal. Ct. App. 2016).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. The identity of Marwan is revealed in Matthew's parents' complaint against the school district. Complaint, *supra* note 190, at 2. In the criminal prosecution, he is referred to as M.H. since he was a minor. *See Id.* at 2.

200. *Id.* at 4.

201. *Id.*

202. *Id.*

203. *Id.*

entered the bathroom while they were in it.²⁰⁴ After leaving the bathroom, Marwan uploaded the video to Snapchat with the caption, “I think this dude is jacking off.”²⁰⁵ The apparent harassment from peers and classmates was too much for Matthew to bear.²⁰⁶ According to his parents’ complaint against the school district, “Matthew Burdette left a note, citing his inability to ‘handle school’ and having ‘no friends’ as reasons for his suicide.”²⁰⁷ Matthew Burdette stated he didn’t want to kill himself, but that he couldn’t return to school.²⁰⁸

Matthew’s tragic case shows how significant men’s rooms are for an adolescent’s social life and, consequently, an adolescent’s own sense of self. When Marwan took out his phone to film some anonymous student from outside a stall door, he did so to document what he viewed as a transgression of the logic of the men’s room—the overt sexualization of the space. The subsequent public social media posting meant that for Matthew, his classmates (especially his male classmates) would always be there to remind him of his sexualization, even if in jest, of the bathroom.

Thus, for Matthew, rather than the men’s bathroom being the potential “ground for political empowerment”—that is, a way to reinforce one’s own heteronormative masculinity—it became a space of “sexual experimentation.”²⁰⁹ As Preciado wrote, “Precisely because the bathrooms are normative scenarios of production for masculinity, they . . . function as a theatre of heterosexual anxiety.”²¹⁰ From this perspective, physical separation of the stalls from the urinals is also significant.

By concealing himself in a stall, therefore, Matthew located himself in the more feminine and, thus, more suspicious part of the men’s room. In making sexual noises and in standing, rather than sitting, he called attention to his non-normative (according to what was socially ingrained in the students) use of the space. The logic of the men’s room, at least in Marwan’s mind, could not tolerate this overt fallacy without calling it to public attention.

C. Trans Schoolboys: A Fundamental Challenge to Articulating the Logic of the Men’s Room

In turning to the most recent of men’s room cases involving minors, it

204. *Id.*

205. *Id.*

206. *Id.* at 5.

207. Complaint, *supra* note 190, at 5.

208. *Id.*

209. Preciado, *supra* note 61.

210. *Id.*

can be observed that numerous federal courts have rejected the idea that inclusive public bathroom policies violate the privacy rights of cisgender individuals. However, the Eleventh Circuit recently bucked that trend in its en banc reconsideration of *Adams v. School Board of St. John's County*.²¹¹ The supposed privacy rights for which the conservative forces argued in this case were ill-defined in the briefs and inarticulate at oral arguments. The only sense of privacy to which the federal judges gave credence was an individual right to visual privacy, which they determined was not at risk of infringement by trans-inclusive policies. When one reads the opinions in these cases, it often seems as though the two opposing sides were not meaningfully engaging with each other's arguments.

In rejecting the argument that inclusive bathroom policies violate privacy rights, the opinions included both descriptive and normative assertions. As an empirical matter, the courts explained that individuals are not forced to undress or to relieve themselves in front of others. As such, there is no forced privacy threat when trans men use the men's room. Moreover, to the extent that the anti-trans forces would redefine privacy to cover these situations, the courts have thus far been unimpressed with the results, referring to the attempts as too general and too abstract.

As Judge Mark Hornak concluded in one such case taking place at a school, conservative forces characterized the asserted right as a "fundamental societal interest in privacy and an essential 'zone of privacy' applicable in all cases beginning at the restroom door."²¹² During oral argument, Judge Hornak observed that all the restrooms at the public school in question had stalls with closing doors. "So what's the privacy risk?" he wondered.²¹³

The school district counsel's response was, "[T]he restroom itself is the zone of privacy."²¹⁴ Counsel contended that this was the case even if no one risked the unwitting exposure of their private parts in the room—"in

211. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022). For a summary of this outlier case, including the competing understandings of privacy, see Sarah Jana, *Transgender Students' Rights to the Restroom: Exploring the Eleventh Circuit's Divide in Adams v. School Board of St. Johns County*, U. CIN. L. REV. BLOG (Mar. 28, 2023), <https://uclawreview.org/2023/03/28/transgender-students-rights-to-the-restroom/>. The Supreme Court even more recently rejected a petition for certiorari that would have resolved this circuit split. See *Metro. Sch. Dist. v. A.C.*, No. 23-392, 2024 WL 156480 (U.S. Jan. 16, 2024). Most recently, a district judge applied rational basis review to uphold a policy banning a nine-year-old transgender girl from using the girls' bathroom at school based on the "governmental interests in privacy and safety." *D.H. v. Williamson Cnty. Bd. Educ.*, No. 3:22-cv-00570, 2024 WL 4046581, at *5 (M.D. Tenn. Sept. 4, 2024).

212. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 281 (W.D. Pa. 2017).

213. Transcript at 130, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (No. 16-1537).

214. *Id.* at 131.

our culture, . . . as understood for [as long] as we've had male and female restrooms, we don't have the concern of someone with different parts being in those facilities. Our understanding is when we walk into the female restroom, females are using it."²¹⁵ In this case, the school district's argument was explicitly a cultural argument for privacy; one based on their own heteronormative tradition and expectations.

The significance of urinals for boys is also evident in other recent school-based examples that involve the debate over trans-inclusive policies. One way that schools are responding to the demand for greater trans inclusivity is by updating their bathroom policies, as well as their bathroom design and architecture. In construction at Dover High School in New Hampshire, for example, the district omitted urinals from the boys' bathrooms.²¹⁶ However, certain students revealed their dissatisfaction with the new bathrooms in a particularly vocal way. Specifically, in February 2020, the high school held a facilitated workshop for the campus community in response to a racially insensitive incident that occurred in a history class.²¹⁷ At the conclusion of the workshop, students voted on the top three priorities for the school.²¹⁸ Racism came in second to bathroom culture.²¹⁹ As the author of a qualitative study on student belonging pointed out:

There [was] a group of white male students who specifically attended this workshop to draw attention to the fact that there [we]re no urinals in any of the bathrooms in the new building This group of male student voices pushed the bathroom issue to the forefront of discussion by repeatedly offering their opinion about this change.²²⁰

In an even more recent incident, also in a New Hampshire school district, a local school board reversed its bathroom policy in just over a week due to media coverage and public opposition. It occurred in February 2023, when the Milford School Board considered amending the existing bathroom policy, which reads, "Students shall have access to the

215. *Id.* at 142.

216. Brian Early, *Urinals in Schools May Become Thing of the Past*, FOSTER'S DAILY DEMOCRAT (Dec. 15, 2018, 3:32 PM), <https://www.fosters.com/story/news/education/2018/12/15/urinals-in-schools-may-become-thing-of-past/6635837007/>.

217. Waldron, *supra* note 185, at 17 ("This incident revolved around a U.S. History class where a pair of students were assigned to sing about the Ku Klux Klan to the tune of Jingle Bells."). Although Waldron uses a pseudonym for the school under study, it is easily identifiable as Dover High School, based on Waldron's revealed characteristics. See Sandra E. Garcia, *High Schoolers Sing K.K.K. Song in Class, and Teacher Gets Put on Leave*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/us/dover-high-school-kkk-video.html> (discussing incident referenced in Waldron's study).

218. Waldron, *supra* note 185, at 19.

219. *Id.*

220. *Id.* at 20.

restroom that corresponds to their gender identity consistently asserted at school.”²²¹ The proposal would have added a biologically-based definition of “sex” to the policy.²²² Additionally, it would have removed the existing restroom policy and replaced it with this language: “Group restrooms shall be maintained for the male and female sexes.”²²³ It appears, from the minutes of the school board meeting, that a majority of the citizens spoke against the proposed change, followed by several board members indicating that they too opposed the changes.²²⁴ Indeed, media coverage of the meeting reported, “[t]he overwhelming majority of people who spoke out Monday night were opposed to [the] proposal, telling board members it was born of hate.”²²⁵

Perhaps sensing that the sex-based language proposal would fail, a board member made a motion to withdraw the proposal and, in lieu, adopt a procedure “to limit the restroom and locker room use at the high school and the middle school to . . . the number of stalls available and prohibit urinal use and public changing areas.”²²⁶ The member who made the motion explained that his goal was to “eliminate the use of urinals that were not protected by a stall.”²²⁷ This motion passed by a vote of four-to-one.²²⁸ In protest of this changed policy, students staged a walkout.²²⁹ The subsequent media coverage focused on the so-called “urinal ban.”

The urinal ban, which was born of a conservative attempt to undo a trans-inclusive policy, lasted all of nine days. At the February 15, 2023, school board meeting, an eighth-grade student presented the board with “a petition signed by approximately half of the 8th-grade students requesting the re-installation of the urinals.”²³⁰ After additional students and community members expressed their unhappiness with the previous

221. *JBAB-R - Administrative Procedure Transgender and Gender Nonconforming Students*, MILFORD SCH. BD. (MILFORD, NH), §IV(D), <https://www.milfordk12.org/apps/pages/JBAB-R>.

222. *JBAB-R Gender-Related Student Policies*, MILFORD SCH. BD. (MILFORD, NH), § II, cl. 2, <https://www.milfordk12.org/ourpages/auto/2023/2/2/021217870849312748868/Proposed%20Policy%20JBAB.docx.pdf> (“‘Sex’ or ‘sexes’ refers to biologically male and female human beings.”).

223. *Id.* at § IV(D).

224. See Minutes from Meeting on Milford Sch. Bd. Budget (Milford, NH) 2-5 (Feb. 6, 2023), <https://4.files.edl.io/c64a/04/03/23/202746-301b31da-079f-4e3f-aa8c-b13ec9161c8c.pdf> [hereinafter Milford Sch. Bd. Minutes].

225. Damien Fisher, *Milford Trans Policy Fight Could Nix School Urinals*, NH J. (Feb. 6, 2023), <https://nhjournal.com/milford-trans-policy-fight-could-nix-school-urinals/>.

226. Milford Sch. Bd. Minutes, *supra* note 224, at 5.

227. *Id.* (Statement of Mr. Boudreault).

228. *Id.* at 6.

229. See Patrick Whittle, *New Hampshire Students Protest Urinal Ban in Gender Debate*, ASSOCIATED PRESS (Feb. 11, 2023, 7:01 PM), <https://apnews.com/article/education-sex-new-hampshire-state-government-concord-702ef27280b184d58db637b93cd5a3e9>.

230. Minutes from Special Meeting of Milford Sch. Bd. (Milford, NH) 1 (Feb. 15, 2023) <https://4.files.edl.io/baad/04/12/23/153118-428b88bb-16d8-4d75-9107-c89eba880628.pdf> [hereinafter Minutes from Special Meeting].

week's decision, the board unanimously adopted "a motion to reinstate the use of urinals throughout the school district."²³¹

Both the Dover School District—by not installing urinals in new bathrooms—and the Milford School District—by prohibiting use of existing urinals—were responding to the modern conservative privacy claim that violations were being committed by trans students. However, urinal elimination is not the only method that school districts have used to further this concern. Some districts have added partitions to existing facilities in an attempt to increase privacy. Even that effort, however, has generated divergent, almost absurd actions.

For example, voters in one Texas district approved a one hundred million dollar bond, the largest portion of which was designated for restroom upgrades.²³² In anticipation of the levy election, the school board president complained to one news outlet, "You've got bathrooms that you go into that have multiple urinals lined up with no partitions."²³³ A different approach was taken by an Ohio school district "to increase privacy for all students."²³⁴ Instead of installing partitions between each urinal, the district added partitions "to separate the sinks and stalls area—the area a transgender boy would use—from the area that contains a row of four urinals."²³⁵ The result was a restroom with a walled-off urinal area that contained four non-partitioned urinals.

In a case filed by an anti-LGBTQ hate group, the Pacific Justice Institute, a fifteen-year-old male student claimed that his privacy was violated while using the Sutherlin High School boys' room when a "girl, who identifie[d] as 'transgender' and goes by the name Tyler, entered the boys' restroom."²³⁶ According to the complaint, Tyler's presence in the boys' room caused the plaintiff "anxiety" and the plaintiff considered it "an intrusion on his privacy and personal dignity, especially given the

231. *Id.* at 3.

232. Robert Stein, *Amarillo ISD Eyes \$100M in Upgrades, 5-Cent Tax Hike*, AMARILLO GLOBE-NEWS (Aug. 13, 2017, 12:07 AM), <https://www.amarillo.com/story/news/local/2017/08/13/amarillo-isd-eyes-100m-upgrades-5-cent-tax-hike/13040688007/>.

233. *Id.*; see also *Parents Fired Up Over Bathroom Incident at TUSD School*, KOLD NEWS 13 (Mar. 27, 2014, 5:18 AM), <https://www.kold.com/story/25085673/parents-fired-up-over-bathroom-incident-at-tusd-school/> (in response to a ten-year-old student who claimed that a female walked into the boys' room while he was using a urinal, the school "temporarily addressed the issue by blocking off all the male urinals in the boys bathrooms, telling students to use the stalls").

234. Jeremy P. Kelley, *Kettering Schools Alters Bathrooms in Wake of Transgender Debate*, DAYTON DAILY NEWS (Jan. 12, 2017), <https://www.daytondailynews.com/news/local-education/kettering-schools-alters-bathrooms-wake-transgender-debate/vM7Wu3G9b3a3yrktB99kcM/>.

235. *Id.*

236. Complaint at 3, *T.B. v. Sutherlin Sch. Dist.*, No. 18CV20549 (Or. Cir. Ct. May 21, 2018) [hereinafter *T.B. Complaint*]. See generally *Anti-LGBTQ*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-lgbtq> (explaining its criteria for classifying anti-LGBTQ hate groups, which includes taking more extreme stances and actions than "[v]iewing LGBTQ people as unbiblical or simply opposing marriage equality").

unique way boys urinate—i.e., standing at a urinal in a state of partial undress with their penises exposed.”²³⁷ The plaintiff sought an injunction against the school’s policy of gender inclusivity.²³⁸ However, the plaintiff eventually dropped the suit because, according to counsel from the Pacific Justice Institute, “recent court decisions in similar cases haven’t gone [his] way, and the district had agreed to improve privacy in the school bathrooms, including providing walls around urinals and showers.”²³⁹

In these varied legal actions undertaken by school districts across the country, plaintiffs make clear attempts to assert supposed privacy claims in favor of “boys,” however they choose to define the term. Yet, how can these attempts reconcile with why, in the New Hampshire districts, the apparent majority of boys rejected their schools’ privacy measures?²⁴⁰ At the same time, how does one understand why privacy is enhanced in Texas by putting partitions *between* urinals, while in Ohio it is advanced by putting partitions *around* urinals?²⁴¹ The cause of these tensions and contradictions lies in the failure to appreciate privacy’s relationship with gender and the reinforcement of masculinity. Those who would eliminate urinals altogether would not be advancing a pure logic of privacy, but instead would be challenging the fundamental logic of heterosexual, heteronormative masculinity. Examining the case law shows how men’s rooms—and the urinals in particular—are especially important to heteronormative culture and impactful on boys, as boys are socialized and acculturated into that hetero-masculine logic.

CONCLUSION

An interdisciplinary group of scholars—architects, historians, and lawyers—has formed an organization called *Stalled!*, with the goal of developing “safe, sustainable and inclusive public restrooms.”²⁴² These scholars propose an interesting solution to the privacy problem, which is essentially to make public restrooms even more public. Their proposed design “dispenses with the wall that typically divides public space from private bathroom and instead treats the restroom as a well-defined, clearly

237. T.B. Complaint, *supra* note 236, at 3.

238. *Id.* at 6.

239. KTVZ News Team, *S. Oregon Mom, Son Drop Transgender Bathroom Lawsuit*, KTVZ (Aug. 9, 2018, 3:43 PM), <https://ktvz.com/news/2018/08/09/s-oregon-mom-son-drop-transgender-bathroom-lawsuit/>. The transgender student named in the complaint, Tyler, told his side of the story to the ACLU. See Tyler W., *I Was Targeted in a Lawsuit for Being Transgender and Using the Bathroom at My High School*, ACLU OR. (Aug. 9, 2018 1:45 PM), <https://www.aclu-or.org/en/news/i-was-targeted-lawsuit-being-transgender-and-using-bathroom-my-high-school>.

240. See Whittle, *supra* note 229.

241. See Stein, *supra* note 232; Kelley, *supra* note 234.

242. See *Stalled!*, <https://www.stalled.online/> (last visited Aug. 23, 2024).

marked but open precinct.”²⁴³ The proposal is interesting and the attempt to challenge the conservative appropriation of “privacy” head-on is admirable. However, it is unclear how such a proposal would fare in the face of the existing social investment in the gendering work done by the existing men’s and women’s bathrooms. If, as Preciado contends, “the men’s bathrooms are a fold of public space intensifying the eyes of visibility, where the standing position reaffirms public space as a masculine space,” then men would have to be willing to give up this one-hundred-year-old “ground for political empowerment” for this proposal.²⁴⁴

While this Article reveals that the law has been complicit in enforcing cultural expectations of gender in the men’s restroom—itsself a unique site of masculine expression—one should not be surprised to see the current trans rights struggle in bathrooms make its way to the courts. In the analyzed cases, minors are rewarded for their recognition of non-normative behavior but corrected when they fail to recognize socially appropriate male urinal performance. Minors’ complaints comprise the primary type of cases in which the law comes down to bear on men’s room interaction between private parties, and thus the only chance the legal system has to arbitrate the logic of the historical form of the men’s room. However, in the vast majority of trans rights cases, it is in fact *adults*, not students, who initiate the complaint to school officials.²⁴⁵ Thus, if the gendered logic of the men’s room is to continue, it will owe a good deal of its success to the legal system’s participation in the order of things.²⁴⁶ These recent cases are a reminder that formal law is

243. Joel Sanders & Susan Stryker, *Stalled: Gender-Neutral Public Bathrooms*, 115 S. ATL. Q. 779, 784 (2016), <https://doi.org/10.1215/00382876-3656191>. See also Joel Sanders & Susan Stryker, *Could the Restroom Become Public Space?*, METROPOLIS (Apr. 18, 2017), <https://metropolismag.com/viewpoints/could-restroom-become-public-space/> (explaining the proposal with visual depictions).

244. Preciado, *supra* note 61.

245. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1040-41 (7th Cir. 2017) (trans boy used high school bathroom for six months without incident until a teacher saw and reported him); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 598 (4th Cir. 2020) (“For seven weeks, Grimm used the boys restrooms at Gloucester County High School without incident. Despite that smooth transition, adults in the community caught wind of the arrangement and began to complain.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 276 n.10 (W.D. Pa. 2017) (three students—two trans boys and one trans girl—used bathrooms for three years without incident until parents became aware and complained); *C.C. v. Harrison Cnty. Bd. of Educ.*, 859 S.E.2d 762, 766 (W.V. 2021) (assistant principal harassed trans male student in boys bathroom when he “entered the restroom; demanded the student exit the stall, expose his genitalia, and use a urinal; and blocked the student’s exit from the restroom” and said to student, “You freak me out”).

246. See MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1994); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 119-35 (1999). Butler explains that “Foucault understands sexuality as saturated with power and offers a critical view of theories that lay claim to a sexuality before or after the law.” BUTLER, *supra*, at 119. In a sense, the law’s very engagement with the existing categories of male and female bathrooms exposes both its participation in a power structure that would treat those categories as natural, and its instatement of

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frequently employed for the maintenance of repressive cultural orders that fail to see themselves as such. Unpacking these seemingly confused concepts of gender and privacy, as this Article does, is essential to creating a liberation jurisprudence that would give no aid to these oppressive, extralegal conceptions.

“that dreaded binary of Same and Other that has plagued . . . the dialectic of sex.” *Id.* at 131.