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Why the “transgender” bathroom controversy should make us rethink sex-segregated public bathrooms

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ABSTRACT
This article draws a theoretical distinction between “transgender” as an identity, and “transgender” as a form of discrimination, in order to better understand the political stakes of recent and ongoing “bathroom bills” that restrict access to sex-segregated public restrooms to our “biological sex.” Some, but not all, transgender people encounter discrimination in sex-segregated bathrooms. And many people who do not self-identify as transgender are in fact harmed by this institutionalized social custom. This includes masculine-appearing cisgender women, feminine-appearing cisgender men, as well as all people who are directed to use female-designated bathrooms. I describe this far-reaching sexism as sex-identity discrimination. And because sex-segregated public restrooms, by their very nature, always prompt and enable this kind of discrimination, I argue that we should eliminate them, and use inclusive design to build no-gender public restrooms that meet our reasonable expectations for personal privacy and safety.

On June 24, 2007, Khadijah Farmer, her girlfriend, and a friend decided to stop by for a meal at The Caliente Cab, a restaurant and bar in New York City, after spending the day taking in the city’s annual Lesbian, Gay, Bisexual and Transgender (LGBT) Pride celebration. Farmer, an African American out-lesbian, excused herself from the table to use the restroom. As she approached the women’s restroom, a female-appearing person exiting it told her that she was entering the wrong bathroom. Farmer assured the person that she was in the right place. In the midst using a toilet in a locked stall, one of the restaurant’s male bouncers barged into the women’s restroom. He pounded his fist on the door of the stall occupied by Farmer, barking that there had been a report of a man in the women’s restroom. In recounting the sequence of events, she recalls seeing him through the small space in the doorframe. “That horrified me, and it made me feel extremely uncomfortable.” She told him that she was female, and in the right bathroom. She opened the door, and offered to show the bouncer her female-marked New York state identification card. But the bouncer refused to look at it. “His exact words were, ‘Your ID is neither here nor there.’” And then he ordered her to leave the premises immediately (Lee 2007).
The bouncer’s refusal to look at Farmer’s state identification card is testament to the tremendous discretionary power he had as an administrative agent. When he heard Farmer’s voice, he likely “knew” that Farmer was a woman, and that the report of a “man in the ladies’ bathroom” had been false. It seemed that the bouncer had already made up his mind to use his authority to override her self-statement. And now caught up in the momentum of “bouncing” her from the bar, he was also committed to not seeing, and so effectively overriding, what the state of New York had to say about her sex identity. Farmer decided to sue the Caliente Cab restaurant for wrongful discrimination on the basis of sex, gender expression, and sexual orientation. The Transgender Legal Defense Fund took up her case – a remarkable turn of events given that Farmer did not self-identify as transgender; nor did her accuser or the bouncer describe her as transgender. The details of the case appeared in The New York Times, but did not spark sustained public discussion about gender identity and public bathrooms.

A decade later, the salacious question of who belongs in which sex-segregated bathroom gripped national attention in a much more forceful and sustained way. And the terms of the debate have shifted to a pointed discussion about the accommodation of “transgender” individuals in sex-segregated public restrooms. In 2016, North Carolina passed a “Bathroom Bill,” which mandates that people use the sex-segregated restroom that matches their “biological sex” in public schools and agencies within the state of North Carolina. The law defines “biological sex” as the sex listed on a person’s birth certificate (General Assembly of North Carolina 2016). Similar legislation has been introduced in other states, but as of the time of this writing, North Carolina is the only state to pass such a law. Many progressive cities and localities have gender identity non-discrimination ordinances and guidelines which explicitly permit transgender individuals to use the sex-segregated bathroom that matches their gender identity. Other laws and ordinances require certain public buildings to accommodate transgender people by designating single-user bathrooms as gender-neutral or all-gender (Campaign 2017a, 2017b). In 2016, the Supreme Court agreed to hear a case involving a Virginia high school’s refusal to allow a transgender male student to use the boys’ bathroom. The Court changed course and sent the case to a lower court for adjudication after the Trump administration rescinded the Obama administration’s guidelines that Title IX’s ban on sex discrimination should be interpreted to include gender identity discrimination. Public bathrooms are ground zero in what some are calling a new culture war over transgender rights (Minter 2016).

Yet there are many misconceptions about what transgender means as an identity, and what transgender means as a source of discrimination. Some, but not all, transgender people encounter discrimination in sex-segregated bathrooms. And many people who do not self-identify as transgender are in fact harmed, to varying degrees, by this institutionalized social custom. This includes a range of people whose appearances deviate from prevailing gender norms of heteronormative femininity and masculinity. In newspaper accounts, Khadijah Farmer, described herself as a lesbian and “not the most feminine” (Lee 2008). Some gender non-conforming people identify as lesbian, gay, bisexual, asexual, or polyamorous, while others identify as heterosexual. When it comes to using public bathrooms, heteronormative gender standards also marginalize people whose bodies deviate from normative male embodiment, such as people who are unable to urinate at urinals for medical, anatomical, or social reasons. Sex-segregated bathrooms
also pose obstacles for caregivers of different sex children and adults in need of help using public bathrooms. And there is even an argument to be made that this form of sex-segregation harms everyone because it constricts our individual freedom to say who we are in relation to the categories of male and female, regardless of how we appear to others and who is in our care while we are in public.

I describe this far-reaching discrimination as sex-identity discrimination. And because sex-segregated public restrooms, by their very nature, always prompt and enable this harm, I argue that we should eliminate them and institutionalize no-gender public restrooms. As I develop this legal normative argument, I explain why the liberal approach of assimilating transgender people into sex-segregated bathrooms fails to remediate sex-identity discrimination. I also show why policies that seek to accommodate transgender people in single-user bathrooms that are built in addition to, and apart from sex-segregated bathrooms, also fail to fully address sex-identity discrimination. The transgender bathroom controversy can also shine light on the ways in which sex-segregated restrooms disadvantage women in relationship to men. It turns out that the universe of people harmed by sex-segregated public bathrooms is much larger than the term “transgender” would suggest. In the final section, I turn to inclusive design to consider some innovative ways for businesses, schools, and government to rethink and redesign public restrooms that more effectively and efficiently achieve our reasonable privacy and safety expectations that do not require sex-segregation.

Although my focus is on feminist, gender, and transgender political theories, my argument has implications that speak to a broader political science audience. I want to push feminist political theory to conceptualize “transgender” discrimination as discrimination on the basis of gender variance in the most expansive and inclusive sense imaginable. This capacious conception of gender-based discrimination has implications for empirical political scientists who study public opinion, political framing, social movements, and coalition building. Who are transgender people, and what do they have in common with other marginalized sex-related social groups such as cisgender (non-transgender) women, lesbians and gay men, and intersex people? Left-leaning scholars and activists are more likely to be sympathetic to my call for no-gender bathrooms. But I also wish to engage those on the right who oppose such reform on moral grounds that are rooted in conservative views about gender roles. I concede that my arguments are not likely to change such attitudes, so I focus on establishing a basic level of toleration. Equal access to public restrooms is a fundamental right that predicates democratic participation of any kind. No-gender public restroom design can help make such toleration tolerable.

What is transgender?

Transgender is a relatively new term that emerged in the 1990s to supplant the terms “transsexual” and “transvestite,” as the civil rights movement for transgender rights gained momentum. Today, it is used as an umbrella term to encompass a wide range of marginalized gender identities, such as people who self-identify as the opposite sex they were designated at birth, as well as those who self-identify as both male and female, and those who self-identify as neither male nor female. To connote the panoply of identities under this umbrella, some people use the abbreviation “trans.” There are also many differences among the people who are yoked together beneath this canopy.
Some individuals use hormones and or surgeries to express their gender identities, while other people forego such medical interventions – either because of personal choice or because they cannot gain access to such choices. Trans identities also envelop traditional forms of sexism, so that those perceived to have transitioned from female to male (FTM) may experience male privileges, and those perceived to have transitioned from male to female (MTF) may experience female disadvantages. Julia Serano describes this phenomenon as a form of trans misogyny (Serano 2009). These privileges and disadvantages are further affected by intersecting social identities such as race, sexual orientation, age, economic class, disability and even geographical location.

To understand how transgender discrimination manifests in public bathrooms, we need to differentiate between transgender as a first-person identity and transgender as third-person perception. Surveys that aim to count the population of transgender people in the US are generally based on respondents’ first-person identities – whether the person self-identifies as transgender. Likewise, surveys aiming to assess the degree and frequency of transgender discrimination typically rely on self-reporting from respondents who see themselves as transgender or at least accept the label. By conceptual contrast, transgender discrimination is largely based on the perception that someone is transgender. To capture this conceptual distinction, most gender identity laws use the language of “actual or perceived” transgender identity. It is possible to be perceived as transgender and experience discrimination based on that perception, even though you may not self-identify as transgender. In this way, surveys undercount the number of people affected by transgender discrimination. This is especially true of gender-based bathroom discrimination, which is typically based on quick visual assessments of whether someone is feminine enough to belong in a women’s restroom.

Gender theorists can help sharpen the meaning of the sex-related conceptual vocabulary that survey writers may take for granted. What does gender mean, and how does the prefix “trans” change how we understand the concept of gender? Toby Beauchamp and Benjamin D’Harlingue examine how transgender identities have been treated in introductory women’s and gender studies courses, and find that those of us who teach these courses often fail to use the concept of transgender to radically question the assumption that “woman” implies particular body parts.

Rather than simply arguing for greater inclusion of transgender subjects under the sign of woman or man, we suggest that careful positioning of transgender bodies necessitates an extensive theoretical reframing of how we design women’s studies and curriculum, and how we teach and conceptualize gendered bodies more broadly. (Beauchamp and D’Harlingue 2012, 26)

To what extent is such radical reconceptualization possible, and what does such a call to action mean for the social and legal custom of sex-segregated public bathrooms?

I see the radical potential of transgender experience as showing us that sex, and not just gender, is mutable. Jemima Repo traces the history of how the term “gender” was invoked by sexologists in the 1950s and 1960s, and then was picked up by feminists in the 1970s to challenge biological determinism (Repo 2016). Judith Butler introduced the term “sex/gender” in the late 1980s to show that sex and gender are mutually constructed by seemingly discrete discursive institutions such as law, medicine, and popular culture. With this move, Butler rejected the liberal feminist proposition that sex is an immutable
characteristic that we are born with and cannot change. She posits that instead of having sex and gender identities, each of us does or performs sex/gender in our actions – how we dress, speak, and otherwise behave. The verb “perform” implies individual agency, but that is somewhat misleading. For Butler goes on to argue that the role of repetition in generating and sustaining social norms creates such momentum in our day-to-day lives that we often experience sex/gender as something a priori to human experience, something natural, or God-given that exists outside of history and beyond our personal control (Butler 2004).

Transgender experience, in all of its variation, tells us that sex is personally changeable – but only within and against existing binary sex categories. While some see postmodern gender theory as trying to destabilize or even abolish gender and sex categories, what one really finds in these arguments is a description of how it is that these categories have changed over time and become so ingrained. For instance, Jack Halberstam points out that the binary sex categories of male and female persist even as people express femininity and masculinity in myriad ways. He writes that the very flexibility and elasticity of the terms “man” and “woman” ensures their durability. To test this proposition, look around any public space and notice how few present formulaic versions of gender and yet how few are unreadable or totally ambiguous. (Halberstam 1998, 27)

Nancy Hirschmann theorizes the “readability” aspect of gender in relation to both female masculinity and transgender identity. “All of these moves, even as they challenge our categories, simultaneously remind us of what the category means; dressing ‘butch’ would not have the intended effect if we did not already have a concept of what ‘men’ dressed like” (Hirschmann 2013, 656).

The matter of intentionality as it relates to transgender identities is complicated, and nearly wholly irrelevant to the gender policing that transpires in sex-segregated public restrooms. It is true that many transgender people seek to transition into the opposite sex and be recognized by others as belonging to that sex category. But other transgender people find a home in between maleness and femaleness and identify as both or neither. And what, after all, does it mean to intend or choose one’s gender identity in a world with stultifying gender expectations. In Butler’s words,

The act of self-reporting and the act of self-observation take place in relation to a certain audience, with a certain audience as the imagined recipient, before a certain audience for whom a verbal and visual picture of selfhood is produced. (Butler 2001, 629)

In the public restroom setting, it is only third-person perception that matters. Does someone appear to be “out of place” in the women’s or men’s room?

Postmodern gender theory helps us understand the ways in which the terms sex and gender have been institutionalized historically. Zein Murib adds to this work by combing through archival documents of transgender activism from 1990 to 1999 to see how particular activists and advocacy organizations deployed the term “transgender” as an identity and a concept. In the activist realm, population counts matter, as do the ways in which the minority group is presented to lawmakers and the public at large. Murib finds, “What began as a broad identity category to capture many different iterations of gender identity came to be represented in politics as a subset of sexual orientation in order to maximize political opportunities” (Murib 2015, 13). Fitting transgender identity into a civil rights narrative meant
articulating “transgender as a discrete and unified minority category with a membership that would be legible to lawmakers.” The legible transgender subject that emerged “would be one conditioned by race, class, and HIV-status to project the image of a white, heterosexual, middle-class transgender subject” (Murib 2015, 11).

According to these criteria, Farmer is not legible. Her story reminds us of the stories that have been left behind, or more accurately, excised from the contemporary legal campaign for “transgender” rights. Racial perception plays a major part in how our sex identities are perceived in public. We rarely notice someone’s sex without also noticing and interpreting her or his race. When Farmer was accused of being a man in a women’s restroom, she was more pointedly accused of being a black man in a women’s restroom. Even more pointedly, she was accused of being a young dark-skinned black man who was deemed threatening and out of place in a female-designated public space. Sex-identity discrimination is about intersectional sexual affinity, about where and with whom we belong in the racialized social scheme of sex. In her book, Visible Identities, philosopher Alcoff observes, “What I can see for myself is what is real; all else that vies for the status of the real must be inferred from that which can be seen [and] race and gender operate as our penultimate visible identities” (2005, 6).

Being seen as a brown or black man in US society differs from being seen as a white man in this society. Navigating public space as a “butch lesbian” differs from navigating public space as a black transgender man. Christian Lovehall, a black transgender male artist and trans activist, shares his experience of being racially profiled and harassed as a young black man post-sex identity transition.

Shortly after the killing of Trayvon Martin, I was approached by two white male police officers after crossing a street late one night in South Philly.

They stopped me for jay-walking. Moments later, they were pushing my small frame down to the concrete, handcuffing me, and throwing me into the back of their police wagon – which smelled of urine, feces, blood and vomit – where they made me wait, wait, and wait. Eventually they gave me two tickets and one citation totaling $360 in fines; one for jay-walking, one for not having an updated address on my ID, and one for disorderly conduct. I realized that night that I was finally “passing” as a black man. I also came to realize that the duties of the police to “protect and serve” did not necessarily apply to someone like me – young, black and male. (Lovehall 2015)

By stark contrast, many white transgender men are surprised to find themselves with newfound “white male” privileges that include being taken more seriously in their work environments and in public more generally.6

**Transgender discrimination as sex-identity discrimination**

If transgender identities do not necessarily trigger transgender discrimination, then what does trigger this kind of harassment and exclusion? Paisley Currah’s theorization of “dissonance” is helpful here. By dissonance Currah means the perception by others that someone’s body exceeds conventional expectations of dimorphic sex.

The presence of someone whose gender identity or gender expression is not traditionally associated with the sex assigned to them at birth can bring people to [the] very brink of cognition, and beyond it, in any setting customarily segregated by gender: bathrooms and locker rooms, homeless shelters, and correctional facilities, among others. (Currah 2008, 331)
Dissonance is another way of describing gender variance in the most expansive sense possible, to the point where it may not be clear in the observer’s mind how to categorize the person being seen.

Dissonance may coincide with discrimination, but it does not always or necessarily lead to discrimination. For discrimination to take place there must also be disapproval, and invidious treatment based on such disapproval. What transpired at the Caliente Cab restaurant was not just dissonance, but the invidious decision-making of the person who reported Farmer as “a man in the women’s restroom,” and the bouncer who cast aside her state identification card and bounced her from the premises. I use the term sex-identity discrimination to refer to harassment and exclusion based upon the judgment that a person’s sex-identity appearance is wrong. I use the term “sex identity” instead of the term “gender identity” because I think it more precisely captures the essence of this kind of discrimination, which is about who belongs in the sex categories of male and female.

Sex-based disadvantage occurs when gender stereotypes are used to limit what a person can and cannot do because she is a woman or he is a man. All people who experience sex-identity discrimination also experience gender stereotyping. Before being reported and then ejected, Farmer’s masculine appearance was noticed. Halberstam notes the asymmetry of this gender policing. In women’s public bathrooms, “it is not only the MTF [male-to-female] but all gender-ambiguous females who are scrutinized, whereas in the men’s room, biological men are rarely deemed out of place” (Halberstam 1998, 26). Hence not everyone who experiences gender stereotyping experiences sex-identity discrimination. Feminine-appearing women do not typically face harassment and ejection from women’s restrooms, but they suffer the sex-based disadvantage of having to spend more time waiting for “their” bathroom in crowded public venues because women’s public restrooms are based upon a male model, a point I return to later in this article.

When administrative agents are given the authority to interpret and enforce sex-classification policies, they are authorized to engage in sex-identity discrimination. This authority includes gender judgment about feminine and masculine norms and categorical judgments about who does and does not belong in the sex categories of male and female. And because most agents are given no guidance as to the criteria for enforcing such policies, they must fall back on their own assumptions and ideas not just about who is intelligible as male and female, but their normative judgments about how far others should be permitted to stretch the elastic bands of gender. Many agents do not wield their power in discriminatory ways, but the problem with sex-classification policies is that they may do so if they choose. Moreover, some people may not experience such decision-making as a choice at all, given the tidal force of prevailing gender norms.

The consequences of being denied equal access to public restrooms are serious. Being forced to “hold” one’s urine can cause urinary tract infections and other health problems. Our need for public bathrooms is a brute fact of life that we are loath to talk about openly as a culture because of our repressive social ban on discussing our bodily functions in public. In a 2008 survey of self-identified transgender people living in Washington, DC, 70% of respondents said they had been “denied access, verbally harassed, or physically assaulted in public restrooms” (Herman 2013). It would be interesting and helpful to see the breakdown of these survey results according to FTM and MTF transgender people, as well as according to whether the transgender respondent is gender-conforming or gender non-conforming in appearance. Missing from these results, too, are masculine-
appearing women and feminine-appearing men. Because urination and defecation are life sustaining bodily functions people without consistent access to public restrooms are prevented from being in public for extended periods of time. Local ordinances prohibiting urination and defecation on common public property such as parks, streets and subway stations mean that we must have access to restrooms in the places where we work, the schools we attend and the businesses we patronize. The fact that most public restrooms are segregated according to binary sex is a further restriction on our capacity to be and participate in the public sphere, but one that many of us accept as a necessary and harmless form of sex differentiation.

Privacy and safety

Both liberals and conservatives defend sex-segregated restrooms on grounds that they are necessary for achieving privacy and safety in public spaces. Personal privacy and safety are legitimate policy goals, but they require contextual definition and qualification. We have a reasonable expectation of some degree of physical seclusion from others when using public toilets, showers, and changing rooms, but this privacy is not absolute and is very different from the kind of privacy we might have in our home. At the heart of the privacy and safety concern is the real issue of violence, and sexual violence against girls and women, in particular. There is an assumption that without sex-segregated public restrooms, women and girls would be even more vulnerable than they are now to sexual assault. Barney Frank, the former liberal Democratic Senator from Massachusetts, frankly stated, “Transgendered people want a law that mandates a person with a penis be allowed to shower with women” (Currah 2008, 333). The allusion to heterosexual rape is clear in this statement that Frank made to the press in 1999.

Frank’s comment is grounded in the false stereotype that transgender women are really men who pretend to be women so that they can enter women’s restrooms to commit sexual assault. This is the “man in a dress” stereotype of transgender women. There have been incidents of men entering women’s restrooms to commit violence against girls and women. But there have not been any reported incidents whereby a transgender woman has sexually assaulted a girl or another woman in a women’s bathroom. On the contrary, there have been many incidents of transgender women being assaulted by cisgender men in public restrooms (Brinker and Maza 2014). Yet the myth persists, and continues to fuel lawmaking. Defending North Carolina’s “Bathroom Bill,” state senator David Brock said, “You know, $42,000 is not going to cover the medical expenses when a pervert walks into a bathroom and my little girls are there.” (Currah 2016) Currah describes this as the “new transgender panic” that is fueling the current “bathroom bills” such as the one passed into law in North Carolina in 2016 (Currah 2016).

The assumption that sex-segregated public bathrooms protect women from physical assault is flawed in two ways. First, sex-segregated restrooms only serve as a barrier to physical assault if one’s attacker is of the opposite sex. Secondly, if someone is already willing to break laws to commit criminal assault, it is likely that the person will break another law to enter a women’s restroom with little or no hesitation. Public restroom sex-segregation is not the best, or even a rational, way to address the very real and important matter of anti-female violence. Even worse, the misconception of women’s restrooms
as places of refuge may lull many women into a false and dangerous sense of personal safety when they enter those rooms.

In thinking about this issue, we should also think about the ways in which race, sex, and class stereotypes infuse our desire for privacy and safety. When we seek privacy we often have in mind particular people we do not wish to be seen by, or be in close proximity to. When we seek safety, we have in mind particular people and situations that make us feel threatened and in danger (Bickford 2000; Kohn 2004). The race–sex profiling of black men in the public sphere does not stop at the doors of public restrooms. Black men continue to be stereotyped as sexual predators who specifically seek out white middle and upper class women and children as their victims. These stereotypes are deeply ingrained in this country’s history. We should look for better ways to achieve a modicum of privacy and safety that do not involve race–sex identity policing in and around public bathrooms.

**Assimilation and accommodation**

Many people believe that assimilating and accommodating transgender people into sex-segregated public restrooms is the best way to solve race–sex identity policing. Mainstream transgender civil rights activists and organizations have pushed for using sex- and gender identity non-discrimination laws to assimilate and accommodate transgender individuals into sex-segregated public restrooms. The Caliente Cab Company adopted this definition of equality in its out-of-court settlement with Farmer. The bar and restaurant chain agreed to add gender identity and expression to its corporate non-discrimination policy, institute a gender-neutral dress code for its employees, and change its employee handbook to state that all patrons and employees of the restaurant have the right to use “the bathroom facilities consistent with their gender identity and expression” (Lee 2008). Bouncers, managers, wait staff, and patrons are no longer authorized to say who may and may not use the sex-segregated restrooms in the restaurant.

The managerial decision not to enforce sex-segregation seems like a step in the right direction. But there are some problems with this approach. First, the policy does not prevent customers from questioning and harassing other customers in and outside of the sex-segregated restrooms. The “men” and “women” signs on restroom doors effectively deputize anyone to make a citizen’s arrest. The fact that the citizen’s arrest would not trigger official ejection from the restroom once the alleged violation was reported to a restaurant employee is cold comfort to a person who has already been humiliated by the accusation. Moreover, the patchwork of different policies at other restaurants and public accommodations across the city, the state, and the country, means that people such as Farmer never know when or where they might be harassed and or ejected from the restrooms they need in order to be in public.

The assimilationist approach was used to settle a 2011 case in which a ninth-grade white female-to-male transgender student brought a Title IX sex discrimination federal lawsuit against the Arcadia Unified School District in California. The student alleged that school district officials had engaged in illegal sex discrimination when they denied his request to use the male restroom and locker facilities at his school. As with the Caliente Cab Company, the case was settled out of court in the student’s favor. As part of the legal settlement, the Departments of Justice and Education each wrote letters stating that discrimination on the basis of “gender identity” constitutes sex discrimination in violation
of Title IX. Officials from both departments were quick to caution that the content of the letters should not be construed as either agency’s official policy (Geidner 2013). In 2016, the Obama administration issued guidelines to this effect, which the Trump administration rescinded in early 2017 (Department of Justice and Department of Education 2016).

Another approach to addressing the problem of transgender discrimination caused by sex-segregated restrooms has been accommodation in the form of a third restroom apart from sex-segregated bathrooms. This has meant adding another purpose to existing single-user bathrooms that were built to meet Americans with Disability Act (ADA) requirements, or including such third restrooms in newly constructed public sphere buildings. Some of these third bathrooms have also been designated as “family restrooms” that allow parents to accompany and assist their children. In 2011, the city of Philadelphia, which has been commended for its LGBT inclusive laws and policies, passed a law that requires all newly constructed city-owned buildings to include single-user gender-neutral bathrooms in addition to traditional sex-segregated restrooms. The announcement of this “trans-inclusive” legislation received high praise from mainstream and progressive media (NBC10 and Wire Reports 2013). Evanston, Illinois recently adopted an ordinance that requires all single-user public accommodation restrooms to be designated “all gender” with appropriate signage to so indicate (Moran 2015).

This approach is based upon a disability rights model of “reasonable accommodation.” The ADA requires restrooms in workplaces, public accommodations, and schools to be accessible to “individuals with disabilities,” where disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.” When it is “technically infeasible” for a public accommodation to physically alter its restrooms, the ADA allows that “unisex (or single-user) toilet rooms” are sufficient. The ADA does not require disabled people to use the single-user restroom, or a modified stall within a sex-segregated restroom (“Guidance on the 2010 ADA Standards for Accessible Design: Volume 2” 2016). Similarly, Philadelphia’s ordinance does not require transgender individuals use the single-user restroom.

The problem with this approach is that it fails to recognize sex-segregation as the ultimate source of sex-identity discrimination. Even worse, the creation of a third restroom option that is set physically apart from the men and women’s restrooms fortifies the principle of sex-segregation as normative. And in doing so, it Sanctions and reinforces the prejudice of many people who view transgender people as deviant and too “aesthetically shocking” (Kirkland, 2006, 108) to share a public restroom with.9 As disability rights activists make plain, the concept of “accommodation” is a relative term that enables those of us in the “normal” category to forget the many ways in which policies and the built environment are made to accommodate us (Arneil 2009). The Republican Utah bill seeking to administratively enforce restroom sex-segregation in public schools contained a “special accommodation” for transgender students to be permitted to use a physically separate gender-neutral bathroom. And North Carolina governor, James McCrory, said in a television interview, “We didn’t pass any laws eliminating unisex bathrooms in our schools or in our private sector” (TEGNA 2016). Liberal accommodation is conducive to conservative ends.
Documenting sex

The lack of stable criteria for enforcing sex-segregation has not deterred politicians from claiming that they have found such criteria. Utah became the first state to have a bill introduced in its state assembly calling for the enforcement of sex-segregated restrooms in public schools. In 2014, a Republican state representative introduced a bill that would legally require public school students to use the sex-segregated restroom that corresponds to their “gender.” The bill defined gender as “the male or female phenotype” of a person that is recorded on a birth certificate or stated in a letter from a physician “based on a physical inspection of the person’s genitalia.” The bill did not deny the existence of “transgender” students, but relegated them to use “reasonable alternate-bathroom accommodations” if so requested by such a student. The bill defined “transgender” students as people whose “gender identity” does not match their “gender” (Davidson 2014). The bill ignited national media attention, but was never passed into law. A Florida state representative introduced a similar bill in 2015. As of this writing, North Carolina is the only state to have passed such a bill into law (The Editorial Board 2016).

North Carolina’s Bathroom Bill defines “legal sex” as the sex recorded on our birth certificates. The enforcement of HB2 would require that everyone carry their birth certificate with them and be ready to show it to a bathroom bouncer stationed outside of all of the public restrooms covered by the law. Farmer effectively encountered such a “bathroom bouncer” at the Caliente Cab Company bar and restaurant. The bouncer’s security duties included other tasks, but he was poised to step into the role of a bathroom sentinel at a moment’s notice. In that role, he was not interested in her “biological sex” or her female-marked state identification card. Her New York state identification card was “neither here nor there.”

But even if North Carolina could place a bathroom bouncer at the entrance of all of the bathrooms in its public buildings, and give their bouncers specific instructions about how to go about checking the sex-marked birth certificates of each person seeking bathroom access, there is another enforceability issue. North Carolina lawmakers failed to take into account the fact that it, and every other state except for Tennessee, allows transgender people to alter the sex marker on their birth certificate. So, ironically the law does not even accomplish the transgender exclusion its proponents intended. Here again we see the ramifications of eliding the concept of transgender with transgender identity. But the symbolism of HB2 is so powerful that it need not be practically enforced to get its point across: the perpetuation of the invidious stereotype that transgender people are men who dress up as women in order to gain access to women’s restrooms so that they can sexually assault girls and women.

North Carolina’s “Bathroom Bill” is irrational, draconian, and patently discriminatory. But the demarcation of separate restrooms for males and females follows the same misguided logic: that sex is binary, original, natural, stable over time, and visually obvious based upon whether you appear right now to have appeared at birth to have a penis or a vagina. This is an eerie illustration of Butler’s famous statement that “gender is a kind of imitation for which there is no original” (Butler 2004). We see conservative politicians rifling through government-issued bureaucratic paperwork to find something that can never be found: the final truth about where we belong in the social scheme of binary politics, groups, and identities.
sex. For that information, we must defer to the present-day self-statements of those with whom we share public space, including and especially public restrooms.¹⁰

Additional harms

People who appear to be “transgender” are not the only ones harmed by sex-segregated public bathrooms. Women, both transgender and cisgender, who consistently perform normative femininities can evade the kind of sex-identity discrimination that Farmer experienced. But they cannot escape the sex-based disadvantage that all sex-segregated bathrooms generate. Feminists have treated public restrooms as a political issue for a very long time. The first feminist efforts related to public toilets focused on pushing for the basic provision of women’s restrooms in public so that women could be in public as workers, students, and consumers (Kogan 2010). The political nature of restroom provision is clear. A very effective way of excluding someone from being in public, let alone participating in it on equal terms, is to deny them access to public toilets. “The lack of toilet provision for women, as many feminist writers have long argued, was no oversight but part of systematic restriction of women’s access to the city of man” (Greed 2010, 121).

The second feminist project concerning restrooms focused on the problem of substantive inequality between men and women’s restrooms. Substantive equality refers to equal outcomes, and is sometimes referred to by political theorists as “egalitarianism.” Procedural equality, by contrast, refers to formal statements of equal opportunity. One could argue that our current system of sex-segregated restrooms satisfies the principle of formal equality, as both males and females are given a restroom. However, there are two reasons why one could argue that this formally equal arrangement is not substantively equal.

The first concerns the condition of sex-segregated restrooms in relation to each other. This occurs when female-designated restrooms are less well maintained than male-designated restrooms, and vice versa, as in for instance lack of soap, toilet paper, running water, or cleanliness. One could further argue that substantive sex-based equality requires the provision of tampons and menstrual pads not just for female-appearing women, but also for transgender men and gender queer people who menstruate. The prohibition against entering the opposite-sex bathroom makes monitoring these matters very difficult. You must be brazen enough to enter both restrooms, and do so repeatedly, as custodial supplies and cleanliness fluctuate over time. Focusing on this kind of substantive equality is futile from a pragmatic point of view, or one has to have a very good monitoring system in place.

The second form of substantive sex-based disadvantage concerns the amount of time women spend waiting for and using public restrooms in comparison to men. This is largely because of urinals in men’s restrooms, the mechanics of peeing standing up versus sitting down, and the time needed to tend to menstruation. This time-based disadvantage can be visually verified by paying attention to the long lines of women waiting to use the restrooms in a number of public venues, while men zip in and out of their restroom aided by the time-saving technology of urinals. In addition to requiring more time than men in using a restroom, women have often been forced to spend more time than men because they have had to travel greater distances than men to use ad hoc female-designated restrooms in workplaces where there are very few women, or just one woman.
Female pioneers in male-dominated professions recount having to walk to a different floor or even building to use a women’s restroom. The Supreme Court building did not have a women’s restroom until 1994 when Sandra Day O’Conner joined the bench.

At first glance, the issue of time-based inequality seems to disadvantage only women. But urinals also disadvantage men who cannot or do not wish to use them. Some transgender men can urinate standing up at a urinal, and some cannot. Some cisgender men cannot pee standing up for health reasons, or because of a physical disability. Older men with enlarged prostates that make urination difficult may forego urinals for toilets to have some privacy. Men of all ages that have certain illnesses may be told by their medical providers to urinate sitting down. Approximately 40% of cisgender men cannot use urinals due to anxiety, or what we might colloquially refer to as being “pee shy.” Many women also experience this anxiety and cannot urinate while others are present even when using a toilet stall (Case 2010). Men with small penises may have trouble urinating standing up. And generally speaking, some men do not wish to pee standing up at urinals because they are self-conscious about the size or appearance of their penises and fear being seen and judged by other men.

In the 1990s feminists pushed for so-called “potty parity” laws that aimed to make separate sex-segregated restrooms substantively equal on the dimension of time. These legal arguments pushed beyond a strictly formal or de jure understanding of equal opportunity, asserting that it is not enough to merely provide women a place to urinate and defecate in the public sphere; some attention must also be paid to sex-specific characteristics that result in gross time disparities in using these facilities. Time disparity was the basis of several “potty parity” court cases during the 1990s. Proposed legislative solutions to this disparity included equalizing the number of toilet stalls in women’s restrooms as measured against both the number of toilet stalls and urinals in men’s restrooms, or some other “egalitarian” ratio. In some states and municipalities, “potty parity” measures resulted in the provision of more restrooms for women in particular public sphere venues (Case 2010).

But these additional restrooms have not eliminated sex-based time disparity in using public restrooms. And while these efforts may have increased public awareness concerning this form of sexism, they have not changed how the vast majority of public restrooms are designed and built. And even when time disparity is taken into account, the metrics fluctuate according to the sex-identity breakdown of how particular venues are used. For example, sex-specific bathroom needs vary in a stadium depending on the event.

As with many other aspects of gender parity, the real problem is that the original male standard has not been challenged in a serious and concerted way. In restrooms, this would mean challenging the male urinal, and using the toilet stall as the standard place for everyone to tend to their private bodily functions while in public.

Sex-segregated public restrooms also pose logistical problems for caregivers who are in the public sphere with children and adults who need assistance using toilets. Mothers who are in the public sphere with their young sons must violate sex-segregation bathroom policies by either taking them into the women’s restroom or taking them into the men’s room. Fathers face a similar problem when they are with their young daughters in public. Teachers and daycare workers who chaperone young children on fieldtrips must also deal with this dilemma, as do the paid and unpaid caretakers of elderly and/or disabled adults. On the surface, this seems to be a problem that equally disadvantages both women and men. However, in practice, the stereotype of male sexual predation places additional burdens on
male caregivers. How would members of the public react to a male teacher taking a group of kindergarten girls into a men’s room at the local zoo or children’s museum? The limited feminist project of trying to make sex-segregated public restrooms separate and equal has been, and continues to be, an elusive ideal that can never be fully and finally achieved.

Inclusive policy design

We can and should build no-gender public bathrooms that meet our reasonable expectations for privacy and safety. Halberstam alludes to such a solution, but does not go into practical detail. He writes, “Either we need open-access bathrooms or multigendered bathrooms, or we need wider parameters for gender identification” (Halberstam 1998, 24). The idea of inclusive design, sometimes referred to as universal design, may help us do so. Inclusive design takes the needs of those who are most disadvantaged as the impetus to design products that make everyone better off (Coleman, Keates, and Lebbon 2003). Current sex-segregated restrooms could be converted into no-gender bathrooms without too much expense. An important aspect of such renovation to consider is removing urinals and building additional private stalls in their place. Another renovation to consider is to extend the walls of individual stalls all the way, or closer, to the floor as a way to increase the level of privacy for users. If a large organization with multiple restrooms is looking for a less radical reform, they might consider converting some or most of their restrooms to no-gender, while maintaining a traditional sex-segregated restroom option for those who wish to use it.

When it comes to new construction, an even better no-gender restroom model is to design and build a single bathroom area for all to use. A model that is being used by some restaurants in cities such as Philadelphia and New York is a series of all-gender single-user stalls that are enclosed by floor-to-ceiling partitions. These private stalls are built around a common area where sinks and mirrors are available for everyone, regardless of sex identity or gender expression. Transgender and cisgender parents, teachers, babysitters, and other caretakers would not have to worry about entering the “wrong” bathroom to visually keep track of or physically assist those under their care. I describe this as an even “better” option because it optimizes space, which is often an important factor in purchasing or leasing commercial space. When restaurant owners were interviewed about their decision to create one restroom space, they cited spatial concerns. The harm of sex-identity discrimination was not the driving force behind their innovation, but rather a beneficial by-product of a smart business decision (Malone 2004).

Cost-effectiveness is a key motivator, but restaurants and other public accommodations should also explicitly state their intention to use such design to fight sex-identity discrimination and sex-based disadvantage. I see no-gender public bathrooms as the architectural manifestation of Butler’s notion of “livability.” Pressing beyond legal remedies, Butler asks, what are the conditions that make it possible for us to see ourselves and others as subjects of love, desire, pain, and ultimately grief (Butler 2004)? We have the right not to be watched by others as we are in the process of using public toilets, but we also have the right to be seen as worthy enough to access public toilets on equal terms with others, regardless of our gendered appearance. A conservative who objects to gender-less bathrooms has the right to retain his or her ideas about gender roles, as well as a right to a certain degree of privacy and safety, but he or she does not have the right to deny
another person equal access to public restrooms based upon that person’s gendered appearance.

A major benefit of using inclusive design to imagine and build public restrooms differently than we do currently is that it has the potential win over conservatives who morally object to “transgender” bathroom inclusion on the grounds of traditional gender roles. If the concern is about being seen by people of the “opposite” sex in public bathrooms, then floor to ceiling partitions can solve that problem. This has the additional benefit of re-focusing our attention on the basic human need that all of us share in common, regardless of gender presentation, and that is consistent access to toilets when we are in public. Conservatives may still disapprove of non-normative gender appearance. This is the aversive remainder that Wendy Brown describes as the byproduct of liberal toleration. “Despite its pacific demeanor, tolerance is an internally unharmonious term, blending together goodness, capaciousness, and conciliation with discomfort, judgment and aversion.” Tolerance cannot resolve the tension among these dispositions and sentiments. Instead, it offers a “strategy for coping” (Brown 2009, 25).

**Conclusion**

Farmer’s story both shows the limits and the radical potential of antidiscrimination law to spur meaningful change. With a clearer understanding of how the third-person concept of transgender differs from the first-person identity of transgender, we can locate and excavate the true source of sex-identity discrimination and sex-based disadvantage: sex-segregation itself. I hope that my analysis will help to nudge feminist political theorists to harness sex discrimination laws and policies to a more expansive feminist project that makes room for the tolerance of gender variance in the widest sense imaginable. That project ought to promote gender parity between men and women, as well as the individual freedom to personally change the predicates of gender parity: the categories of male and female. This civil right is especially important to those of us whose gendered appearances may not be socially accepted by others in places such as the restrooms we must use in the schools we attend, the places where we work, and the businesses we frequent. The absence of binary sex signs on restroom doors removes the mechanism that both prompted and made it possible for another customer to report Farmer as “a man in the women’s restroom.” At the same time, cisgender and transgender people who are gender-conforming are not made worse off by the redesign, and in fact may benefit from it.

**Notes**

2. At the time of this writing, Bathroom Bills similar to North Carolina’s have been introduced in seven other states: Alabama, Kentucky, Missouri, South Carolina, Virginia, Washington, and Minnesota (Dart 2017).
3. See, for example, Haider-Markel et al. (2017); Miller et al. (2017); Sellers (2012).
4. Prior to the 1990s, the terms “transsexual” (referring to someone who’s had sex reassignment surgery and/or hormonal therapy) and “transvestite” (referring to someone who wears clothing associated with the opposite sex) were common (Murib 2015, 2).

5. See, for example, Spade (2011).


7. Individuals without homes are “comprehensively unfree,” meaning that they literally have no place to be (Feldman 2006; Waldron 2006).

8. See, for example, Lambda Legal (n.d.).

9. Kirkland (2006) argues that the real animus against transgender people is that they are aesthetically shocking.

10. Laurie Shrage makes this argument about trusting our present-day gender self-statements, but does not argue for no-gender public bathrooms (Shrage 2012).

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References


