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Jill D. Weinberg

TRANSGENDER BATHROOM USAGE: A PRIVILEGING OF BIOLOGY AND PHYSICAL DIFFERENCE IN THE LAW

BY JILL D. WEINBERG*

When Steven began teaching, he was diagnosed with Gender Identity Disorder[1] (GID) and began transitioning from a male to a female. This process lasted from August 2000 until June 2003. During this time, Steven legally changed her name to Rebecca, presented as a female at work, and changed the sex designation on her driver's license to reflect her female identity. She had a number of cosmetic surgeries and ultimately, had sex reassignment surgery. This transformation never bothered the college until fall 2001 when students complained that a man was using the women's restroom. The college indicated that students expressed concerns regarding their privacy and/or safety and that the college had "a compelling interest in protecting privacy rights of other individuals . . . by maintaining the sex-segregation of the restrooms."[2] The college informed Rebecca that she could not use the women's restroom until she provided proof that she had sex reassignment surgery.

Rebecca's story is not uncommon for transgender employees. One reason for such discomfort over transgender bathroom usage is the result of a legal and social landscape that has adopted a "separate spheres" ideology,[3] in which the construction of sex segregated bathrooms and preoccupation with anatomical difference remain unchallenged. By this

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*PhD (student), Northwestern University; M.A., The University of Chicago; J.D., Seattle University School of Law.

[1] The medical diagnosis refers to an individual who has a strong and persistent belief of having been born into the wrong body and a desire to live or be treated as the other sex. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION § 302.9 (4th ed. 1994).

[2] Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ. 021531 PHXSRB, 2006 WL 820955 (D. Ariz. June 3, 2004) (Defendant's Motion for Summary Judgment).

[3] *See* Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture & Gender*, 14 MICH. J. GENDER & L. 1, 5-6 (2007).

account, to permit a transgender person – one who crosses the gender binary – to choose a particular restroom would challenge one of the few structures that permits sexual distinction and confront the deference to biology when gender should govern. In other words, the uneasiness associated with transgender bathroom usage highlights a legal resistance to the gender usage and by extension, a gender-driven jurisprudence.

This essay compares transgender bathroom usage to the varying histories of segregation, accommodation, and integration. In this theoretical project, I argue that transgender bathroom usage highlights the resistance to gender jurisprudence and the law's continued (and undue) emphasis on biology. Even though the comparison between race and gender bathroom segregation is not a novel exploration,[4] the comparison between disability and gender has not been made.

The closer examination of this issue looks at the efficacy of current antidiscrimination legislation that would provide "employment protections" for transgender individuals. Currently, both houses of Congress have introduced a transgender-inclusive Employment Non-Discrimination Act (ENDA),[5] yet the bills do not include provisions regarding bathroom usage, nor do they impose a burden on employers to make bathroom accommodations for transgender employees. In effect, such legislation permits employers to impose restrictions on bathroom usage and to discriminate against transgender employees without the risk of liability.

The broader analysis revisits "potty parity" and what we can learn from the biological justification for segregating bathrooms. I argue that although biological division of

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[4] *See, e.g.*, Richard A. Wassertrom, *Race, Sex and Preferential Treatment: An Approach to the Topics*, *in* CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 552-53 (Robert E. Goodwin & Philip Pettit eds., 2d ed. Blackwell Publ'g 2006) (1997) ("[I]t is wrong, clearly racist, to have racially separate bathrooms. . . . [But there is] no common conception that it is wrong, clearly sexist, to have sexually segregated ones.").

[5] The Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); The Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009).

bathrooms has been somewhat fluid,[6] the current construction of bathroom segregation privileges certain groups of legally protected minorities (race and disability) over sex, gender, and gender identity. Not only is sex segregation inconsistent with a legal landscape that advocates for integration and accommodation, but it also reinforces the unwillingness to adopt gender jurisprudence.

I. THE EFFICACY OF ENDA AND THE CREATION OF THE "BATHROOM EXCUSE"

An analysis of transgender bathroom usage through the lens of employment discrimination cases shows that many workplace controversies involve an employer imposing unreasonable demands on a transgender. The cases suggest that employers impose unreasonable medical documentation requirements so as to preclude a fair number of transgender individuals from using the bathroom of their choosing. Although the passage of a gender identity inclusive ENDA would mark a significant victory for transgender employees, there remains a number of concerns Congress has not addressed. Specifically, Congress should provide appropriate restroom accommodations for those who are transitioning or have transitioned (whether or not one had gender reassignment surgery).

The exclusion of bathroom provisions in ENDA permits employers to defer to bathroom accommodation as a legitimate non-discriminatory reason to terminate an employee. For example, in *Johnson v. Fresh Mark*, the Sixth Circuit reasoned that the employer's basis for firing Selena Johnson, a male-to-female transgender, was appropriate because of complaints that a male was using the women's restroom.[7] The Tenth Circuit in *Etsitty v. Utah Transit Authority* concluded that a male-to-female transsexual bus driver's termination was not based on gender identity, but because of the driver's expressed intent to use the women's public restrooms, which could result

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[6] *See infra* note 9.

[7] 98 Fed. App'x. 461 (6th Cir. 2004).

in liability.[8] Cases such as *Johnson* and *Etsitty* suggest that an antidiscrimination law that does not capture all the dimensions of discriminatory conduct truly undermines the legislation altogether.

By allowing employers to use a "bathroom excuse," so to speak, the law creates several medical obstacles to permitting a person to use a particular restroom. First, an individual who wishes to have gender reassignment surgery must undergo a lengthy process of hormone therapy and presentation as the opposite gender *before* a doctor considers performing the surgery.[9] Consequently, such individuals cannot provide medical documentation during this interim period and therefore, are forced to present as one gender, but use the bathroom of the opposite gender.[10] Second, the cost and health risks associated with gender reassignment surgery may cause transgender individuals to refrain from the procedure. To make surgery the gate-keeping function for particular bathroom usage forces those who are transgendered, but cannot afford or choose not to have the surgery to use the bathroom of the gender opposite from the gender in which he or she is publically presenting him or herself.

These unfair and unreasonable outcomes can be ameliorated by including language in ENDA that permits transgender individuals to choose the bathroom of their transitioning gender. This may prove to be the single best way for giving the adequate legal coverage for transgender employees, acknowledging that bathroom usage – like uniform

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[8] 502 F.3d 1215 (10th Cir. 2007).

[9] The one-year period of gender presentation is called the Real-Life Experience (RLE). This typically succeeds the two years of counseling and hormone therapy and precedes gender reassignment surgery. THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION, at 17 (2001), *available at* http://wpath.org/Documents2/socv6.pdf.

[10] Interestingly, this peculiar scenario would necessarily create more workplace disruption and tension between the transgender employee, his co-workers, and customers. A transgender person who transitioned, but did not have the gender reassignment surgery would be using a bathroom of one gender, but presenting as the other gender. For example, a male-to-female transgender would be forced to use the men's room even though she physically presents and considers herself to be a female.

or other transition provisions – should be protected under ENDA. Although some employers may object to the prospect of either (1) having co-workers or customer complaints over sharing a bathroom with a transgender or (2) constructing separate bathroom facilities for a single employee, these concerns pale to the notion that an individual can continue to be legitimately fired for simply using a bathroom of the gender to which they identify. With respect to the former, the discomfort of others has been a dispositive issue in other contexts, so to make transgender bathroom usage an issue is legally inconsistent. To that end, it is unlikely that whites were comfortable sharing a restroom with an African-American the day after Jim Crow laws were repealed. With respect to the latter, even though ENDA does not mandate the construction of separate facilities to accommodate transgender employees, it does beg the question of why the law mandates bathroom accommodation for disabled people, but not transgender individuals.

II. TRANSGENDER BATHROOM USAGE AND A LESSON IN ~~GENDER~~ BIOLOGICAL JURISPRUDENCE

An examination of bathroom segregation on the basis of race, disability, and transgender status suggests there is an inconsistent application of biology used to a structural division of restrooms. Specifically, the exclusion of bathroom usage highlights a pervasive problem with jurisprudence, namely, the undue reliance of anatomy in policy-making, a concern scholars have expressed considerably over the law's preoccupation with sex over gender.

Jim Crow laws are the often-cited example for the unjustifiable separation of public facilities. The evisceration of the Civil Rights Act of 1875 prompted states to enact racial segregation legislation to subordinate and separate African-Americans from public space such as restrooms. When *de jure* segregation was no longer constitutional[11] and facilities were forced to become integrated, there was no public protestation

[11] Brown v. Board of Education, 347 U.S. 483 (1954).

over the integration of bathroom facilities between blacks and whites.

Although religious rights organizations have mocked the comparison between Jim Crow laws to transgender bathroom usage,[12] legal commentators have thought otherwise.[13] Patricia Williams, for example, compared the relegation of a university transgender student to a unisex bathroom to race discrimination.[14] She argued that instead of giving the student the right to choose – a mantra we associate in many circumstances involving our bodies (e.g., abortion, birth control, or right to die) – the student had "to invert, to stretch, meaning rather than oneself . . . [and] became a mere floating signifier."[15] In essence, the relegation of a transgender individual to a bathroom is akin to forcing blacks to a separate restroom facility.

Furthermore, although society may view race and gender differences as different cases, the rhetoric of anatomy and power have been employed for both groups. To this end, racial segregation of bathrooms was justified (bizarrely, but apparently with a straight face) to prevent "contamination."[16] The biological justifications ultimately manifested in the form of a social and legal system of racial oppression during slavery through the Jim Crow era.[17]

The adoption of racial *de jure* segregation created a legal system in which race became the symbol of subordination and disparity, while other forms of biological difference were viewed as epiphenomenal. This becomes apparent through Elizabeth Abel's pivotal work in which an analysis of the visual imagery

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[12] *See, e.g.*, *Transgender 'Peeing in Peace' Paper Equates Male-Female Restrooms with Jim Crow Laws*, AMERICANS FOR TRUTH ABOUT HOMOSEXUALITY, April 22, 2008, *http://*americansfortruth.com/news/peeing-in-peace-paper-equates-male-female-restrooms-with-jim-crow-laws.html.

[13] *See, e.g.*, Thomas C. Grey, *Cover Blindness*, 88 CAL. L. REV. 65, 68 (2000) ("Why were the racially segregated bathrooms of Jim Crow so clearly invidious, while bathrooms segregated by sex equally clearly are not?").

[14] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 122-24 (Harvard Univ. Press 1991).

[15] *Id.* at 123.

[16] *E.g.*, Rachel D. Godsil, *Race Nuisance, The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 514 (2006).

[17] Wassertrom, *supra* note 4, at 553.

and propaganda during the Jim Crow era featured bathrooms and drinking fountains and highlighted race, not gender, difference.[18] She suggested "race not sex is the dyad that founds the symbolic register."[19] This assertion not only highlights the fact that gender identification becomes eclipsed by racial identification in the context of segregated bathroom facilities, but also the fact that segregation and differentiation is malleable and legally constructed.

The most obvious panacea is to create statutory authority in which emphases of accommodation and equality are moved to the forefront of lawmaking. This framework has been employed in the context of disability antidiscrimination protections. In 1990, the Americans with Disabilities Act (ADA) passed mandating the retrofitting of public facilities, including bathrooms.[20] Under the ADA, both newly constructed and currently existing bathrooms needed to be made available for persons with disabilities. The law suggests that facility accommodations are necessary to remove the "architectural barriers" for the disabled.[21]

Prior to 1990, transgender individuals diagnosed with GID could and did bring antidiscrimination lawsuits for employers who failed to accommodate them. Ultimately, this legal theory was no longer possible when Congress expressly excluded transgender as a protected illness under the ADA.[22] The preclusion of transgender individuals from ADA coverage proved to have practical and theoretical consequences. As a practical matter, several transgender litigants were successful with their disability discrimination claims.[23] As a theoretical matter, a transgender seeking bathroom accommodations is identical to a disabled person and less onerous architecturally.

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[18] Elizabeth Abel, *Bathroom Doors and Drinking Fountains*, 25 CRITICAL INQUIRY 435 (2000).

[19] *Id.* at 436.

[20] 42 U.S.C. § 12101 (1990).

[21] *See* 42 U.S.C. § 12182(b)(2)(A)(iv) (1990).

[22] *See* 42 U.S.C. § 12211(b)(1) (1990) (stating that "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders" are not covered disabilities).

[23] *See, e.g.*, Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446, at *3 (D.D.C. June 12, 1985).

Transgender individuals do not wish to create a separate restroom facility for them, but rather they are hoping to use a facility based on the gender to which they identify.

The legal regulation of restrooms emerged from an ideology in which women who occupied public spaces needed spatial safeguards. As women became more engaged in the public sphere, particularly in the paid labor force, the justification for sex-segregated bathrooms was premised on women as "weaker" bodies who needed safe haven.[24] Even if the "weaker bodies" argument had any merit, there still remains the logistical question whether males and females require separate facilities, particularly when bathrooms already have architectural divisions within the space itself (most notably, bathroom stalls). Indirectly, the ideological context for separate facilities was only necessary to protect the "separate spheres" social order in which males and females occupied different spheres and performed different functions.[25]

The normative problem of using a sex-laden framework is that defining males and females based on biology will marginalize some and privilege others such that it reinforces gender norms.[26] In this case, transgender individuals either face discrimination for not comporting with gender norms or are compelled to produce medical documentation that shows an official physical marker of moving from one gender group for the other. Furthermore, this intrinsic division is based on biological categories that are not necessarily visible[27] and assumes that sex and gender are synonymous and interchangeable.

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[24] *See* Kogan, *supra* note 3, at 27.

[25] *Id.* at 34.

[26] *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Lind J. Nicholson ed., Routledge Classics 2006) (1990) (discussing how society constructs the norms associated with gender and how this affects a person's behavior within these constructions).

[27] *See* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 40 (1995) ("Biology and genitals, so it seems, operate as false proxies for the real rules of both gender attribution and sexual identity in our culture.").

III. CONCLUSION

At first blush, the issue of transgender bathroom usage may be a seemingly isolated, unique, and extreme case. In the context of antidiscrimination law, the absence of a statutory solution to this concern, although professionally and socially damaging for transgender employees, does not affect a significant number of people to make this problem appear to be pervasive. However, the transgender restroom experience exposes fundamental problems in gender jurisprudence.

Attention to transgender rights highlights broader issues about how American jurisprudence places precedence on race and disability in the context of bathroom integration and accommodation, yet continues to use anatomy to justify imposition of sex segregated bathroom facilities. This framework leads to a "privileging of biology and physical difference." Such legal and social developments become further complicated with a transgender whose identity challenges a rigid gender binary through the transition from one gender to the other. In addition, the transgender experience aids legal theorists in trying to navigate the problem of identity construction in the law and its construction in antidiscrimination and civil rights laws.[28] The transgender case prompts legal theorists and lawmakers to consider deconstructing our current legal construction of difference to fuel the ongoing progress of equality.

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[28] *See* Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 31-32 (2003).