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## Sex-Separation in Public Restrooms: Law, Architecture, and Gender

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SEX-SEPARATION IN PUBLIC RESTROOMS:  
LAW, ARCHITECTURE, AND GENDER

*Terry S. Kogan\**

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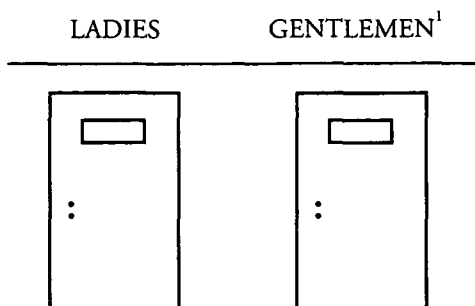
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### INTRODUCTION

This Article challenges the common assumption that legally mandated sex-separation of public restrooms is a benign recognition of natural anatomical differences between men and women. Relying on legal history, gender history, and architectural theory, my central thesis is that, contrary to common intuitions, there was nothing benign or gender neutral about the social and historical origins of the first laws adopted at the end of the nineteenth century that mandated such separation.

It all seems so obvious. Given human biological needs, public buildings require public restrooms. Given two sexes and concerns for privacy and safety, the law needs to mandate that public buildings provide separate facilities for men and women and, in turn, that persons of one sex be prohibited from entering the restroom designated for the other.<sup>2</sup>

1. See *infra* notes 28–29 and accompanying text.

2. See e.g., MASS. GEN. LAWS ANN. ch. 149, § 133 (1999), which provides that:

In every industrial establishment and railroad establishment there shall be provided suitable, adequate and convenient water closets and washing facilities, separate for each sex and plainly so designated, of such number, in such location, and so constructed, lighted, ventilated, arranged and maintained as may be determined by such reasonable rules and regulations as the department may adopt. No person shall be allowed to use a closet or privy provided for the use of persons of the opposite sex.

MASS. GEN. LAWS ANN. ch. 149, § 180 provides: “Whoever violates a provision of this chapter for which no specific penalty is provided shall be punished by a fine of not more than five hundred dollars.”

In addition to regulating workplace toilet facilities, many states and municipalities have adopted statutes and ordinances requiring sex-separate toilet facilities in other public locations. See, e.g., MASS. GEN. LAWS ANN. ch. 111, § 33 (2004) (“In every city . . . when, in the opinion of the board of health, public necessity requires it,

It all seems so obvious . . . unless:

- you happen to be a wheelchair-user who needs the assistance of your opposite-sex partner in a public restroom facility.<sup>3</sup>
- you happen to be a transsexual person dressed in accord with your gender identity who is prohibited from using the workplace restroom designated for the sex with which you identify.<sup>4</sup>
- you happen to be a woman at a rock concert standing in a long line outside the restroom marked “Women,” while no line exists outside the door marked “Men.”<sup>5</sup>
- you happen to be a parent tending an opposite-sex, five-year-old child when you or your child suddenly needs a public restroom.<sup>6</sup>

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there shall be established and maintained by the town in some convenient places, at or near the business centre, one or more sanitary stations, with separate water closets for the use of each sex.”).

Various federal regulations also require sex-separated toilet facilities. *See, e.g.*, OSHA Gen. Envtl. Controls, 29 C. F. R. § 1910.141(c) (1) (i) (2000).

3. Certain states have adopted exceptions to toilet sex-separation laws for persons with disabilities. *See, e.g.*, CAL. STREETS & HIGHWAYS CODE § 223.5 (2005):
  - (a) The department shall develop a policy for the use of restroom facilities at safety roadside rests by disabled travelers at those locations on state highways which have separate restroom facilities for disabled persons. The policy shall permit a disabled person to be accompanied in the restroom by his or her attendant, who may be a person of the opposite sex, to assist the disabled person.
  - (b) The policy shall provide for the design and placement of special signs at the safety roadside rests clearly indicating that it is permissible for a person of the opposite sex to accompany a disabled person into the restroom to assist the disabled person.
4. *See, e.g.*, Johnson v. Fresh Mark, 337 F.Supp.2d 996 (2003), *aff'd* 2004 WL 1166553 (6th Cir. 2004) (Court upholds, *inter alia*, employer’s refusal to allow male-to-female transsexual to use women’s restroom); *see also* Goins v. West Group, 635 N.W.2d 717 (Minn. 2001) (Court affirms summary judgment that dismissed transgender former employee’s claim that employer’s designating workplace restrooms based on biological gender violates the state’s Human Rights Act).
5. In 1990, the City of Houston prosecuted a woman who used the men’s restroom at a rock concert because the line outside the women’s restroom was too long. *Jury Acquits Women Who Used Men’s Room; Ladies Line was Too Long, Defense Argued*, WASHINGTON POST, Nov. 4, 1990, at A24. Faced with a possible \$200 fine, the woman was acquitted by a jury after eight minutes of deliberation. The jury forewoman noted that “[t]here was no proof or evidence that she entered in a manner calculated to cause a disturbance.” *Id.*
6. *See, e.g.*, Ann Landers, SALT LAKE TRIBUNE, July 16, 1997:

- you happen to be an intersexed child, born with ambiguous genitals and/or reproductive organs, whose parents have decided (despite social pressure and pressure from the medical community) not to subject their child to surgery until the child can participate in that decision.<sup>7</sup>

Each example illustrates how the seemingly “natural” requirement that public restrooms be separated by sex inflicts real-life hardship on individuals responding to basic bodily functions.

This Article demonstrates that the first laws mandating sex-separation of workplace toilet facilities at the end of the nineteenth century were rooted in the “separate spheres” ideology of the early century, an ideology that considered a woman’s proper place to be in the home, tending the hearth fire, and rearing children. By the end of the century, the separate spheres ideology had been filtered through the science of the realist movement, the public health concerns of the sanitarian movement, and the vision of modesty embraced by late Victorian society. Nonetheless, the legal requirement that public restrooms be sex-separated owes its origins to the early nineteenth century ideology that advocated a cult of true womanhood, a vision of the pure, virtuous woman protected within the walls of her domestic haven.

Dear Ann: My husband took our 4-year-old daughter on a field trip with the school. Everything was fine until she had to go to the bathroom. He didn’t know whether he should let her go into the women’s bathroom alone or if he should take her into the men’s bathroom with him.

He eventually asked one of the other mothers to take her but it made him uneasy. Now he is reluctant to take our daughter anywhere in public for an extended period of time. Any suggestions would be appreciated. Stockton, Calif.

Dear Stock: Some innovative places have “family rest rooms” to accommodate situations like yours. If one is not nearby and the child is 5 years of age or older, the father should take her to the ladies’ room while he waits outside the door. If she is under 5, he can take her in the men’s room with him.

7. The term “intersexuality” encompasses individuals born with sex chromosomes, external genitalia, or an internal reproductive system that are not considered “standard” for either male or female. *See generally* SHARON E. PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* (2003). Recently, medical authorities and political activists representing intersexed individuals have advocated delaying corrective surgery, if any, until an intersexed child has the emotional maturity to participate in that decision, unless surgery is necessary for an infant’s physical health. *Id.* at 60–86. *See also* Milton Diamond, *Sexual Identity and Sexual Orientation in Children With Traumatized or Ambiguous Genitalia*, 34 J. SEX RES. 199, 208 (1997).

Part I reviews the developing field of critical architectural theory. For several decades, feminist legal scholars have explored how law is complicit in perpetuating the subordination of women in American culture.<sup>8</sup> More recently, architectural theorists and historians have also begun examining how the configuration of physical spaces that people inhabit similarly contributes to gendered hierarchies of male over female.<sup>9</sup> I borrow from critical architectural theory to reveal the social understandings attributed by late Victorian society to the sex-separated public toilet facility.

Part II traces the history of the first state laws that mandated sex-separation in public toilet facilities. These laws, which applied to workplace restrooms, were adopted in the late nineteenth century as extensions to earlier labor legislation aimed at protecting women and children.<sup>10</sup>

Part III then places this legislative history in the context of nineteenth century social and gender history. The fast-paced growth of technology, industry and transportation in nineteenth century America was accompanied by a fundamental disruption of traditional family life. Though the separate spheres ideology of the early century envisioned the home as the proper place for women, the demands of an expanding economy saw a steady stream of women leave the home to enter the workplace.

The mid-century rise of a new intellectual movement called realism profoundly impacted how society responded to this disruption of family life. Realism placed a new emphasis on science, encouraging a focus on the physical, tangible aspects of daily life for explanations of the world. In particular, a new emphasis was placed on the human body and the physical spaces that the body inhabited. Among the "scientific" conclusions reached by realist scientists was that women are inherently weaker than men in both physical stamina and intellectual ability. This "discovery" was used to bolster the faltering separate spheres ideology's view that women belonged in the home and not in the workplace.<sup>11</sup>

In the spirit of realism, legislators began to regulate public architectural spaces as a means of fostering social values. Accepting the inherent weakness of women and their need for protection, Victorian society be-

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8. See, e.g., MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992).

9. See *infra* notes 14–19.

10. The first law requiring that workplace toilet facilities be separated by sex was adopted in Massachusetts in 1887. See 1887 MASS. ACTS 669, *infra* note 51. Within two months, New York adopted a similar law requiring that manufacturing establishments provide separate water closets for men and women. See 1887 N.Y. LAWS 557.

11. See discussion *infra* Part III.B.1.

gan creating separate spaces in public facilities reserved exclusively for women. Public libraries set up separate women's reading rooms. A "ladies' car" reserved exclusively for women and their traveling companions became a common feature on American railroads. Separate salons for women were created in hotels, department stores, train stations, and photography studios. Even banks set up separate entrances and windows for women.<sup>12</sup>

Part IV applies this analysis to the workplace "water closet," as toilet facilities were then known, and to the newly-adopted laws mandating sex-separation of this space. I argue that the legal requirement that workplace toilet facilities be separated by sex was a last-ditch effort by Victorian regulators to bolster the moribund separate spheres ideology and to recapture the lost world of the early nineteenth century. If the realities of the late nineteenth century made it impracticable to force women back into the home, then the law would mandate that spaces in the dangerous public realm be set aside to serve as protective havens for women, as surrogate "homes away from home." In the workplace, this was accomplished through laws mandating the creation of sex-separated toilet facilities, washrooms, and dressing rooms.

## I. THE GENDER OF ARCHITECTURE, THE ARCHITECTURE OF GENDER

### *A. Critical Architectural Theory and Gender*

Recent cultural theory has uncovered how aspects of human identity that seem natural, aspects including sexuality, gender, race, and class, are in fact socially constructed.<sup>13</sup> The discourse of architecture—construction—is borrowed to describe this fundamental tenet of post-modern identity theory.<sup>14</sup> Only recently has architectural theory itself

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12. See discussion *infra* Part III.B.3.

13. See, e.g., *AFTER IDENTITY: A READER IN LAW AND CULTURE* (Dan Danielsen & Karen Engle eds., 1995).

14. See, e.g., Joel Sanders, *Introduction*, in *STUD: ARCHITECTURES OF MASCULINITY* 11, 12 (Joel Sanders ed., 1996):

In one of modern intellectual history's stranger alliances, contemporary cultural theorists have recently borrowed from architectural discourse the language of "construction" to *denaturalize* sexual identity. Arguing that identity is "constructed" rather than natural, "mapped" rather than given, these theorists draw on the popular perception of architecture as manmade precisely in order to de-essentialize gender. But in the process of erecting an argument about gender, cultural theory draws on a view of



begun to focus on how the physical spaces that a society builds and occupies contribute to the ways in which human identity is socially constructed.<sup>15</sup>

Architectural space has been taken for granted, considered to be a neutral, empty stage on which the real plot of the human drama unfolds. Social relations matter; the spaces in which these relations take place are often ignored as mere backdrops of little significance.<sup>16</sup> Critical architectural theory attempts to remedy this oversight. Theorists including Leslie Kanés Weisman,<sup>17</sup> Aaron Betsky,<sup>18</sup> Daphne Spain,<sup>19</sup> and Joel Sanders<sup>20</sup> have argued that the spatial arrangements of our buildings and communities reflect and reinforce our understandings of sex and gender, and help to define and police the sexual hierarchies that exist in our culture.<sup>21</sup>

For example, critical architectural theorists have explored how certain architectural dichotomies have historically been associated with the masculine and the feminine: the unadorned and simple as masculine, the adorned and ornamented as feminine; the public and outside as masculine (and heterosexual), the private and inside as feminine (and

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architecture—architecture as human artifice—that the discipline itself, has, throughout its long history, sought either implicitly to camouflage or emphatically to deny.

15. See, e.g., LESLIE KANÉS WEISMAN, *DISCRIMINATION BY DESIGN—A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT 2* (1992):

Space, like language, is socially constructed; and like the syntax of language, the spatial arrangements of our buildings and communities reflect and reinforce the nature of gender, race, and class relations in society. The uses of both language and space contribute to the power of some groups over others and the maintenance of human inequality.

16. SANDERS, ED., *supra* note 14, at 12.

17. WEISMAN, *supra* note 15.

18. AARON BETSKY, *QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE* (1997); AARON BETSKY, *BUILDING SEX: MEN, WOMEN, AND THE CONSTRUCTION OF SEXUALITY* (1995).

19. DAPHNE SPAIN, *GENDERED SPACES* (1992).

20. See, SANDERS, ED., *supra* note 14.

21. Aaron Betsky has suggested that “architecture in its broadest sense is how we construct our sexualities in the real world and thus define ourselves in a given place and time.” BETSKY, *BUILDING SEX*, *supra* note 18, at xvii. Similarly, Joel Sanders explains:

Based on the assumption that gender roles are not innate biological predispositions, but rather are historically and culturally produced, [critical architectural] theorists look at how architecture functions as a cultural practice that actively shapes masculinity and femininity. . . . By allocating and segregating human activities in space, architects create the places where individuals daily enact socially prescribed gender roles.

homosexual); hard surfaces as masculine, soft surfaces as feminine.<sup>22</sup> Men have been associated with planning and building spaces, women with decorating and making those spaces livable.<sup>23</sup> Men have been associated with urban spaces, characterized by oppressive and inhuman skyscrapers and straight streets; women have been associated with rambling suburban spaces.<sup>24</sup>

### B. *The Public Restroom as Architectural Space*

Public restrooms are an omnipresent feature of our lives, identified by the ubiquitous labels "Men" and "Women."<sup>25</sup> Presenting the appearance of absolute equality, each architectural space is entered through a door of identical size, shape, and material, with identical handles. Each door has signage of identical size and location, using the same font or similarly designed logo.<sup>26</sup>

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22. SANDERS, ED., *supra* note 14, at 13–14.

23. BETSKY, *BUILDING SEX*, *supra* note 18, at xiii. The association of men with the public has enabled them to shape understandings of social power and gender roles. *See also*, SPAIN, *supra* note 19, at 3 ("Throughout history and across cultures, architectural and geographic spatial arrangements have reinforced status differences between women and men.").

24. *See, e.g.*, DIANA AGREST, PATRICIA CONWAY & LESLIE KANES WEISMAN, *Introduction to THE SEX OF ARCHITECTURE* 11, 11 (Diana Agrest, Patricia Conway, & Leslie Kanes Weisman eds., 1996) "[M]an builds and woman inhabits; that man is outside and woman is inside; that man is public and woman is private; that nature, in both its kindest and its cruelest aspects, is female and culture, the ultimate triumph over nature, is male." *See also* MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS 1825–1880*, at 3 (1990).

Feminist scholars have recently challenged the long-accepted assumption that social space is divided into the public realm and the private realm with men occupying the former and women the latter. *See, e.g.*, Michelle Rosaldo, *Woman, Culture and Society: A Theoretical Overview*, in *WOMAN, CULTURE, AND SOCIETY* (Michelle Zimbalist Rosaldo and Louise Lamphere eds., 1974): "I suggest that the opposition between domestic and public orientations . . . provides the necessary framework for an examination of male and female roles in any society. Obvious as it may seem, its ramifications are enormous; it permits us to isolate those interrelated factors that make women universally the 'second sex.'"

25. At times, these words are replaced by universal symbols understood to stand for "Men" and "Women."

26. This surface appearance of equality is in stark contrast to racially segregated public restrooms in the pre-civil rights South. "Whites Only" restrooms were placed in easily accessible locations in public buildings, while restrooms for "Colored" people were hidden in less accessible places (often outside the building). Moreover, the exterior appearance of the doors was rarely the same.

This appearance of architectural equality suggests a benign justification for separating public restrooms by sex, one based perhaps on inherent biological differences between men and women that result in different functional needs.<sup>27</sup> Relying on critical architectural theory, this Article demonstrates that, in fact, the late nineteenth century justifications for laws requiring sex-separated workplace restrooms were far more complex than a simple reliance on anatomical differences and the functional needs of men and women.

In his work, *Écrits*,<sup>28</sup> French critical theorist Jacques Lacan employs the image set forth at the beginning of this Article to explore the ways in which society constructs sexual difference. Though Lacan focuses on how the signifiers “Ladies” and “Gentlemen” contribute to what he refers to as our “laws of urinary segregation,” Joel Sanders suggests that the architectural structure of these rooms similarly supports such “laws”:

The spatial differentiation of the sexes may find its most culturally visible form in the construction of the sexually segregated public bathroom. It is not by accident that Jacques Lacan chooses, as his privileged example of the institutionalization of sexual difference, adjoining public bathrooms in a railway station. . . . Lacan attributes the division of the sexes to the powerful signifying effects of language. But sexual difference is also a function here of *spatial* division. Lacan’s reduction of the problem of sexual difference to the two-dimensional surface of a pair of bathroom doors, one called “Ladies” and the other “Gentlemen,” conceals the more complex ways that the actual three-dimensional space of the public bathroom assigns sex and gender identity. The architecture of the public bathroom, where physical walls literally segregate the sexes, naturalizes gender by separating “men” and “women” according to the biology of bodily functions.<sup>29</sup>

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27. See, e.g., SANDERS, *supra* note 14, at 164 (“Conventional bathroom architecture confirms and naturalizes gender distinctions by segregating the sexes within rigidly contained spaces. Subscribing to the popularly held belief that lavatory design responds to the functional demands of anatomical difference, the public restroom perpetuates the notion that gender rests squarely on the foundations of anatomy.”).

28. JACQUES LACAN, *ÉCRITS* (1966).

29. SANDERS, *supra* note 14, at 162. In a previous article, I suggested that the exterior appearance of public restroom doors serves as a powerful mechanism for contemporary society to perpetuate the view that sex is dimorphic: humans fall into two, and only two, categories: male and female. This message often proves devastating to the identities, not to mention the basic biological needs, of both transgender and inter-

In their analyses, both Lacan and Sanders address cultural “laws.” In this Article, I employ critical architectural theory to extend that analysis to understanding how statutory laws that mandate sex-separation of public restrooms impact the social understanding of sex, gender, and gender difference.

## II. NINETEENTH CENTURY PROTECTIVE LABOR LEGISLATION AIMED AT WOMEN

The first laws mandating that public restrooms be separated by sex were adopted at the end of the nineteenth century as extensions to protective legislation passed earlier in the century aimed at women and children in the workplace. Part II chronicles the history of these laws.

### *A. Protective Legislation Aimed at Children and All Adults: The First Half of the Nineteenth Century*

The move to enact protective labor legislation in America came early in the nineteenth century in response to the radical transformation of daily life wrought by the industrial revolution. The first such legislation was aimed solely at protecting children.<sup>30</sup> Though in 1813 Connecticut passed an unenforced law aimed at the basic education and preservation of morals of children in factories,<sup>31</sup> Massachusetts took the first serious steps toward protecting working children in 1836.<sup>32</sup>

As early as the mid-1820s, proposals were made to limit the working day for all adult workers to ten hours.<sup>33</sup> In 1847, New Hampshire

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sexual people. See Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L. J. 1223, 1248 (1997).

30. GEORGE M. PRICE, *THE MODERN FACTORY: SAFETY, SANITATION AND WELFARE* 489 (1914). The industrial revolution saw the first cotton mill in the United States established in Rhode Island in 1790. *Id.* By 1831, almost half of the workers in Rhode Island cotton mills were children. *Id.*
31. See ELIZABETH LEWIS OTEY, *THE BEGINNINGS OF CHILD LABOR LEGISLATION IN CERTAIN STATES: A COMPARATIVE STUDY* 90–91 (1974) (discussing Connecticut Session Laws from 1813).
32. PRICE, *supra* note 30, at 489–90. The law provided that “no child under fifteen years shall be employed to labor in manufacturing establishments unless such child shall have attended school at least three months out of the twelve next preceding any and every year in which such child shall be so employed.” *Id.* at 490.
33. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 182 (1982) (discussing arguments that by limiting workers’

became the first state to enact such legislation.<sup>34</sup> Though other states followed, all such legislation was ineffective because it allowed the employer and employee to contract out of the requirement.<sup>35</sup> Minimal statutory protections for all adult industrial workers without regard to sex would not come about in the United States until the late 1930s.<sup>36</sup>

### *B. Protective Legislation Aimed at Women: The Second Half of the Nineteenth Century*

#### 1. Hour Laws

During the first half of the nineteenth century, factory work was considered a temporary respite for young women who ultimately sought to marry.<sup>37</sup> The attitude toward working women was often one of resentment, for they were seen as taking work away from more skilled male laborers.<sup>38</sup> Accordingly, though early reformers pressed for legisla-

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hours, the general welfare would be served by sharing available jobs and creating more opportunities for an educated and aware citizenry).

34. Act of July 3, 1847, ch. 488, sec. 1, 1847 N.H. LAWS 465-66.

35. See, e.g., Elizabeth Brandeis, *Labor Legislation*, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 397, 461-62 (John R. Commoner ed. 1935; reprinted Augustus M. Kelley Pub. 1966) (1935).

36. Alice Kessler-Harris, *The Paradox of Motherhood: Night Work Restrictions in the United States*, in PROTECTING WOMEN: LABOR LEGISLATION IN EUROPE, THE UNITED STATES AND AUSTRALIA, 1880-1920, at 338 (Wikander, Kessler-Harris, Lewis eds., 1995). The effort to adopt protective legislation aimed at all workers was stymied early in the twentieth century by the U.S. Supreme Court's striking down such laws in the name of "freedom of contract." See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York law limiting the hours that bakers could be forced to work). In contrast, the court upheld protective legislation aimed at women in *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding legislation limiting the hours of women workers in mechanical establishments, factories, and laundries).

37. See THOMAS DUBLIN, *TRANSFORMING WOMEN'S WORK: NEW ENGLAND LIVES IN THE INDUSTRIAL REVOLUTION* 27 (1994). By the Civil War, however, women's tenure in the workplace had increased significantly. In 1836, women's mean years of employment were 1.8 years; by 1860 the mean had risen to 3.6 years. CATHERINE CLINTON, *THE OTHER CIVIL WAR* 29 (1984).

38. See, e.g., DAVID R. ROEDIGER AND PHILIP S. FONER, *OUR OWN TIME—A HISTORY OF AMERICAN LABOR AND THE WORKING DAY* 9 (1989) ("As early as 1799, for example, Baltimore journeymen tailors complained that their wages plummeted and their work became less diversified after the hiring of women workers who did 'most of the easy work at half the price.'"). See also *History of Women in Industry in the United States*, 14 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES IN 19 VOLUMES, Senate Doc. 61-645 (1910, prepared under the direction of Chas. P. Neill, Commissioner of Labor) [hereinafter *CONDITION OF WOMAN AND CHILD WAGE-EARNERS*] at 14, referring to a Boston Courier newspaper

tion to protect women workers,<sup>39</sup> it was not until the second half of the century that such legislation was actually enacted.

In 1852, Ohio adopted the first state hours law that classified women together with children as needing special protection in the workplace.<sup>40</sup> Though other states soon followed,<sup>41</sup> these early statutes were either unenforceable or unenforced.<sup>42</sup> It was not until 1879 that Massachusetts enacted the first hours law directed towards women that has been generally regarded as effective.<sup>43</sup>

article: "In 1830 the same paper asserts that 'the times are out of joint' because 'the women are assuming the prerogatives and employments which, from immemorial time, have been considered the attributes and duties of the other sex,' and suggested that soon 'our sons must be educated and prepare to obtain a livelihood in those dignified and more masculine professions of seamstresses, milliners, cooks, wet nurses, and chambermaids.' "

39. See, e.g., labor reformer Frederick Robinson, *Oration Delivered Before the Trades Union of Boston July 4, 1834* (Charles Douglas Pub. 1834):

But [women] are the weaker portion of our species, and weakness and ignorance have always been the legitimate prey of the aristocracy. However much *we* have borne from them in every age, our mothers, our wives, our sisters, our daughters have been still more abused. Their sufferings call for our immediate interposition, and we ought never to rest until we regulate the hours of their labor in factories by direct legislation . . . .

Robinson's views have been described by one labor historian as "radical, not to say extravagant." Charles E. Persons, *The Early History of Factory Legislation in Massachusetts*, in *LABOR LAWS AND THEIR ENFORCEMENT* 14 (Persons, Parton, Moses eds. 1911; reprinted Arno Press 1971).

40. 40 Act of March 19, 1852, sec. 1, 1852 OHIO LAWS 187. It stated in pertinent part: "[I]n all manufactories, workshops and other places used for mechanical or manufacturing purposes in the state of Ohio, where children under the age of eighteen years, and women, are employed, the time of labor of the persons aforesaid, shall not exceed ten hours for each day . . . ."
41. See, e.g., 1857 MINN. LAWS 154-55 (setting maximum work hours for women and children in factories to ten hours a day); 1863 DAKOTA LAWS 241 (setting the limit also at ten hours a day); 1867 WIS. LAWS 80-81 (setting the limit at eight hours a day).
42. Several of them imposed a fine only if the employer "compelled" a woman to work more than the legal maximum. See, e.g., 1852 OHIO LAWS 187 ("[A]ny owner, stockholder, overseer, employer, clerk or foreman, *who shall compel* any woman or any child . . . to labor . . . ." (emphasis added)); 1867 WIS. LAWS 80-81; 1863 DAKOTA LAWS 241; 1857 MINN. LAWS 154-55. Other statutes imposed fines only for "wilful" violations. See, e.g., 1887 CONN. PUBLIC ACTS 693 ("Every person who wilfully employs . . . any person in violation . . . .") (emphasis added); 1885 (May Sess.) R.I. ACTS & RESOLVES 1-2. Certain statutes allowed employees to contract for hours in excess of the specified limit. See, e.g., 1887 ME. ACTS 121. Still others contained no specific requirements to guarantee enforcement. See, e.g., 1890 VA. ACTS 150.
43. Elizabeth Brandeis has noted that "[t]he history of enforceable hour legislation for the period prior to 1896 is practically a history of the Massachusetts laws." BRANDEIS, *supra*

## 2. Health and Safety Measures

In addition to regulating working hours, states also began enacting legislation aimed at protecting the health and safety of women workers during the second half of the nineteenth century. Such legislation included laws prohibiting women from engaging in certain professions or work assignments deemed dangerous;<sup>44</sup> laws restricting or prohibiting night work by women;<sup>45</sup> laws mandating that women be given relief time for meals;<sup>46</sup> laws mandating a rest period during the working day;<sup>47</sup> laws prohibiting the employment of women immediately before or after childbirth;<sup>48</sup> and laws aimed more generally at protecting a woman's reproductive capacity.<sup>49</sup> Laws requiring that seats be provided for women

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note 35, at 461. Though in 1874 Massachusetts had adopted a law limiting the hours of women and children under eighteen to ten hours a day, the statute required a "wilful" breach, effectively rendering it unenforceable. 1874 MASS. ACTS 145-46. See generally SARAH SCOVILL WHITTELEY, MASSACHUSETTS LABOR LEGISLATION: AN HISTORICAL AND CRITICAL STUDY 9-34 (1901). Minimum wage legislation protecting women (and minors) would not appear until Massachusetts passed the country's first such law in 1912. KESSLER-HARRIS, *supra* note 33, at 196.

44. The first health and safety legislation aimed at barring women from certain professions was an 1872 Illinois law forbidding women from working in mines. Act of Mar. 27, 1872, § 6, 1872 ILL. LAWS 570 (providing for the health and safety of persons employed in coal mines). By 1931, 17 states had adopted similar legislation. Other prohibitory labor legislation included laws prohibiting women from carrying or lifting heavy weights and from cleaning moving machinery. See, e.g., Act of May 25, 1887, ch. 462, sec. 4, §§ 11, 20, 1887 N.Y. LAWS 576-77 (prohibiting girls under 21 from cleaning machinery while in motion). See generally U.S. DEP'T OF LABOR, BULL. OF THE WOMEN'S BUREAU NO. 91, WOMEN IN INDUSTRY 55 (1931). Kansas adopted a more general law prohibiting women from working in any industry or occupation "under conditions of labor detrimental to their health or welfare." Washington adopted a similar law, but substituted "morals" for the term "welfare." *Id.* at 56.
45. See, e.g., Act of Apr. 11, 1890, ch. 183, § 1, 1890 MASS. ACTS 152; 1889 N.Y. SESS. LAWS ch. 560. Massachusetts adopted the laws to prohibit unscrupulous textile mill employers who wanted to hire for a second shift women who had already completed a full day in a neighboring factory. KESSLER-HARRIS, *supra* note 33, at 191.
46. See, e.g., Act of Apr. 22, 1887, ch. 215, 1887 MASS. ACTS 832.
47. See, e.g., Act of Mar. 31, 1915, ME. REV. STAT. ANN. ch. 350, § 1 (1916).
48. See, e.g., Act of May 26, 1913, ch. 112, 1913 CONN. PUB. ACTS 1701; Act of Apr. 15, 1912, ch. 331, sec. 1, § 93-a, 1912 N. Y. LAWS 660.
49. See, e.g., Act of May 12, 1919, No. 239, § 1, 1919 MICH. PUB. ACTS 427. (Caveat appended to wage nondiscrimination law: "Provided, however, That no female shall be given any task . . . detrimental to her morals, her health or her potential capacity for motherhood.").

workers in a wide range of industries were adopted in virtually every state.<sup>50</sup>

### 3. Toilet Laws

In 1887, Massachusetts enacted the first state law mandating that workplace toilet facilities be separated by sex.<sup>51</sup> The Massachusetts act was not directly linked to prior protective legislation aimed at women. However, when two months later New York became the second state to adopt a toilet statute, it did so by explicitly amending an earlier hours law, adding a range of health and safety requirements including a provision that water closets be separated by sex.<sup>52</sup> Thereafter, other states

50. The first seat law was adopted by New York. *See* Act of May 18, 1881, ch. 298, 1881 N.Y. LAWS 402. Entitled, "An Act for the preservation of the health of female employees," the law stated:

It shall be the duty of all employers of females in any mercantile or manufacturing business or occupation to provide and maintain suitable seats for the use of such female employees, and to permit the use of such seats by such employees to such an extent as may be reasonable for the preservation of their health.

*Id.*

*See also* Act of Apr. 12, 1882, ch. 150, 1882 MASS. PUB. STATS. SUPP. 28; Act of Mar. 31, 1882, ch. 159, 1882 N.J. LAWS 227; Act of Feb. 27, 1883, ch. 45, 1883 NEB. GEN. LAWS 229; Act of Apr. 2, 1885, H.B. 310, 1883 COLO. LAWS 297; Act of Apr. 10, 1885, No. 39, § 5, 1885 MICH. PUB. ACTS 37; Seats for Female Employees, 1885 MO. LAWS 150 (Act of Apr. 16, 1885, H.B. 601, 1885 OHIO LAWS 131. By 1931, forty-six states and the District of Columbia had enacted laws requiring that women in the workplace be provided with seats. WOMEN IN INDUSTRY, *supra* note 44, at 55.

51. Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668. Entitled "An Act to secure proper sanitary provisions in factories and workshops," that act provided in pertinent part:

Every person employing five or more persons in a factory, or employing children, young persons or women five or more in number in a workshop, shall provide, within reasonable access, a sufficient number of proper water-closets, earth-closets, or privies for the reasonable use of all persons so employed; and whenever male and female persons are employed in the same factory or workshop, a sufficient number of separate and distinct water-closets, earth-closets or privies shall be provided for the use of each sex and shall be plainly designated, and no person shall be allowed to use any such closet or privy assigned to persons of the other sex.

*Id.*

52. Act of May 25, 1887, ch. 462, § 13, 1887 N.Y. LAWS 575 ("A suitable and proper wash-room and water-closets shall be provided for females where employed, and the



followed New York's lead by amending existing protective legislation aimed at women to add a requirement that workplace toilet facilities be separated by sex. These laws are examined in greater detail in Part IV.<sup>53</sup>

### *C. The Debate Over Protective Labor Legislation Aimed at Women*

The U.S. Supreme Court's 1908 decision in *Muller v. Oregon*<sup>54</sup> energized many states to enact a broad range of labor legislation aimed at protecting women. Yet the seeds for such legislation were planted half a century earlier. Part III examines the social and political factors that motivated regulators in the 1850s to begin classifying working women together with children as needing special workplace protections. This history will shed light on the reasons why legislatures adopted laws later in the century requiring the sex-separation of workplace toilet facilities. But a brief note on protective legislation is in order.

The debate over the motivations and purposes behind nineteenth century protective labor legislation aimed at women has been ongoing for many years.<sup>55</sup> The debate centers on the conflict between enacting special protections for working women, which inevitably emphasizes their differences from men, on the one hand, and insisting on equal workplace treatment for men and women, on the other. This debate has "pitted men against women, set government representatives and political parties against each other, and divided women among themselves."<sup>56</sup>

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water closets used by females shall be separate and apart from those used by males . . .").

53. See statutes cited *infra* notes 167–173.

54. 208 U.S. 412 (1908). See KESSLER-HARRIS, *supra* note 33, at 187–88 ("decision [in *Muller*] electrified the field of protective legislation. . .").

55. See generally PROTECTING WOMEN, *supra* note 36, at 180–214; SUSAN LEHRER, ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905–1925 (1987); JUDITH A. BAER, THE CHAINS OF PROTECTION—THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION (1978); CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP—AN ECONOMIC HISTORY OF AMERICAN WOMEN 189–201 (1990).

56. PROTECTING WOMEN, *supra* note 36, at 3. The authors describe the profound questions that the debate raises:

What concepts of "women" and of "workers" are embodied in the legislation? How far has "protective" labor legislation been designed to enhance the well-being of women in the workplace rather than to encourage their activities in the home? To what extent does it further the interests of mothers in the health of their children as opposed to those of the state in child welfare? Does it enable women to maximize their work force contributions, or does it contribute to perpetuating and sharpening the sexual division of labor? Can protective labor legislation be said to serve the immediate interests of male workers in regulating the participation of women in the labor

Two schools of thought have emerged. One view asserts that protective labor legislation was a positive step motivated by a genuine desire to protect women from harsh and dangerous conditions in the workplace.<sup>57</sup> The opposing view asserts that, rather than aimed at protecting women, such legislation was directed at preventing women from competing with men in the workplace.<sup>58</sup>

No one view can ultimately prevail in this debate. Historians have made clear that “[b]ecause protective legislation grew out of a variety of agendas, its passage appears to have been overdetermined.”<sup>59</sup> Those supporting such legislation included men and women, trade unionists, employers, social activists and reformists, women’s organizations and feminists, and others, many of whom held different motivations and competing political and social goals.<sup>60</sup> These disparate groups all struggled between women’s legitimate demands for economic independence and thus increased role in the workplace on the one hand, and a desire to preserve traditional family life under a mother’s influence on the other.<sup>61</sup>

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force. To what extent does it advance the interests of men as employees and employers to preserve male privilege at a time of technological change and shifting power relations in the workplace? Finally, how far did women support or oppose such legislation, and whose voices influenced politicians.

*Id.*

57. See, e.g., KESSLER-HARRIS, *supra* note 33, at 205–06 (discussing support of protective labor legislation by the largest women’s reform groups, including the Women’s Trade Union League). Well-off, reform-minded women often led the charge for women’s protective labor legislation in America. PROTECTING WOMEN, *supra* note 36, at 15. However, many supported such legislation less out of concern for women’s work conditions and more from a commitment to protecting families and assuring women’s greater presence in the home. *Id.* at 1.
58. See, e.g., S. J. KLEINBERG, WOMEN IN THE UNITED STATES, 1830–1945 (1999) at 124 (Adolph Strasser, president of the Cigar Makers’ International Union, declared in 1879 that, though it was impossible to drive women out of the trade, laws could restrict their numbers.)
59. PROTECTING WOMEN, *supra* note 36, at 17.
60. On a state-by-state basis, the legislative initiative to pass protective legislation was led by middle-class women who possessed a traditional vision of the family and derived their fervor for workplace reform more from a concern for family life than for poor working women. Kessler-Harris, *supra* note 36, at 339.
61. PROTECTING WOMEN, *supra* note 55, at 18. As noted by several historians: “[T]he general tenor everywhere was to see restrictions and benefits for women as a compromise between the perceived needs of family life and the demands of wagework. When applied to women only, protective legislation was directed less at their welfare than at reconciling the competing needs of women and families to meet a broader set of social purposes including sustaining the family wage male breadwinner ideology;

It is against this background that I examine in Part III the mid-nineteenth century social history behind the enactment of protective legislation aimed at women. I then focus in Part IV on the late century passage of legislation mandating sex separation of workplace toilets.

#### *D. The Intersection of Race, Class, and Ethnicity with Gender*

This Article focuses on the interrelationship between public architectural space and the late nineteenth century cultural understanding of gender. Historians have stressed, however, that gender is but one aspect of human identity, and throughout American history, race, economic class, and ethnicity have often had an equal or greater impact in determining a person's social status and opportunities.<sup>62</sup>

The growth of public transportation in nineteenth century America provides a clear example of this intersection. In Part III, I explore the creation of the "ladies' car" on railroads, a public space reserved exclusively for women and the men accompanying them.<sup>63</sup> In contrast, men traveled in smoking cars or other second-class accommodations considered inappropriate for women.<sup>64</sup>

However, black women and children were not allowed passage in the ladies' car. Irrespective of whether or not they could afford it, they were relegated to smoking cars and other second-class accommodations with white and black men.<sup>65</sup> Class was also implicated in this social division of space, for women of lesser means were by default also relegated to travel in the men's accommodations.<sup>66</sup> Finally, ethnicity was implicated when, late in the century, "[i]mmigrants found their way across the American continent crammed into cheap, dirty 'emigrant cars.'"<sup>67</sup>

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supporting a sexually separated labor market; and enhancing the possibility of survival for future generations of workers." *Id.* at 23.

62. See, e.g., CATHERINE CLINTON & CHRISTINE LUNARDINI, *THE COLUMBIA GUIDE TO AMERICAN WOMEN IN THE NINETEENTH CENTURY* 14–16 (2000) (reviewing bibliography concerning intersection of race, gender, and ethnicity).

63. See *infra* text accompanying notes 133–135.

64. BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920*, at 260 (2001).

65. See *id.* at 293 ("If black women could ride in ladies' accommodations, it followed that black men could as well, in the minds of many white Southern men, a black man taking a seat in a ladies' car or other first-class accommodations was a combined statement about economic well-being, political rights, and sexual ambition. It was an explosive combination.")

66. *Id.* at 265, 282.

67. *Id.* at 265.

The remainder of this Article focuses on one aspect of human identity—gender—and the ways in which late nineteenth century society restructured architectural space to accommodate social understandings of gender. Though one could also consider the relationship between social space and race, class and/or ethnicity, the heightened importance placed on gender in the workplace during this period of American history justifies this focus.

### III. BODIES, ARCHITECTURE, AND GENDER IN THE NINETEENTH CENTURY

To set the stage for analyzing toilet laws in Part IV, I turn to placing protective labor legislation aimed at women in the context of nineteenth century social history. A key to the enactment of such legislation is understanding a fundamental shift in cultural outlook that occurred at mid-century—the rise of the intellectual movement known as realism—and the impact of that movement on social attitudes toward gender.

#### *A. The First Half of the Nineteenth Century: The Age of Idealism*

##### 1. Idealism, the Separate Spheres Ideology, and the Cult of True Womanhood

Historians have characterized the first half of the nineteenth century as an age of sentimental idealism. “[I]dealists shared a basic conviction that fundamental truths rested in the unseen realm of ideas and spirit or in the distant past rather than in the accessible world of tangible facts and contemporary experiences.”<sup>68</sup> During this period American culture displayed a “sovereign disregard of reality.”<sup>69</sup>

This sentimental idealism had a profound impact on attitudes toward women:

During the nineteenth century, the genteel elite—as well as an emergent middle class—developed an ardent faith in the

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68. DAVID E. SHI, *FACING FACTS: REALISM IN AMERICAN THOUGHT AND CULTURE, 1850–1920*, at 13 (1995).

69. *Id.* at 13 (quoting novelist Hjalmar H. Boyeson, *The Realism of American Fiction*, 44 *INDEPENDENT* 3 (1892)). The nation’s cultural elite focused on refining tastes, culture and spiritual sensibilities, and “took little interest in the commonplaces of everyday life.” SHI, *supra* note 68, at 15, 17.

civilizing power of moral women. Females were widely assumed to be endowed with greater moral sensibility and religious inclinations than men. Such pedestaled notions of women helped nourish a powerful “cult of domesticity” which assigned to women the role of self-denying guardians of the hearth and soul. As the more complex economy of the nineteenth century matured, economic production was increasingly separated from the home, and the absence of men who left to work long hours in the city transformed the middle-class home into a “separate sphere” governed by mothers.<sup>70</sup>

How did this separate spheres ideology develop? At the outset of the nineteenth century, the household was “a center of production, retail business, and professional practice.”<sup>71</sup> Beginning early in the century, however, the economic restructuring of American society as a result of the industrial revolution led to a “division of spheres.”<sup>72</sup> The home ceased to be the central economic unit as men left for new public workplaces where manufacturing was centralized.<sup>73</sup> No longer considered a simple extension of the street, the home assumed a denser screen of privacy, and in so doing became associated with women who stayed behind as the men left. The ideological division between public space and private space emerged during the course of the century; the workplace became the domain of men, the home that of women.<sup>74</sup>

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70. SHI, *supra* note 68, at 17.

71. RYAN, *supra* note 24, at 64. The home was also the site of relatively open socializing and wasn't viewed as a cloistered realm reserved for immediate kin. In that open environment, there were fewer distinctions between the realms of males and females, between the realms of public and private. *Id.* at 66.

72. CLINTON, *supra* note 37, at 18.

73. The separation of the worlds of the household and the workplace was not a sudden event, but rather a “slow and tangled disengagement.” *Id.* at 23.

74. CLINTON & LUNARDINI, *supra* note 62, at 36–37. This division of spheres led to a devaluation of domestic labor as the hourly wage paid in the workplace became the fundamental measure of social economic productivity. *Id.* The degrading of the economic importance of women in the home exacerbated their relative lack of clout in the political realm. CLINTON, *supra* note 37, at 16–17. Many men believed women's consignment to the private sphere of the home was necessary to protect them from the excesses of the public realm. *Id.* at 18; *see also* RYAN, *supra* note 24, at 8 (“The relative absence of women in public life denotes not just segregation but stratification and hierarchy. In public, men speak for and act upon the community as a whole, including women. A reciprocal power does not accrue to women by virtue of their stature in the private realm.”).

The ideology that enshrouded the home as the separate sphere of women has been dubbed the "cult of True Womanhood,"<sup>75</sup> an ideological commitment that remained central to antebellum American life.<sup>76</sup> During the first half of the nineteenth century, attitudes toward the appropriate place of women in society were a matter of idealism, social propriety, and etiquette, not a scientific assertion concerning their physical or mental capacity. Gender distinctions based on physical and mental differences between men and women would flourish only later in the century.

## 2. The Emergence of Women from the Domestic Sphere into Public Life

The sentimental vision of the virtuous woman entrenched in her domestic sphere was a cultural myth, bearing little resemblance either to women's daily experiences or to the evolving social realities of the nineteenth century.<sup>77</sup> From its outset, the century witnessed the emergence of women from the privacy of the home into the public world of the workplace.<sup>78</sup> Beyond the workplace, women also moved into the civic

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75. BARBARA WELTER, *DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY* 21 (1976).

76. *See id.*

77. *See CLINTON, supra* note 37, at 40. *See also id.* at 34:

While the cult of domesticity promoted a doctrine of gentility and refinement for women, it was not realized by the majority of American women. Even those upper- and middle-class females who aspired to idealized visions of the lady were not wholly exempt from domestic labor, and those who were simply substituted other women's labor for their own. Somebody had to do the dirty domestic chores, and it was always labeled "women's work."

78. As early as 1822 when textile mills were founded in Lowell, Massachusetts, young women flocked to mill towns, and white single women constituted the overwhelming majority of the early textile work force. CLINTON, *supra* note 37, at 22. Of the 1,200 employees in the six cotton mills in Lowell, Massachusetts in 1827, nine-tenths were women. PERSONS, *supra* note 39, at 6. By 1831, females comprised nearly 70 percent of the 58,000 millworkers in the North. CLINTON & LUNARDINI, *supra* note 62, at 30. By 1860, more than sixty-two thousand women were employed in mills across New England, Dublin, *supra* note 37, at 15, and women were nearly one quarter of the country's industrial work force, largely as a result of the predominance of female laborers in cotton manufacturing. CLINTON & LUNARDINI, *supra* note 62, at 30. During the period from 1880 to 1900, the number of women in the labor force underwent a significant increase. ROEDIGER & FONER, *supra* note 38, at 163. In 1880 there were 2,647,000 women employed in the workforce; in 1900 the figure had increased to 5,319,500. *Id.*

life of the community.<sup>79</sup> Perhaps most significantly, women became involved in moral and social reform and suffrage movements that “often led women out of the house and literally into the street, all in the cause of reform.”<sup>80</sup> This involvement in public civic life further undermined attempts to keep women isolated in their homes.<sup>81</sup>

Though by 1840 sites of social engagement including theaters and public parks had developed,<sup>82</sup> prior to the Civil War these semi-public spaces were largely the domain of men. Women were either outright banned from these spaces, or extreme opprobrium was directed at those who dared to breach these male environs.<sup>83</sup> By the second half of the nineteenth century, however, women’s presence in places of public entertainment gradually became acceptable.<sup>84</sup> In addition, new, semi-public spaces began developing with women patrons in mind, including the first American department store opened by A.T. Stewart in New York in 1846.<sup>85</sup>

Nonetheless, any move by women outside the domestic sphere was viewed by many with concern,<sup>86</sup> for the growing number of women in

79. RYAN, *supra* note 24, at 31–32. Women’s involvement in public ceremonies was extremely limited in antebellum America. After the Civil War, however, women began to appear prominently in civic events such as parades. *Id.* at 44.

80. CLINTON, *supra* note 37, at 54. Reform organizations granted women a new, unprecedented semi-public status. *Id.* Organizational involvement included religious missions, temperance associations, crusades against prostitution, and antislavery movements. *Id.* at 55–62, 67–71. Accordingly, women used their domestic sphere and the moral and religious values surrounding that sphere as a springboard into public life. *See, e.g., id.* at 44 (“During the early decades of the nineteenth century, women’s concerns began to expand—in concentric circles—beyond the home. But when women began to step outside their immediate domain, they followed a path prescribed by domestic custom. Women performed services in the public arena which essentially they had learned within the family circle. Teaching and moral reform also became major avenues to female public influence.”).

81. *See id.* at 55 (“The more women plunged into public campaigns, the less effective their plea for women to remain isolated in their domestic havens.”). It was but a short step from reform organizations to new organizations that began to champion women’s rights, organizations that emerged in the 1840s and 50s. *See id.* at 72.

82. RYAN, *supra* note 24, at 62.

83. *Id.* at 67.

84. *Id.* at 79.

85. *Id.* at 76.

86. *See* CLINTON & LUNARDINI, *supra* note 62, at 37 (“Antebellum ideologues harped on female inferiority and confinement, arguing that whenever a woman went out to mingle in the public realm, she was deserting the station God and nature intended. Home was her designated arena.”); *see also* CLINTON, *supra* note 37, at 41. Discussing the growing presence of women in Victorian London, Lynne Walker states:

Ideologically, however, [women’s] expanded presence in the public spheres was not the norm and it perturbed the male occupants. As Griselda Pollock

the public realm evidenced a “living contradiction of the cult of true womanhood.”<sup>87</sup> Victorian society, however, did not abandon that ideology or its ideal of women in their separate domestic spheres. Instead, it struggled to reconcile the conflict between the vision of gender developed decades earlier and the realities of late nineteenth century society.

### *B. The Second Half of the Nineteenth Century: The Age of Realism*

The second half of the nineteenth century witnessed the development of a new intellectual movement known as realism, a movement fueled by the rise of science<sup>88</sup> that was committed to “verifiable knowledge and tangible concerns.”<sup>89</sup> Considered by its advocates to be a rejection of early nineteenth century idealism, realism infused every aspect of late century intellectual and artistic life.<sup>90</sup>

Legal scholars have long recognized the influence of realism on classical legal thought, a movement in legal theory in the second half of the nineteenth century that sought to align law with the growing sciences.<sup>91</sup>

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has pointed out women “were never positioned as the *normal* occupants of the public realm”. Nonetheless, their presence and autonomy in the West End of London toward the end of the nineteenth century engendered a dissonance between ideology and lived experience that made spaces for real change through the development of a public ideology for women.

Lynne Walker, *Vistas of Pleasure: Women consumers of urban space in the West End of London 1850–1900*, in *WOMEN IN THE VICTORIAN ART WORLD* 79 (Clarissa Campbell Orr, ed. 1995) (quoting Griselda Pollack, *Modernity and the Spaces of Femininity*, in *VISION AND DIFFERENCE: FEMININITY AND HISTORIES OF ART* 50 (1988)).

87. CYNTHIA EAGLE RUSSETT, *SEXUAL SCIENCE* 10 (1989).

88. SHI, *supra* note 68, at 10.

89. *Id.* at 3–5.

90. *See, e.g., id.* at 3: “Realists of all sorts—scientists, philosophers, writers, artists, architects, and tastemakers—muscled their way onto center stage of American culture and brusquely pushed aside the genteel timidities, romantic excesses, and transcendental idealism then governing affairs of the mind.”

91. *See, e.g.,* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 *RES. L. SOC.* 3, 23 (1980); Donald H. Gjerdigan, *The Future of Our Past: the Legal Mind and the Legacy of Classical Common-Law Thought*, 68 *IND. L.J.* 743 (1993); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICAN 1886–1937*, at 79–93 (1998). As in any science, classical legal theorists viewed the common law to be composed of neutral, natural principles that were both ahistorical and apolitical. These principles existed in a static netherworld of pure reason and, accordingly, could be applied by judges scientifically and mechanically. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 *SO. CAL. L. REV.* 257, 315–16 (1990).



Among other features, classical legal thought tended to view the world in physicalized, spatial, and boundaried ways.<sup>92</sup> More generally, physical objects and their locations in space took on special meaning for realist thinking,<sup>93</sup> a focus that will prove central to explaining the passage of protective labor legislation in the latter half of the nineteenth century.

As realism took hold of American culture, thinkers began attempting to reconcile the inherent conflict between the separate spheres ideology and the social reality of women's presence throughout the public realm. Early century justifications for that ideology based on idealistic notions of social morality and etiquette could no longer carry intellectual force in the new world of realism. Any justification for perpetuating the separate spheres ideology would have to be based on hard, scientific facts about the physical world.

Realist scientists, legislators, and writers did not abandon the vision of the vulnerable woman protected in her homestead. Rather they found "facts" and, in turn, enacted laws to vindicate that vision. Specifically, scientists undertook research to "prove" the female body to be inherently weaker than the male body. Armed with these hard facts, realist policy-makers began enacting regulations directed at women's bodies and the public spaces inhabited by these bodies.

### 1. Scientists Discover the Inherent Weakness of Women

Despite their commitment to the newly emerging scientific method, there was nothing neutral about late nineteenth century realist scientists' approach to gender. Realists "viewed 'things out there' through a lens of confining social conventions and moral inhibitions. Considerations of the marketplace, class consciousness, racial and gender prejudices, and deeply embedded standards of morality and decorum often narrowed the borders of the realistic impulse. . . ."<sup>94</sup>

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92. "The legal world was viewed as divided into absolute spheres of power among autonomous legal actors (including institutional actors). Each such actor had absolute dominion within his sphere. Thus, the government, the state, and each citizen dominated a particular, distinct sphere of power. It was the courts' responsibility to police the boundaries and to make certain that no one overstepped his own sphere." *Id.* at 317-18.

93. Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871, at 877: "[P]eople have rights in things. Physical spaces and things are the usual objects of control; physical dominion is the usual manifestation of control; physical dominion is the usual manifestation of control. Physical boundaries thus become important and designate the things subject to dominion."

94. SHI, *supra* note 68, at 5.

Early in the nineteenth century, differences between men and women were a matter of folklore, theology, and philosophy.<sup>95</sup> After mid-century, a new sexual science arose that shifted the understanding of gender from a focus on idealized social roles to a focus on physical bodies.<sup>96</sup> Though science had long explored the differences between men and women,<sup>97</sup> late nineteenth century sexual science aspired to be more empirical than previous inquiries into the nature of gender, calling upon the new social sciences of anthropology, psychology, and sociology.<sup>98</sup>

Actual testing and measurement become central to the realists' scientific method, according scientists a high level of prestige based on their promise of certain knowledge.<sup>99</sup> In line with mid-century classical legal thought,<sup>100</sup> "it was possible to believe that nature was an objective reality 'out there' apart from humanity but reliably knowable and predictable. Science was a product of human discovery, not an artifact of the human mind."<sup>101</sup>

In contrast to late eighteenth century thought which had stressed the commonalities shared by human beings,<sup>102</sup> realist scientists stressed differentiation and hierarchy.<sup>103</sup> Their thinking "fractured the assumption of human unity, thereby encouraging invidious comparisons among groups . . .,"<sup>104</sup> focusing, in particular, on race and gender.<sup>105</sup> Victorian scientists from a range of disciplines reached the common conclusion that "women were inherently different from men in their anatomy,

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95. RUSSETT, *supra* note 87, at 3.

96. *Id.* This new science was in part "a response to the particular historical moment in which women were asserting new claims to a life beyond the domestic hearth." *Id.*

97. Aristotle concluded that women were a deformity of nature because they possessed insufficient heat to transform menstrual blood into the more perfect form of semen. Descartes similarly believed that it was semen alone that endowed the offspring with a soul. *Id.* See also THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990).

98. RUSSETT, *supra* note 87, at 4.

99. *Id.* at 5.

100. See, e.g., *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (attacking nineteenth century legal formalism's view that law was "a brooding omnipresence in the sky.").

101. RUSSETT, *supra* note 87, at 5.

102. *Id.* at 6. Differences between people were attributed largely to environment and social conditions.

103. See, e.g., *id.*: "Environmentalism lost favor; categories hardened and were made permanent. Physical attributes were construed to be the determinants of character."

104. *Id.*

105. *Id.* at 7.

physiology, temperament, and intellect.”<sup>106</sup> What previously had separated men from women was a matter of proper social roles. Now what separated men from women were innate bodily differences, a conclusion that bolstered the validity of the separate spheres ideology.<sup>107</sup>

As the rapid growth of technology threatened the ideological divide between public space and the private home, a deepening sense of anxiety pervaded Victorian society.<sup>108</sup> Science offered one response to this anxiety. By questioning whether the growing presence of women in the workplace threatened the “natural” role of woman as mother and the

106. *Id.* at 11. Anglo-American scientists from fields as diverse as anatomy and physiology, evolutionary biology, physical anthropology, psychology, and sociology all came to the service of justifying “how and why men and women differed from each other and . . . what these differences signified for social policy.” *Id.* at 10. Russett further explains:

In the evolutionary development of the race women had lagged behind men, much as ‘primitive people’ lagged behind Europeans. Even as adults, they remained childlike in body and mind, never developing traits, such as beards, that distinguished the men from the boys. The reason for woman’s arrested development was the need to preserve her energies for reproduction; she suffered a foreshortened maturation, but the race gained. . . . Nature had decreed a secondary role for women. The great principle of division of labor was here brought to bear: men produced, women reproduced. This was called complementarity.

*Id.* at 11–12.

107. *Id.* at 12. Rather than a tool of objective inquiry, science in the late nineteenth century was used to bolster political positions. Science became a weapon against abolitionism and was also directed against the emergent women’s rights movement, both movements that attacked privileges and opportunities previously reserved for men. *Id.*
108. *See, e.g., id.* at 14:

Many writers expressed anxiety at women’s restiveness, while others expressed outrage. The subject of women and their status in society clearly touched a deep nerve. I believe that this issue became interwoven in complex ways with other concerns of this period, religious, philosophical, social, and economic, to form a tapestry of uncertainty: about changes in the economy and social structure deriving from industrialism, and more profoundly about evolutions and humanity’s kinship with the brutes, and about the eclipse of divinity in the universe and the relation of matter and spirit. Educated Victorians of all kinds felt the impact of change, but scientists were particularly aware of the cosmic instabilities that evolution disclosed. In denying to women a coequal role in society, scientists sought to stabilize at least one set of relationships. . . . Women and the lesser races served to buffer Victorian gentlemen from a too-threatening intimacy with the brutes.

future of the human race,<sup>109</sup> science gave solace to those hungering for simpler times when gender roles seemed more clearly defined.

Though the early century separate spheres ideology viewed women as vulnerable when they left their domestic havens, its idealistic nature did not result in the actual enactment of protective legislation. Moved by the scientific pretensions of realism after mid-century, however, legislators began to take seriously the threat that allowing vulnerable women into the public realm would endanger both their own weaker bodies and the welfare of future generations.<sup>110</sup> As a result, every locus outside of the home occupied by women became a potential target for regulation.<sup>111</sup>

In line with the realist focus on physical bodies in bounded space, protective legislation enacted after mid-century can be considered to fall into two types: First, certain legislation operated directly on women's weaker bodies either by banning women entirely from dangerous industries or, alternatively, by regulating the conditions under which women worked. Second, regulators began manipulating the public physical spaces occupied by women. Specifically, new architectural spaces were cordoned off for the exclusive use of women, spaces that

109. *See, e.g., id.* at 9: ("Most women worked in factories through no desire of their own but simply to survive, yet they too, like the female doctors and the suffragists and the New Women of all persuasions, contributed to the perceived threat to the established social order.").

*See also* CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT* 46 (1985): "[M]ale physicians and legislators saw bourgeois women's rejection of motherhood as the principal source of familial and social disorder. Wild-eyed aborting matrons, hysterical young women unwisely seeking education, unmarried professional women, all bespoke male social anxieties in an uncertain world.;" *Id.* at 23:

[A]s legitimate roles [for women] outside the home developed during the mid- and late nineteenth century, male allopathic physicians began systematically to transpose the Cult of True Womanhood (originally phrased in the language of religion) into a medical and scientific dogma. Any violation of the cult—such as demands for education or for employment outside the home, or the practice of fertility control—called forth furious jeremiads from the profession. The nonreproductive woman endangered society—and herself.

110. *See, e.g., SMITH-ROSENBERG, supra* note 109, at 23–24:

Medical jeremiads quickly turned into political campaigns. Using abortion, fears of race suicide and of the spread of venereal disease among the youthful male population, the American Medical Association worked with male state legislators to secure legislation that greatly expanded state intervention in the lives of everyday citizens . . . . Steadily the state increased the areas of its control under the rubric of protecting health and morals.

111. *See, e.g., RYAN, supra* note 24, at 64: "[Women's] regulation and protection were preoccupations of ordinances pertaining to public order."

were seen to offer protective havens in the dangerous public realm.<sup>112</sup> I argue in Part IV that laws mandating sex-separated workplace toilet facilities (along with dressing rooms and resting rooms) are examples of laws that regulated public space to protect women.

## 2. The Realist Solution to the Conflict Between Ideology and Reality: The Regulation of Women's Bodies in the Workplace

As technology advanced, factories posed an ever-greater threat to workers' health and safety.<sup>113</sup> Accordingly, as the number of women in the workplace increased, concerns over their welfare led to the enactment of much gender-specific protective legislation in the latter part of the nineteenth century. Melding the separate spheres ideology with realist science, investigations into the conditions of women workers during this period often recommended the adoption of such legislation based on women's inherent physical weakness.<sup>114</sup> In addition, the need for leg-

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112. I readily admit this is not a bright-line distinction. For example, New York laws barring women from employment in public places of amusement and San Francisco laws setting curfews on places of amusement that employed women as entertainers or waitresses, *see* Ryan, *supra* note 24, at 90, can be viewed either as protecting women's bodies or as controlling the spaces inhabited by those bodies. Nonetheless, the distinction is useful for classifying and understanding much Victorian labor legislation.

113. Though health concerns were but one justification for early hours legislation, health arguments would become the primary justification for protective legislation later in the century. Don D. Lescohier, *Working Conditions*, in 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, at 97-98 (John R. Commons ed., 1935).

114. For example, a study by Grace F. Ward for the Women's Educational Industrial Union in 1909-10, states:

Legislation in the past has recognized that conditions of labor for children and women are very closely allied by nature. Both classes are admittedly in need of greater protection by the public than is usually afforded to the working man, and this for cogent reasons. The physical strength of the working man is less likely to fail through overwork; and even where it does fail, the effect on future generations is less serious than a similar deterioration in the mothers.

Grace F. Ward, *Weakness of the Massachusetts Child Labor Laws*, in PERSONS ET AL., *supra* note 39, at 161. The enactment of seating legislation illustrates the central role that the new science's determinations about women's bodies played in justifying workplace regulations. Commenting on the 1882 Massachusetts law requiring seats for women in manufacturing establishments, an early historian of protective labor legislation notes:

Such a [seating] law had been urged as early as 1874, by the commissioner of labor statistics. He deplored "the barbarous practice of keeping shop-girls all day upon their feet" and suggested remedial legislation. Physicians and others later interested themselves in the passage of a seating law. The

isolation was also justified as necessary to protect a woman's reproductive capacity and thus the future of the human race.<sup>115</sup>

Late century legislation aimed at protecting women's bodies served a dual function. Such legislation symbolically bolstered the scientific evidence "proving" that women's bodies were inherently weaker than men's. At the same time, this legislation protected women workers from very real dangerous conditions in factories and other workplaces, protection that would have been welcomed by all adult workers.

### 3. The Realist Solution to the Conflict Between Ideology and Reality: The Regulation of Public Architectural Spaces Inhabited By Women

In addition to regulating women's bodies, Victorian policymakers also protected women by cordoning off architectural spaces for the exclusive use by women who ventured into the dangerous public realm.<sup>116</sup> Such spaces were created in railroad cars, commercial

testimony of medical men as to the serious results to health from long hours of standing moved the legislature to action.

U.S. DEP'T OF LABOR, BULL. OF THE WOMEN'S BUREAU No. 66-1, HISTORY OF LABOR LEGISLATION FOR WOMEN IN THREE STATES 65 (1932). Employers frequently violated the seating laws by providing seats but not allowing employees to use them. See, e.g., MARC LINDER & INGRID NYGAARD, VOID WHERE PROHIBITED 72-73 (1998) (discussing reports of employers violations).

115. See, e.g., 1919 MICH. PUB. ACTS, 427 (provided that no woman "shall be given any task disproportionate to her morals, her health, or her potential capacity for motherhood").

Six states prohibited women from working immediately before or after childbirth. WOMEN IN INDUSTRY, *supra* note 44, at 56. In 1900, an AFL trade unionist (historically, a group sharing solidarity with women workers) stated: "Women may be adults, and why should we class them as children. Because it is to the interest of all of us that female labor should be limited so as not to injure the motherhood and family life of a nation." Sir Lyon Playfair, *Children and Female Labor*, AMERICAN FEDERATIONIST, at 103 (April 1900), cited in KESSLER-HARRIS, *supra* note 33, at 202.

116. See, e.g., WALKER, *supra* note 86, at 75:

To avoid embarrassment and confrontation in 'the gendered and eroticized terrain' of the metropolis, the middle-class desire for segregation and privacy was spatially inscribed thoroughly separate rooms for 'ladies' in public buildings. In hotels, railway stations and restaurants, a separate sphere was created for women, to ensure protection, respectability and control within the public realm. These women-only spaces within conventional accommodation encouraged middle-class women's participation in the public spheres but also reproduced the perception that women in public places were interlopers whose daring, foolishness or innocence would be punished, and indeed their femininity removed . . . .

(internal citations omitted).

photography studios, department stores, hotels, restaurants, banks, post offices, public parks and libraries.<sup>117</sup> An examination of these spaces will set the stage for understanding the creation of the sex-separated public restroom.

#### a. Gendered Separate Spaces: Public Libraries and the Ladies' Reading Room

A rarity in America before 1850, the few public libraries that existed were bastions of male status that often excluded women.<sup>118</sup> As public libraries began to develop, the question of women's presence became a serious issue.<sup>119</sup> Some library leaders advocated admitting women into public libraries to assure that private libraries would continue to be exclusive male enclaves.<sup>120</sup> Others, however, were concerned that women would be disruptive to the concentration of serious readers.<sup>121</sup>

Nonetheless, embracing the vision of the cult of true womanhood, many library leaders believed that women would enhance a library's cultural mission to uplift the populace.<sup>122</sup> But women's moral superiority also led such library leaders to perceive them as vulnerable to the advances of vulgar males.<sup>123</sup>

The solution to allowing women into public libraries was architectural: create a separate ladies' reading room stocked with fashion and home advice magazines.<sup>124</sup> In 1859, the Boston Public Library opened its first building with a ladies' reading room located on the floor below the general reading room.<sup>125</sup> By the last quarter of the nineteenth century, a separate women's space became an accepted part of American library design.<sup>126</sup> The furnishings in such rooms were generally less insti-

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117. Abigail A. Van Slyck, *The Lady and the Library Loafer: Gender and Public Space in Victorian America*, 31 WINTERTHUR PORTFOLIO 221, 223 (1996).

118. *Id.* at 224–25. Among the justifications for banning women was to protect them from harmful literature and vulnerability to “symbolic violations of the male leer and the impertinent comment.” *Id.* at 225.

119. *See id.* at 226.

120. *See id.*

121. *Id.* It was assumed that women who came to the library were only interested in reading fashion and home advice magazines and light novels. *Id.*

122. *See id.*

123. *See id.* at 227.

124. *See id.* at 228: “As early as 1856, the first American manual of library arrangement and administration recommended the provision of ‘a smaller reading room which may be used exclusively by females’ in the library basement.”

125. *Id.*

126. *Id.* at 230: “Between 1884 and 1897, at least one third of the forty-four American library buildings pictured in the *Library Journal* included ladies’ reading rooms.”

tutional than those in the rest of the library, often reflecting the furnishings in a private home.<sup>127</sup> One common feature of such rooms was a hearth, which combined with the furniture, carpets and window treatments to reflect the domestic spaces associated with women's separate sphere.<sup>128</sup> To protect the modesty of "true women," these rooms often provided discrete access to the women's toilet, invisible to other parts of the library.<sup>129</sup> Abigail Van Slyck explains:

Ladies' reading rooms established in American public libraries in the late nineteenth century did not welcome women as full participants in the public sphere. Rather they played an active role in reproducing a particular set of gender assumptions. Their design and location suggest that they constituted a partitioning of the public sphere through the provision of specially arranged settings that encouraged female readers to assume culturally prescribed postures of genteel femininity.<sup>130</sup>

#### b. Gendered Separate Spaces: The "Ladies' Car" on Railroads

Barbara Young Welke has explored how the growth of railroads and urban streetcars in the United States impacted social understandings of gender and race during the second half of the nineteenth century.<sup>131</sup> The

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127. An article in an 1895 edition of *Library Journal* described the ladies' reading room as "furnished as beautifully as the drawing room of a private house." *Id.*

128. *See id.* at 230–31.

129. *See id.* at 237–38.

130. *Id.* at 241.

131. *See* WELKE, *supra* note 64. In examining the evolving law related to physical and emotional injuries resulting from advancing transportation technology, Welke argues that "gender fundamentally shaped the outcomes of men's and women's interactions with technology. Men suffered from the assumption of ableness as much as women suffered from social and physical constraints on independence." *Id.* at 43. Welke concludes that the approach to injuries resulting from transportation technology was illustrative of the more general approach to gender in America in the late nineteenth century:

Nervous shock was a testament to the inadequacy of nineteenth century gender norms for life in an urban, industrialized world. Gender norms for white men and women in nineteenth-century America positioned men to act and constrained women to depend. The ideal of nation of free men rested fundamentally on this dichotomy. Men, the ideal assumed, were capable of looking after themselves and were obligated to safeguard those—women and



advent of transportation technology was considered especially dangerous to women.<sup>132</sup> American society responded to this threat by reconfiguring architectural space. Beginning in the 1840s, American railroads began designating a railroad car for the exclusive use of women known as the “ladies’ car.”<sup>133</sup> The spatial significance of the ladies’ car did not stop with the simple creation of a separate space. The car was generally placed at the end of the train, which “spatially reflected men’s obligation to protect women’s physical safety,”<sup>134</sup> since those nearest the front of the train suffered the greatest injury in the event of a crash. Moreover, its distance from the engine assured that the ladies’ car had the cleanest air.<sup>135</sup> In contrast, men were relegated to smoking cars, the atmosphere of which was more like a tavern or men’s club, a place of smoking, chewing tobacco, and drinking.<sup>136</sup> Respectable women rarely ventured into the smoking car.<sup>137</sup> Other spaces related to railroad travel were also re-created to offer separate, special accommodations for women, including ticket windows and waiting rooms in train stations.<sup>138</sup>

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children—whom the ideal constructed as dependent upon men’s protection.

*Id.* at 178.

132. *See id.* at 52–57. “In traveling, one might say, women entered a zone of moral danger. When middle-class white women ventured out in public, ‘they entered a realm in which they felt—or were expected to feel—particularly vulnerable.’ The norms of public conduct binding middle-class white women amounted to socialized helplessness.” *Id.* at 57.

133. *Id.* at 254. Men accompanying women were also allowed to enter this car. *Id.*

Based on the assumption that a railroad car for ladies should match the comfort and safety of a lady’s parlor, a ladies’ car might be equipped with a comfortable sofa or at the least seats covered with “plush.” Ladies’ cars often included an ice-water dispenser and, more important, had two water closets, one at each end of the car, so that women did not have to choose between waiting or suffering the embarrassment and sexual suggestion of using the same water closet as men riding in the car. By allowing only men who were accompanying women to travel in the ladies’ car, railroad companies made the space “safe” for women traveling alone. Passengers’ conduct in the car was also closely monitored to ensure that women were not exposed to smoking or rough conduct or language.

*Id.*

134. *Id.*

135. *Id.* at 254–55.

136. *Id.* at 255.

137. *Id.* at 255.

138. *Id.* at 53. Similarly, in the late nineteenth century, steamships often separated out special space as ladies cabins. *Id.* In addition, New York’s ferry boats set aside special compartments for women. RYAN, *supra* note 24, at 78.

### c. Gendered Separate Spaces: The Ladies' Parlor

In addition to libraries and railroads, a women-only parlor space was created in the late nineteenth century in a range of other establishments, including photography studios, hotels, and big-city department stores, spaces that served as domestic-like havens in a dangerous public world.<sup>139</sup> Katherine C. Grier explains:

Apart from the practical considerations associated with tending small children or women's special sanitary needs in travel, the proliferation of commercial parlors—both ladies parlors and drawing rooms for mixed gatherings—may have gained momentum with the increasing power of the concept of separate masculine and feminine spheres in middle-class life—the cult of domesticity—reflected in voluntary separation of the sexes. This separation was not absolute; women could and did participate in mixed-sex social life in the saloons of steamboats, on railroad coaches, and in large parlors of hotels. . . . The ladies parlors were islands of domesticity in the realm of otherwise unregulated public life.<sup>140</sup>

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139. See Katherine C. Grier, *Imaging the Parlor, 1830–1880*, in *PERSPECTIVES ON AMERICAN FURNITURE* 205 (Gerald W. R. Ward ed. 1988). For example, in the newly opened “heliographic establishment” of New York daguerreotypist M.M. Lawrence observed in 1853, gentlemen remained in the elegant reception room, while women “were invited to prepare themselves for their portraits in a 25-square ‘ladies parlor,’” a room “‘carpeted with rich tapestry,’ the walls were ‘covered with richest blue velvet and gold paper,’ and whose furnishings included ‘rose wood furniture, covered with blue and gold brocatelle—reception, easy and rocking chairs, tete-a-tetes, &c.,’ and a ‘marble-top centre table’ and ‘rose wood book-stand.’” *Id.* at 205.

In New York's first department store on Chambers Street from 1846 to 1862, women “could linger in a public ladies' parlor on the second floor, whose giant mirrors, imported from France, refracted back their own images in this secure, sex-segregated crowd of strangers.” RYAN, *supra* note 24, at 76. In the 1880's, among the amenities that New York's Macy's described in an advertising booklet was the following: “For the accommodation of our lady patrons we have an elegantly appointed Parlor in our 13th Street annex; also, large Dressing Rooms for ladies, with lavatory and retiring rooms attached on our second floor, with entrance on the right of our Boys' Clothing department.” RALPH M. HOWER, *HISTORY OF MACY'S OF NEW YORK 1858–1919—CHAPTERS IN THE EVOLUTION OF THE DEPARTMENT STORE* 465 (1946).

140. GRIER, *supra* note 139, at 234–235.

Grier concludes:

[L]adies parlors in particular provided a domestic haven which buffered their interactions with the broader public in commercial spaces, as well as providing an interim solution for a young society which was still looking for a “place” (in both the psychological and the spatial sense) for women in the public sphere.<sup>141</sup>

During the third quarter of the nineteenth century, other public spaces set aside for exclusive use by women included drawing rooms, dining rooms, and ladies’ entrances in hotels; ice cream parlors; a ladies’ parlor in New York City Hall; and a ladies’ window in San Francisco’s post office.<sup>142</sup>

Critical architectural theory teaches that the ways in which a society utilizes its physical spaces directly impacts the society’s understanding of gender. This teaching offers insights into how late nineteenth century society understood public spaces separated for exclusive use by women. These spaces served as one response of an anxious society to the growing public presence of women. Though doing little to actually protect women and their “weaker” bodies, these spaces were utilized to bolster the crumbling separate spheres ideology. While acknowledging the ever-increasing presence of women in public, these spaces reinforced the cultural message that, as the weaker sex, women needed special home-like protections when they ventured outside their domestic havens. If pushing women back into the home was not a realistic possibility, policymakers settled on the alternative of recreating aspects of that separate sphere in public architectural design.<sup>143</sup>

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141. *Id.* at 239. Lynne Walker has suggested that late nineteenth century separate spaces provided Victorian society with a way to deal with the growing presence of women in public while still holding to a separate spheres ideology: “These department stores provided a setting in the public sphere, ‘a meeting place and promenade,’ which for the first time gave women ‘a home away from home,’ a feeling of being at home in the public sphere, which only men had previously experienced.” WALKER, *supra* note 86, at 79.

142. RYAN, *supra* note 24, at 77–78.

143. See WELKE, *supra* note 64, at 282. The manipulation of architectural space became yet another mechanism in the highly physicalized world of the late nineteenth century to delineate gender differences between men and women.

Far more than men’s, women’s respectability depended on their location in public space. As the public sphere extended in the mid- to late-nineteenth-century beyond what were by definition men’s spaces—courthouses, legislative halls, taverns—to include public parks, department stores, and railroad stations, specially designated spaced for “ladies” prolif-

#### IV. CREATING A PRIVATE HAVEN IN THE PUBLIC REALM: SEX-SEPARATED WORKPLACE WATER CLOSETS

The stage is now set to explore the social and historical origins of the sex-separated public restroom and laws enacted to regulate that space. We begin by considering the post-Civil War public health and sanitarian movements in America, movements that led to greater regulation of sanitation and plumbing, including factory sanitation and plumbing.

##### *A. A Brief Pit Stop: Sanitation and Toilets in Late Nineteenth Century America*

Nineteenth century antebellum America was a filthy place.<sup>144</sup> Because public works systems capable of delivering water to private homes were not constructed in most cities until the late 1870s, few homes had running water.<sup>145</sup> With the exception of the wealthy, homes did not have indoor bathrooms as we know them today. Even among the better off, “despite the growing bourgeois devotion to sanitation in person and in the kitchen, the outdoor privy was still the norm in polite society.”<sup>146</sup>

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erated. Ladies’ car and other ladies’ accommodations were an early marketing tool in an emerging consumer culture. The label invited women to travel alone, assuring them they would not compromise their respectability by moving about in public space without a male escort. By mapping urban spaces as male or female, unsafe or safe, private businesses and urban planners attempted to impose social order on an increasingly chaotic urban landscape. These spaces emerged with the middle class. The way women, in particular, inhabited public space became an important marker not only of their own status but of the status of the men to whom they were related.

*Id.*

144. See, e.g., SUELLEN HOY, *CHASING DIRT* 3 (1995)

In 1850, cleanliness in the United States, north and south, rural and urban, stood at Third World levels. . . . Early nineteenth-century Americans, whether on farms or in towns, lived in dirty, buggy, and smelly surroundings. Although they seemed unbothered by these conditions, travelers from other countries often found them disturbing. The English traveler William Faux . . . described Midwesterners as ‘filthy, bordering on the beastly.’

*Id.* at 7.

145. *Id.* at 65. In fact, not until the 1880s and 1890s did the idea develop that running water was a household necessity. Until this time, only the wealthy had running water in their households. *Id.*

146. *Id.* at 18.

Though public water works connecting homes to municipal sewer systems would not develop until later in the century, an interest in indoor plumbing in America took hold in the 1840s.<sup>147</sup> Tied to a commitment to national progress, this interest grew out of a belief that an individual's character as a citizen was based on the quality of one's home.<sup>148</sup> Complementing the growing realist focus on science and physical space, a self-help literature concerning domestic architecture and its impact on health developed in the 1840s.<sup>149</sup> This literature stressed the principle of "convenience," a principle tied closely to the social understanding of the proper role of women in American society.<sup>150</sup> The commitment to convenience led many middle-class and wealthy Americans to introduce self-contained plumbing fixtures into their homes.<sup>151</sup> Because this development preceded municipal waterworks, there was little public regulation and thus little uniformity in the design of early domestic plumbing.<sup>152</sup>

The American public health movement was brought about largely by cholera epidemics, rampant disease, and death during the Civil War.

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147. Maureen Ogle, *ALL THE MODERN CONVENIENCES: AMERICAN HOUSEHOLD PLUMBING, 1840–1890*, at 3–5 (1996).

148. *Id.* at 15. Moreover, for nineteenth century Americans, plumbing represented one aspect of technological progress that distinguished America from the rest of the world: "[P]lumbing fixtures served as tools with which to affirm the distinctive character of American civilization and its people's dedication to progress and improvement and symbolized the differences between young modern America and old decaying Europe." *Id.* at 22.

149. *Id.* at 17.

150. *Id.* at 18. "Americans . . . linked the principle of convenience to good health and moral improvement, albeit indirectly: the elimination of unnecessary drudgery protected the health and well-being of women and enabled them to devote maximum effort to the important tasks of nurture and moral guidance." *Id.* See also ANNMARIE ADAMS, *ARCHITECTURE IN THE FAMILY WAY* (1996) (exploring the relationship between domestic sanitation and the role of women in Victorian England.)

151. Private household plumbing systems often obtained water from creeks, springs, brooks, rivers and wells. OGLE, *supra* note 147, at 37. The waste generally drained into cesspools or privy vaults located outside the home on the family's property. *Id.* at 48. Some households purchased water from municipally-financed wells and cisterns. But providing running water to households was not the initial purpose of such public water systems: "[A]s water department reports indicate, officials regarded household running water as an afterthought, an incidental benefit to the more important need to supply water to firefighters and businesses, and they were rarely prepared for the extent to which households both consumed and wasted water." *Id.* at 37.

152. Driven by a "desire for convenience, rather than a crisis in urban sanitation or new ideas about medicine," these developments preceded the health crisis that would develop in America during the Civil War. *Id.* at 35. "[Midcentury Americans] viewed running water primarily as a labor-saving tool that made household life more convenient and pleasant, rather than as a tool of hygiene or sanitation." *Id.* at 47.

Prior to that time, disease was considered a "scourge of the sinful."<sup>153</sup> Only after post-war development of the germ theory of disease did Americans begin to understand that sickness was brought about not by human moral failure but by a lack of sanitary conditions.<sup>154</sup> Thereafter, sanitation became recognized as a science,<sup>155</sup> and Americans began to take hygiene seriously.

Established in the 1870s, a public health movement led by reformers known as "sanitarians"<sup>156</sup> began attacking the haphazard self-contained plumbing arrangements that had developed in American homes.<sup>157</sup> By 1890 extensive public waterworks connected private homes to municipal water systems,<sup>158</sup> and crusaders began lobbying for passage of plumbing codes to standardize household plumbing.<sup>159</sup> The adoption of these codes represented the further demise of the private realm as public regulation reached into more aspects of daily life previously considered private.<sup>160</sup>

Regulators first turned their attention to factory sanitation in the 1880's. Until then, sanitary conditions in factories paralleled the general

153. Hoy, *supra* note 144, at 23. See also OGLE, *supra* note 147, at 106: "Physicians and laypeople alike . . . accepted the doctrine of predisposing causes—that is, the idea that people's behavior rendered them susceptible to disease."

154. Though the germ theory of disease was not fully understood by scientists until later, during the mid-century social reformers including Sylvester Graham, William Alcott, John Griscom and Lemuel Shattuck began to connect health to sanitation. Hoy, *supra* note 144, at 23–26.

155. OGLE, *supra* note 147, at 102.

156. *Id.*; See generally JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* (1990).

157. OGLE, *supra* note 147, at 93.

158. Though by the late 1890s approximately 41.6% of the U.S. population lived in cities and towns that furnished public water supplies. See Samuel W. Abbott, *The Past and Present Condition of Public Hygiene and State Medicine in the United States*, in *MONOGRAPHS ON AMERICAN SOCIAL ECONOMICS* 37 (Department of Social Economy for the United States Commission to the Paris Exposition of 1900 No. XIX, 1900), only 28.7% of the population lived in sewered towns at the end of the century. Fewer than one-quarter of American cities and towns had sewerage systems in 1896. *Id.* at 40.

159. *Id.* Maureen Ogle notes:

There was only one way to guarantee that every American lived in a scientifically sanitary home the force of law. Over the course of the nineteenth century, Americans had been gradually but decisively altering the nature of municipal authority, expanding both its role and its powers. By the late century, it was natural for sanitarians to eye municipal government as a tool with which to supervise and regulate household sanitation systems.

*Id.* at 144.

160. See, e.g., OGLE, *supra* note 147, at 147.

filthy state of America. Prior to the sanitarian movement, concern over factory sanitation focused not on dirt but on dust; discussions in the scientific literature concerned ventilation.<sup>161</sup> The cause of unhealthy conditions in the factory was deemed to be “atmospheric vitiation,” the inhaling of impure air.<sup>162</sup> Mention of toilets and sanitation was generally in the context of inadequate ventilation.<sup>163</sup>

Like American homes, factory toilet facilities most often consisted of outdoor privies or outhouses. When technological advances enabled workplace toilets to be brought indoors, the facilities were not separated by sex.<sup>164</sup> A 1914 study of factory sanitation in New York State demonstrates that progress in sanitary technology was slow in coming to the workplace.<sup>165</sup> In a section entitled “Toilet Accommodations,” the inspector notes:

No part of an industrial establishment is so neglected as the toilet accommodations. In many cases they are located outside of the factory, and sometimes quite a distance from it, causing the loss of much time and also endangering the health of the employees.

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161. See, e.g., ROBERT RITCHIE, OBSERVATIONS ON THE SANATORY ARRANGEMENTS OF FACTORIES WITH REMARKS ON THE PRESENT METHODS OF WARMING AND VENTILATION AND PROPOSALS FOR THEIR IMPROVEMENT (1844) (study of British factories focusing almost entirely on ventilation and airborne poisons).

162. *Id.* at 2.

163. An 1882 study of sanitation in British factories states:

*General Evidences as to Sanitary Defects and Consequences. . . .*

Mr. R.W. Cole stated that in large factories they are in the habit of putting closets in the workroom, which sometimes are exceedingly injurious to the health. They emit the most frightful odour, so much so, that I have often felt sickened myself in going through the factories.

B.H. THWAITE, OUR FACTORIES, WORKSHOPS, AND WAREHOUSES, THEIR SANITARY AND FIRE-RESISTING ARRANGEMENTS 26 (1882).

164. See, e.g., *Men's Ready-Made Clothing*, in 2 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 499 (quoting *Second Annual Report of the Factory Inspectors of New York* 26 (1887)):

The workshops occupied by those contracting manufacturers of clothing, or “sweaters,” as they are commonly called, are foul in the extreme. Noxious gases emanate from all corners. The buildings are ill smelling from cellar to garret. The water-closets are used alike by males and females, and usually stand in the room where the work is done.

165. PRICE, *supra* note 30, at 275.

In the investigation made for the New York State Factory Commission, the toilets were located in yards in 186 of the establishments inspected. . . . Many of the toilets were not separated for the sexes and were of an obsolete and crude type.<sup>166</sup>

### B. *The Enactment of Toilet Laws*

In 1887 Massachusetts adopted the first law mandating that “water closets” in factories and other workplaces be separated by sex;<sup>167</sup> New York enacted a similar law two months later.<sup>168</sup> By 1920, 43 states had adopted similar legislation.<sup>169</sup> Legislative history of state laws in the late nineteenth century is virtually unavailable,<sup>170</sup> but the passage of these laws followed several patterns. A significant number were enacted as amendments to existing labor legislation aimed at protecting women and children workers.<sup>171</sup> Other legislation mandating workplace sex-separated

166. *Id.* Price notes that “[a]ll industrial and sanitary codes demands [sic] separate water-closet compartments for the sexes in every factory where men and women are employed. All toilet rooms should be located within the factory building and be convenient and accessible to the persons using them.” *Id.* at 277.

167. Act of Mar. 24, 1887, ch. 103, § 2, 1887 MASS ACTS, 668, 669; *see* text of statute, *supra* note 51.

168. Act of May 25, 1887, ch. 462, § 13, 1887 N.Y. LAWS 575, 577.

169. George Martin Kober, *History of Industrial Hygiene and its Effects on Public Health, in A HALF CENTURY OF PUBLIC HEALTH* 361, 377 (Mazýk P. Ravenal ed., 1921).

170. Referring to such statutes in her 1935 study of American labor legislation, Elizabeth Brandeis notes:

But to tell the story of how the laws came to be passed and how well they worked out in practice is a very different matter. Material on how specific laws came to be passed is fragmentary in the extreme. The official records in most states reveal nothing—there are no stenographic reports of legislative hearings or legislative debate. Even if such records were available, they would not reveal completely the interplay of forces which actually put the particular measure on the statute book.

BRANDEIS, *supra* note 35, at 400.

171. *See, e.g.*, 1887 N.Y. LAWS, ch. 462, § 13 (“An act to regulate the employment of women and children in manufacturing establishments . . .”); 1893 PA. LAWS, No. 244, 276 (“An Act to regulate the employment and provide for the safety of women and children in manufacturing establishments, mercantile industries, laundry or renovating establishments, and to provide for the appointment of inspectors to enforce the same, and other acts providing for the safety or regulating the employment of said persons.”); 1919 N.D. LAWS, ch. 174, 317 (“An Act to Protect the Lives and Health and Morals of Women and Minor Workers . . .”); 1913 S.D. SESS. LAWS, ch. 240, 332 (“An Act to Regulate the Employment of Women and Girls and Children Within This State . . .”).



toilet facilities aimed more narrowly at protecting only women.<sup>172</sup> Some states adopted toilet legislation using gender-neutral terms, with no specific reference to protecting women.<sup>173</sup> Still other laws included a toilet sex-separation requirement as one provision in comprehensive legislation aimed at improving factory sanitation.<sup>174</sup>

Irrespective of the title and language of any particular statute, an examination of the statutes and related literature makes clear that the toilet laws were aimed primarily at protecting women (and in some cases, children) and were not intended as gender-neutral regulations.<sup>175</sup>

### *C. Four Justifications for Separating Public Toilet Facilities by Sex*

By the early twentieth century, great interest developed in examining the working conditions in American factories. States established commissions to study factory health issues,<sup>176</sup> while on the federal level, the Department of Labor undertook investigations into factory sanitation.<sup>177</sup>

In addition, in 1907, the U.S. Congress passed "An Act To authorize the Secretary of Commerce and Labor to investigate and report upon the industrial, social, moral, educational, and physical condition of woman and child workers in the United States."<sup>178</sup> As a result, in 1910, the Department of Commerce and Labor issued an extended study entitled "Report on Condition of Woman and Child Wage-Earners in the United States in 19 Volumes."<sup>179</sup> Certain volumes focused on conditions in particular industries, including the cotton textile industry,<sup>180</sup> the men's

172. *See, e.g.*, 1891 Ohio Laws, No. 413, 87 ("To amend section 1 of an act entitled 'An act for the preservation of the health of female employees,' passed April 16, 1885, as amended March 1, 1889"); 1919 Ark. Acts 197 ("An Act for the Protection of the Health of Women Workers, and Providing Penalties for Violations Thereof"); 1897 Tenn. Pub. Acts, ch. 98, § 1, 247 ("An Act to require employers of females to provide separate water-closets for them").

173. *See, e.g.*, 1913 N.C. Sess. Laws, ch. 83, § 1, 127 ("An Act to Compel all Persons and Corporations Engaged in Manufacturing or Other Business Enterprises Where Male and Female Employees are Employed to Provide Separate and Distinct Toilets.").

174. *See, e.g.*, 1887 Mass. Acts, ch. 103, 668 ("An Act to secure proper sanitary provisions in factories and workshops.").

175. *See infra* Part IV.C.

176. *See, e.g.*, Price, *supra* note 30.

177. *See, e.g.*, C. F. W. Doehring, *Factory Sanitation and Labor Protection*, 44 Bull. of the Dep't of Labor 1 (1903).

178. Pub. L. No. 59-41, 34 Stat. 866 (1907).

179. Report on Condition of Woman and Child Wage-Earners, *supra* note 38.

180. *Cotton Textile Industry*, 1 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1910).

ready-made clothing industry,<sup>181</sup> the glass-making industry,<sup>182</sup> and the silk industry,<sup>183</sup> among others. Additional volumes focused on more general issues related to working women in American industry,<sup>184</sup> while others were concerned with issues of child labor.<sup>185</sup>

Included in each volume devoted to a particular industry is an examination of factory sanitary conditions, including the conditions of toilet facilities.<sup>186</sup> The reports are universal in recommending that factory water closets be separated by sex.<sup>187</sup> What led regulators to perceive a need for sex-separate toilet facilities (and, at times, wash rooms and dressing rooms)? An examination of state statutes and related literature reveals four justifications for this requirement:

1. The sex-separated water closet was necessary as a *haven* to protect the weaker body of the woman worker;
2. The sex-separated water closet was necessary as one aspect of a factory's providing its workers with *sanitary*—"clean and adequate"—toilet accommodations;
3. The sex-separated water closet was necessary to protect a worker's interest in *privacy*; and
4. The sex-separated water closet was necessary to protect and vindicate *social morality*, a morality rooted in the early nineteenth century separate spheres ideology.

181. *Men's Ready-Made Clothing*, 2 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1911).

182. *Glass Industry*, 3 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1911).

183. *The Silk Industry*, 4 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1911).

184. See, e.g., *History of Women in Industry in the United States*, 9 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1910).

185. See, e.g., *Juvenile Delinquency and Its Relation to Employment*, 8 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1911).

186. The discussion of factory restrooms generally appears in a chapter of each volume concerning "Working Conditions." See, e.g., *Cotton Textile Industry*, 1 Report on Condition of Woman and Child Wage-Earners, *supra* note 38, at 357. The discussion of "waterclosets and privies" is often coupled with a discussion of "wash rooms" and "dressing rooms." See *id.* at 368, 370.

187. For example, after adverting to state laws mandating separate toilet facilities, the reporter investigating men's ready-made clothing industry notes: "Aside from the question as to whether required by law or not, it goes without saying that in any manufacturing establishment there should be adequate water-closet facilities conveniently located, separate for the sexes, properly ventilated, and having sufficient privacy of approach." *Men's Ready-Made Clothing*, 2 Report on Condition of Woman and Child Wage-Earners, *supra* note 38 (1911), at 333.

Each justification offers a different perspective on the late nineteenth century cultural understanding of the sex-separated public toilet facility as architectural space. These four justifications are often interwoven in the literature. Nonetheless, teasing out each theme helps to illuminate the evolving understandings of gender from the early nineteenth century into the twentieth century through the lens of critical architectural theory.

### 1. The Sex-Separated Water Closet as a Haven to Protect the Weaker Body of the Woman Worker

The literature discussing health and sanitation issues in turn-of-the-century factories leaves little doubt that female workers were viewed as weaker and more vulnerable than male workers. A statement in a 1903 Department of Labor study of factory sanitation is typical.<sup>188</sup> Discussing the effects of “insanitary conditions” in factories, the author states:

Under the influence of long-continued work under insanitary conditions the physiques of the workmen, and especially those employed in factories, often show more or less characteristic marks. The height is usually below medium, the body, weak and thin, is poorly nourished and of sickly paleness. . . . The spiritual and moral life may likewise become inactive and apathetic. . . . Women suffer even more than men from the stress of such circumstances, and more readily degenerate. A woman's body is unable to withstand strains, fatigues, and privations as well as a man's.<sup>189</sup>

Turn-of-the-century concerns about working women often focused on their reproductive capacity.<sup>190</sup> For example, the author of a 1908 monograph on occupational diseases wondered whether the increased

188. *Factory Sanitation*, *supra* note 177.

189. *Id.* at 1–2.

190. *See, e.g., id.* at 28 (section of report concerning “Relation of Sex to Lead Poisoning,” quoting Dr. Thomas Oliver):

Where the two sexes are as far as possible equally exposed to the influence of lead, women probably suffer more rapidly, certainly more severely, than men. To a certain extent the reason is to be found in the fact that lead exercises an injurious influence upon the reproductive functions of women. It deranges menstruation.

speed of machinery might result in female workers mothering "infants who are puny, ill-nourished and of a highly strung nervous system?"<sup>191</sup>

Women's greater physical vulnerability led to the recommendation that separate, special facilities for women be provided in the workplace.<sup>192</sup> State laws mandating sex-separate toilets were often joined with a requirement that women employees be provided with separate dressing rooms, wash rooms, lunch rooms, and resting rooms.<sup>193</sup> These requirements were similarly justified based on the increased vulnerability of women employees. For example, a 1913 report by Dr. George Price on the dress industry notes:

There is, however, one important matter of sanitation in which the shops suffer in common with the shops of many other industries, namely, the absence of lunch and retiring rooms. In the shops where there are a large number of girls working, it is probable that there are a number likely to have sudden attacks of dizziness, fainting or other symptoms of illness, for whose use provision should be made in the form of rest or emergency rooms.<sup>194</sup>

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191. THOMAS OLIVER, *DISEASES OF OCCUPATION FROM THE LEGISLATIVE, SOCIAL AND MEDICAL POINTS OF VIEW* 3 (E.P. Dutton, N.Y. 1908).

192. *See, e.g., Glass Industry*, 3 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 348, where the reporter suggests that toilet facilities for women workers deserve special attention: "It is commonly agreed that closet accommodations which might be classed as satisfactory for males might not be satisfactory for females."

193. *See, e.g.,* 1911 COLO. ACTS, ch. 132, § 10 ("In factories, laundries, mills, and workshops . . . where the labor performed by the operator is of such character that it becomes desirable or necessary to change the clothing wholly or in part before leaving the building . . . separate dressing rooms shall be provided for women and girls whenever so required by the factory inspector."); 1893 PA. LAWS, No. 244, § 10, 276, 278 ("A suitable and proper wash and dressing room and water closets shall be provided for females where employed . . ."); 1891 OHIO ACTS, No. 413, § 1, 87, 87 ("That every persons or corporation employing females employes in any manufacturing, mechanical or mercantile establishment in this state . . . shall also provide . . . suitable and separate toilet and dressing rooms and water-closets for the exclusive use of such female employes."). The requirement that dressing rooms and wash rooms be provided for females was not deemed applicable to males. *See, e.g.,* 1911 COLO. ACTS, Ch 132, 1893 PA. LAWS, No. 244, 1891 OHIO ACTS, No. 413.

194. GEORGE M. PRICE, JOINT BOARD OF SANITARY CONTROL IN THE DRESS AND WAIST INDUSTRY, SPECIAL REPORT ON SANITARY CONDITIONS IN THE SHOPS OF THE DRESS AND WAIST INDUSTRY 13 (1913). In his final list of recommendations, in addition to suggesting that separate water closets be provided for each sex, Dr. Price also

Because dizziness and fainting were considered conditions unique to women, special spaces needed to be set aside in which women workers could rest.<sup>195</sup> The first theme that emerges from the literature is that sex-separated restrooms (along with other sex-separated facilities) were necessary to provide a protective haven for the vulnerable bodies of women employees, a place where a woman could seek comfort and rest when her weak body gave out on the job.

## 2. The Sex-Separated Water Closet as Necessary to Provide Workers with *Sanitary*—“Clean and Adequate”—Toilet Facilities

The scope of turn-of-the-century investigations into factory “sanitation” was very broad. In addition to issues of cleanliness,<sup>196</sup> included under the rubric of sanitation were concerns of fire protection,<sup>197</sup> light and illumination,<sup>198</sup> and ventilation.<sup>199</sup> Investigations into sanitation also included inquiry into whether toilet facilities, dressing rooms, and rest rooms were separated by sex.<sup>200</sup> Moreover, laws requiring sex-separation of toilet facilities often added a requirement that these facilities be maintained in a sanitary condition.<sup>201</sup>

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recommends that “[in] all shops where more than twenty-five women are employed, a provision should be made for rest and emergency rooms for their use.” *Id.* at 16.

In addition to their inherent physical vulnerability, other justifications given for excluding women from certain professions related to their inherent lack of mechanical skills and the danger caused by their clothing. In the Department of Commerce and Labor Report on the cotton textile industry, the reporter stated:

Mule spinning is always done by men. . . . One reason why men are employed instead of women is that the mule is a very complicated machine, and much mechanical skill is necessary to keep it properly adjusted. . . . Besides, there would be danger of a woman’s skirts being caught in the moving machinery.”

*Cotton Textile Industry*, 18 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 404.

195. *See, e.g.*, ROSENBERG, *supra* note 109, at 197–216 (discussing hysteria as another condition considered to be unique to women in nineteenth century culture).
196. *See, e.g.*, PRICE, SPECIAL REPORT, *supra* note 194, at 13–14.
197. *See, e.g., id.* at 9–11.
198. *See, e.g., id.* at 12.
199. *See, e.g.*, INDUSTRIAL COMMISSION OF WISCONSIN, GENERAL ORDERS ON SANITATION—INCLUDING VENTILATION, TOILET ROOMS AND GENERAL SANITATION 7 (1921) (Part I focuses exclusively on “Ventilation”).
200. *See, e.g.*, PRICE, THE MODERN FACTORY, *supra* note 30, at 275 (investigation reveals that toilets in many New York State factories not separated by sex).
201. *See, e.g.*, 1911 COLO. ACTS, ch. 132, § 10, 387, 395 (In addition to requiring separate toilets for each sex, the statute also required that [s]uch closets shall be properly

What is the relationship between sex-separation and cleanliness, and why did investigators consider sex-separation of toilet facilities to be an issue of sanitation?

The sections of reports examining sanitation regularly considered the "adequacy" of a factory's toilet facilities. Subsumed under the concept of adequacy were concerns of the sufficiency of the number of toilets<sup>202</sup> and concerns as to whether the facilities were conveniently located.<sup>203</sup> The sex-separation requirement is melded into considerations of sanitation as an issue of adequacy. For example, in a section on "General Sanitation" in the Department of Commerce and Labor report, the reporter notes:

The provision of adequate toilet rooms has received much attention from factory inspectors, in the States included in this study, with good results. Only three cases were noted during the investigation where separate provision for the sexes was not made. . . . In the excellent class were placed those rooms in which the plumbing was of good modern pattern, the floors of cement or tile or carefully constructed of wood, and cleaning was so frequent and careful that even suspicious inspection would not disclose offense in odor or appearance.<sup>204</sup>

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screened and ventilated and at all times kept in a clean and good sanitary condition.").

202. *See, e.g.*, 1887 MASS. ACTS, ch. 103, § 2, 668, 669 ("a sufficient number of separate and distinct waterclosets, earth-closets or privies shall be provided for the use of each sex . . .").
203. *See, e.g.*, SPECIAL REPORT, *supra* note 194, at 12. *See also, e.g.*, 1887 MASS. ACTS 669 ("Every person employing five or more persons . . . shall provide, within reasonable access, a sufficient number of proper water-closets . . .").
204. 11 SEN. DOC. 61-645, at 26 (1911).

Similarly, in the New York State report on the Dress and Waist Industry, among the recommendations set forth as "Sanitary Standards of the Industry" are the following:

20. Walls and ceiling of shops and water-closet apartments should be cleaned as often as necessary, and kept clean.
21. Floors of shops, and of water-closet apartments, to be scrubbed weekly, swept daily, and kept free of refuse.
22. A separate water-closet apartment shall be provided for each sex, with solid partitions to extend from floor to ceiling, and with separate vestibules and door.
23. Water-closets to be adequately flushed and kept clean.

. . .

Sex-separation is a sanitation concern comparable to cleanliness and ventilation. An investigator's final recommendations regarding sanitation often included a recommendation that sex-separate facilities be provided.<sup>205</sup> That recommendation is considered part and parcel of the adequacy of a factory's sanitation. A second theme to emerge from the literature concerning factory toilet facilities is that sex-separation of such facilities is one aspect of a factory's maintaining sanitary, clean, and "adequate" toilet facilities.

### 3. The Sex-Separated Water-Closet as a Space to Protect a Worker's Privacy

State statutes that mandated sex-separated workplace toilet facilities often regulated the "privacy" of such facilities. For example, in addition to requiring separate toilet facilities, the Connecticut law also required that "every manufacturing, mechanical and mercantile establishment . . . provide adequate toilet accommodations, so arranged as to secure reasonable privacy, for both sexes employed or engaged in any such establishment. . . ."<sup>206</sup> While not using the word "privacy," other states adopted similar requirements. Pennsylvania required that women's water closets not adjoin those used by men, but be "entirely away from them."<sup>207</sup> Some statutes required that the toilet accommodations for the different sexes have "separate approaches,"<sup>208</sup> while others required that water closet accommodations be "properly screened."<sup>209</sup> Connecticut required that "when any such accommodations intended for use by any female adjoin such accommodations intended for use by any male, the partition constructed between such accommodations shall be solidly constructed from the floor to the ceiling."<sup>210</sup>

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27. Water-closet apartments, dressing-rooms, wash-rooms, and lunch-rooms to be properly lighted, ventilated, and cleaned, and to be kept clean.

PRICE, SPECIAL REPORT, *supra* note 194, at 16.

205. See, e.g., MILTON J. ROSENAU, PREVENTIVE MEDICINE AND HYGIENE 1337 (1921):

WATER-CLOSETS AND URINALS.—Separate accommodations must be provided for the sexes; privies in country districts should be in entirely separate buildings. The urinals should be constantly and automatically flushed and water-closets and urinals should be made to allow complete inspection and use of the scrubbing brush. Thorough ventilation of the toilet-rooms should be planned for and they should be kept clean and sweet at all times.

206. 1921 CONN. PUB. ACTS 3250.

207. 1893 PA. LAWS 278.

208. See, e.g., 1899 IND. ACTS 235.

209. See, e.g., 1893 PA. LAWS 278.

210. 1921 CONN. PUB. ACTS 3250.

What was the legislative goal in mandating privacy of workplace toilet facilities? To understand this, one must explore Victorian concerns of modesty that surrounded the human body and bodily functions. Personal privacy became an obsession in late Victorian society. "The right of individual privacy, under new pressures in the brashly inquisitive metropolis and subject to the development of new technologies of intrusion and publicity, was elevated to sacred status, which everyone was bound to respect."<sup>211</sup> This interest in privacy was heightened with respect to issues surrounding bodily functions,<sup>212</sup> and concerns over such functions became deeply intertwined with social morality.<sup>213</sup>

Given this obsession with privacy, public spaces such as the workplace posed a special problem for late Victorian society. Obviously, the "more intimate functions"<sup>214</sup> had to be performed in such locations. One way to assure privacy was to cordon off toilet spaces from more public spaces by requiring floor-to-ceiling walls and "properly screened" approaches.<sup>215</sup>

211. JOHN F. KASSON, *RUDENESS & CIVILITY: MANNERS IN NINETEENTH CENTURY URBAN AMERICA* 116 (1990).

212. *See id.* at 124: "In public especially, but also in private, one sought particularly to stifle all activities that might draw attention to the internal workings of the body, such as coughing sneezing, yawning, scratching, tooth picking, throat clearing, and nose blowing. More intimate functions were generally beneath discussion.") In an admonition against chewing tobacco, Kasson quotes one etiquette writer's view that spit "is an excrement of the body, and should be disposed of as privately and carefully as any other." *Id.* at 126.

213. ELIZABETH WILSON, *THE SPHINX IN THE CITY: URBAN LIFE, THE CONTROL OF DISORDER, AND WOMEN* 37 (1991). Addressing the deplorable health conditions in London around mid-century, Wilson notes:

Efficient sewage systems were as desperately needed as adequate water supplies. In both cases, morality was inextricably entwined with cleanliness, disorder with filth. For the Victorians excrement became a metaphor, and a symbol for moral filth, perhaps even for the working class itself, and when they spoke and wrote of the cleansing of the city of filth, refuse and dung, they may really have longed to rid the cities of the labouring poor altogether.

214. KASSON, *supra* note 211, at 124.

215. The lack of adequate privacy was a regular point of critique in the Department of Commerce and Labor reports. For example, in the report on the men's ready made clothes industry, the reporter notes:

[A] larger number of establishments were delinquent with reference to the lack of privacy of approach to the water-closets than in any other respect. It is very common for the closets for men and women to be located side by side, with the doors opening from a common jamb. In many instances the closets opened directly into the workshops. In some instances the closet would be built as one inclosure, with a thin partition constructed within.



The literature makes clear that Victorian concerns over modesty and privacy in the workplace were directed more toward protecting women than men.<sup>216</sup> For example, the reporter notes in the Department of Commerce and Labor report on the cotton textile industry:

In a very large proportion of the mills there is not reasonable privacy of approach to the water-closets. In some cases the water-closets for females immediately adjoin those for males. In some mills the construction of the water-closets is disgraceful; closets are built within the workrooms, and the thin board partitions do not extend to the ceilings, and in some instances the doors do not reach to the floor. Where this is the case the feet and lower parts of the skirts of females occupying the water-closets can be seen from the workrooms.<sup>217</sup>

It is female vulnerability that is of concern in this report.<sup>218</sup> It is a violation of Victorian modesty for any part of a woman's anatomy to be subjected to public scrutiny while she performs intimate bodily functions. The literature paints a vision of male workers defiling a woman's virtue by illicitly sneaking peeks at her lower extremities while she is using the water closet.<sup>219</sup> Moreover, merely shielding a woman while she

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This partition in some cases did not reach to the ceiling and was entirely inadequate. In other cases closets were used by the employees of different shops or establishments and the approach to them would be by a single hall or passageway.

2 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 335.

216. In the Department of Commerce and Labor report on the glass industry, in a section on "Closets for Females," the reporter notes that the privacy of approach to factory toilets, a "factor affecting the character of women's closets . . . to which very few manufacturers have given any thought or, at least, active attention." He criticizes instances in which "closets are often simply walled-off portions of the workroom, the men's and women's closets side by side and the entrances exposed to the direct view of all." 3 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 353.

Factory Inspector George Price believed that adequate partitions between men's and women's restrooms were not enough: "It is best that toilet rooms for males and females should be in different parts of the building." PRICE, *THE MODERN FACTORY*, *supra* note 30, at 277.

217. 1 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 371.
218. The reporter also expresses similar concerns about the presence of children in factories: "[I]n a greater number of cases there is a lack of the privacy of approach to closets which may reasonably be demanded and which is of especial importance where large numbers of young children of both sexes are employed." *Id.* at 372. The act of viewing a person in the midst of intimate functions, or being viewed oneself while engaging in such functions, is deemed to be inherently corrupting.
219. In the Department's report on the men's ready-made clothing business, the reporter notes that workers should "not have to wash in sight of all the other employees."

was in the process of using the water-closet was not enough. Victorian modesty was threatened if a woman could even be seen entering the facility.<sup>220</sup>

Victorian concerns of modesty went beyond demanding privacy between the sexes. One report describes a mill where, though privacy of approach to the sex-separated water closets was adequate, there was “no privacy within their doors. Along the walls of each room stand from six to eight toilets, with no partitions between them.”<sup>221</sup> When engaging in intimate bodily functions, workers need privacy not only from the opposite sex, but from everyone.

A third theme surrounding the factory sex-separated water closet was founded in Victorian values of modesty, values that developed in response to an invasive technological world. Under this value system, the sex-separated water closet was necessary as a private space in which workers, particularly women, could attend to intimate bodily functions hidden from public gaze.

2 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 330. But here again the concern seems directed more towards women than men: “Still another [factory] had for its female employees a sink and faucet with towel service in their toilet room, while the men might wash at a sink just outside the men’s toilet.” *Id.* at 331. Victorian modesty required that a woman be shielded from male observation not only when engaging in intimate functions, but even when just washing her hands. In contrast, it mattered less if a male was subject to observation while washing up.

220. In the Department’s report on Laundries, the reporter criticized the location of the water-closet:

In one instance the one closet of the establishment was in the basement under the pavement, with no light except what came from a circular piece of glass set in the pavement and no ventilation but the open door. . . . It was in plain sight of the men who were doing the washing in the basement, clad only in their undergarments . . . . In another laundry, while other conditions were very good, the one objectionable feature was one closet for both sexes and that in a dark, unwholesome basement, where the women had to pass among the washers to reach it.

12 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 12. The concern is twofold: First, women entering the water-closet will be seen by male workers; second, women workers will have to endure the embarrassing sight of male workers in their underwear.

221. 1 CONDITION OF WOMAN AND CHILD WAGE-EARNERS, *supra* note 38, at 372.

#### 4. The Sex-Separated Water-Closet as a Space to Protect Social Morality

Each of the justifications examined above for separating public restrooms by sex finds its origins in cultural and social developments of the late nineteenth century. Viewing the sex-separated public bathroom as a space in which to protect a woman's weaker body arose out of scientific discoveries about inherent differences between the sexes. Viewing the sex-separated public bathroom as a necessary component of adequate sanitation evolved from the sanitarian movement and late century developments in public health. Viewing the sex-separated public bathroom as a private space necessary to protect a woman's modesty evolved from Victorian anxieties over new invasive technologies that threatened to overwhelm private life.

A fourth theme surrounding the sex-separated water closet also emerges from the literature, one that underlies the other themes: the sex-separated water closet was necessary as a space in which to protect and vindicate social morality and propriety. Unlike the other justifications, this theme is not rooted in late nineteenth century social developments; rather, it is firmly based in the separate spheres ideology of the early century. Separating public restrooms by sex was necessary to foster the cult of true womanhood. This theme proves to be the driving force behind the laws mandating sex-separated public restrooms.

Strong evidence as to the overwhelming importance of this fourth theme is embodied in a book entitled *Factory Sanitation*,<sup>222</sup> published in 1913 by the Standard Sanitary Manufacturing Company of Pittsburgh, Pennsylvania, one of the country's major manufacturers of plumbing fixtures.<sup>223</sup> *Factory Sanitation* served two functions. The second half of the book consisted of an extensive catalog of workplace bathroom fixtures manufactured by the company. The first half of the book contained an extended essay also entitled "Factory Sanitation," by J.J. Cosgrove, a highly regarded sanitary engineer who published a number of technical books and histories used in colleges and technical schools to teach sanitation and plumbing architecture.<sup>224</sup>

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222. J.J. COSGROVE, *FACTORY SANITATION* (1913).

223. In 1967 the company would change its name to "American Standard Companies, Inc.," today one of the world's largest manufacturers of plumbing fixtures. See American Standard Company Overview, <http://www.americanstandard-us.com/CompanyInfo/overview.aspx> (last visit Apr. 20th, 2007).

224. See COSGROVE, *supra* note 222. Among J.J. Cosgrove's other publications were: *HISTORY OF SANITATION* (1909); *PRINCIPLES AND PRACTICE OF PLUMBING* (1906); *SEWERAGE PURIFICATION AND DISPOSAL* (1909); *WROUGHT-PIPE DRAINAGE SYSTEMS* (1909); *PLUMBING PLANS AND SPECIFICATIONS* (1910); *PLUMBING ESTIMATES AND*

Cosgrove's essay was intended to serve as a technical manual to advise companies about the most up-to-date ways to design factory toilet facilities. Accordingly, much of the essay is written in highly technical language. Nonetheless, Cosgrove also was interested in advising factory owners on how well-planned facilities could enhance employee happiness.<sup>225</sup> The essay is illustrated with extensive pictures of both dilapidated and well-designed factory toilet facilities. Beneath a picture of a filthy wooden structure in the corner of a workroom with two adjacent doors, the following extended caption appears:

TOILET FACILITIES AS BAD MORALLY AS  
FROM A SANITARY STANDPOINT

Moral decency requires that where males and females are employed, separate accommodations shall be provided which, in every sense of the word, will be private. Ignoring the obvious filth of this double accommodation for "men" and "females," close proximity of the fixtures separated only by a thin board partition, far from sound proof, and the common approach, such accommodations would be morally objectionable even if they were sanitary, clean, well lighted and well ventilated.

Apply the golden rule in business. You would recoil with horror at the thought of your daughter being forced to avail herself of such accommodations. Treat other men's daughters, then, as you would like them treat yours.<sup>226</sup>

Though set forth in a technical scientific essay on factory plumbing and sanitation, Cosgrove's concern for a sex-separated bathroom is not founded in the "adequacy" needs of sanitary science. His concern is based upon a vision of true womanhood, which aims to vindicate the early century separate spheres ideology. The appeal to one's "daughter" is meant to invoke a vision of woman as pure and virginal. Despite the

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CONTRACTS (1910); DESIGN OF THE TURKISH BATH (1913); and SANITARY REFRIGERATION AND ICE MAKING (1914).

225. Thus, in a section entitled "Interesting Men in their Employment," he states: "Washing and bathing facilities will bring the men to work ahead of time so they can change their clothes; throws them together so they become better acquainted; makes a sort of social club of the factory outside of working hours, and promotes a good feeling all around." COSGROVE, *supra* note 222, at viii.

226. *Id.* at ix.

scientific pretensions of the realist and sanitarian movements, the moral ideology of the early nineteenth century continues to shape technological decisions at the turn of the twentieth century.

Elsewhere in his technical treatise, Cosgrove suggests that the sex-separated toilet space for women should aspire to be home-like. The following caption appears beneath a picture of a well-designed women's toilet room in one factory:

#### BATH ROOM FOR WOMEN IN DAYTON FACTORY

Suggestive of all the comfort, cleanliness and convenience of a bath room in the home. Can self-respecting capable operatives be blamed for preferring such accommodations to those shown in the front part of the book?<sup>227</sup>

Like women's reading rooms in Victorian public libraries, the factory restroom for women in Cosgrove's view should aspire to provide a domestic atmosphere.

Other experts on factory plumbing were also influenced by early nineteenth century moral ideology. In his 1882 work on factory sanitation in Britain, B.H. Thwaite introduces a highly technical section entitled "Closet Arrangements" with the following:

The importance of a proper closet accommodation, and its effects on the health and morality of the workpeople, especially in mills and workshops where operatives of both sexes are employed, will be acknowledged. Much immorality, vice and disease have been fostered by abominable closet arrangements. . . . The closets should be arranged in convenient positions. The closets for males should be distinctly separate from those for females. Closets on the midden system are extremely unhealthy and should be removed; they not only pollute the atmospheres and thus engender disease but pollute the subsoil.<sup>228</sup>

Concerns of morality are interwoven with concerns of health and sanitation. Separate toilets are necessary to protect pure womanhood from immorality, vice and disease. Late nineteenth century concerns

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227. *Id.* at xxii.

228. THWAITE, *supra* note 163, at 36.

about germs and sanitation become entangled with early nineteenth century ideological concerns of pure womanhood.<sup>229</sup>

Protective labor legislation aimed at women and children in the late nineteenth and early twentieth centuries often directly addressed concerns of morality along with concerns of health, adequate wages, and maximum hours.<sup>230</sup> Moreover, the Department of Commerce and Labor reports regularly interweave considerations of morality with discussions of the other three themes related to factory toilet accommodations.<sup>231</sup>

229. Discussions of late nineteenth century factories often combined women's health issues with issues of modesty and morality. Thus, in a 1905 report, Mabel Parton, Director of the Department of Research of the Women's Educational and Industrial Union, states:

The evidence . . . indicates that the menstruation of the doffers, usually young girls between fourteen and seventeen years of age, is affected by their standing barefoot on wet floors, and that colds, rheumatism and bronchitis are unduly prevalent among wet-room women.

Several doctors in twine and cordage factory towns have suggested that the relation between wet-room conditions and morals is as important a subject for investigation as the one chosen, and other indications bear out this opinion.

Mabel Parton, *The Work of Women and Children in Cordage and Twine Factories*, in *LABOR LAWS AND THEIR ENFORCEMENT* 143, 144–45 (Susan M. Kingsburg ed., Arno & The N.Y. Times 1971) (1911).

230. See, e.g., 1913 OR. LAWS 92 enacted "To protect the lives and health and morals of women and minor workers . . ." stated:

Section 1. It shall be unlawful to employ women or minors in any occupation . . . for unreasonably long hours; and it shall be unlawful to employ women or minors in any occupation . . . under such surroundings or conditions, sanitary or otherwise, as may be detrimental to their health or morals.

231. For example, in a section of the cotton textile industry report entitled "The Moral Condition of Cotton-Mill Operatives," the reporter states:

In cotton mills large numbers of men, women, and children are brought together in the same workrooms. Where men and women are thus constantly associated it is, of course, possible for immoral relations between them to spring up. A woman and a man never jointly attend the same machine; usually each has several large machines to attend. A woman, if she wishes, need have no communication with the men in the mill except the section hand, second hand, and overseer.

*Cotton Textile Industry*, *CONDITION OF WOMAN AND CHILD WAGE-EARNERS*, *supra* note 38, at 590.

In the very next paragraph, these concerns for morality are tied directly to concerns of privacy in the configuration of factory restrooms: "In many mills . . . there is no privacy of approach to the toilets, and anyone entering them does so in full view

*D. The Sex-Separated Factory Water Closet as a Protective Haven*

The late nineteenth century cultural understanding as to the need to separate public restrooms by sex integrated four themes: 1) the vulnerable, weak bodies of women needed special protection in the dangerous public realm; 2) sex-separation was one aspect of providing “adequate” sanitary toilet facilities, a sanitation concern as important as cleanliness; 3) Victorian concerns of modesty viewed sex-separation of toilet facilities as necessary to protect a woman’s privacy when engaged in intimate bodily functions; and 4) sex separation of public toilets was necessary to vindicate the social morality of true womanhood, a morality steeped in the separate spheres ideology of the virtuous woman in her domestic haven. When considered together, these themes help to explain the underlying motivations of regulators who adopted the first laws mandating the sex-separation of public toilet facilities.

Mid-century realism shifted the focus of American thought from idealism to hard facts, facts often related to physical bodies in physical space. A new devotion to scientific inquiry led scientists to search for innate differences between men and women. This realist science, however, was not neutral. Firmly rooted in the separate spheres ideology, scientists “discovered” that women’s bodies were inherently weaker than men’s, and, accordingly, women were especially vulnerable when they ventured into the public realm. This discovery led to a deep concern over the presence of women in the workplace and, in turn, to the enactment of laws aimed at protecting the vulnerable bodies of working women.

The realist focus on physical space also led to regulation of those public architectural spaces inhabited by women. Again influenced by the lingering separate spheres ideology, regulators separated out certain spaces for the exclusive use by women.

Cholera epidemics during the Civil War, coupled with the scientific discovery of the germ theory of disease, led to the rise of an intense interest in sanitation and public health. New technologies enabled toilet facilities to be brought inside buildings, now connected to newly created municipal sewerage and public works systems. At the same time, the obsession with sanitation led to the enactment of extensive regulations that reached not only into the once-inviolable home, but also into many previously-unregulated public sites including the factory. More particularly, given concerns over the general danger that factories posed to

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of persons of both sexes in the same workroom, a condition obviously not in the interest of good morals.” *Id.*

women, lawmakers found the workplace water closet to be a potent target for regulation. In addition to the sanitation concerns implicated by this space, the toilet facility was that public space in which a woman's body was most vulnerable.

Invading every aspect of late nineteenth century life, the growth of technology induced a pervasive sense of danger and anxiety. In addition to challenging fundamental social values inherited from early in the century, the growing presence of women in the workplace was perceived by some as a threat to future generations. But the reality was that women could not be pushed back into the home. The critical role they played in supporting the expanding American economy would simply not be undermined by longings for a time gone by.

By enacting laws mandating sex-separated toilet facilities (along with dressing rooms, resting rooms, etc.) for women workers in factories, policymakers sought to reconcile the early century vision of women with the realities of late century life. Laws creating separate facilities for women in the workplace were a manipulation of architectural space aimed at creating a surrogate home, a protective haven, for women in the public realm. Adopted as extensions to protective labor legislation, these laws symbolized the weaker nature of women and their need for protection. Ultimately, laws mandating sex-separation of public restrooms were a last-ditch attempt by Victorian regulators to bolster the crumbling separate spheres ideology.

## CONCLUSION

Despite common intuitions, the historical and social justifications for the ubiquitous practice of separating public restrooms by sex were based not on a gender-neutral policy related to simple anatomical differences between men and women. Rather its origins were deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society.

Were the impact of this practice benign, the facts uncovered in this Article might offer little more than a historical curiosity. However, this architectural practice causes both physical challenges and emotional harms to significant groups of people: transsexuals facing workplace discrimination based on an employer's refusal to allow them to use the restroom designated for the sex with which they identify; persons with disabilities needing assistance from an opposite sex partner who is not allowed into the opposite-sex's restroom; parents with opposite sex



children facing hostile stares when they bring their child into a public restroom; women at public events inevitably waiting in long restroom lines during intermission, well after the men's restroom has cleared; intersexual persons facing the emotional challenges in choosing which restroom to use.

But the damage done by our regime of sex-separated public restrooms goes beyond these daily challenges faced by many. Sex-separated public restrooms convey subtle, yet potent messages about the nature of gender and gender difference, messages that date back two hundred years.<sup>232</sup> Separate public restrooms for men and women foster subtle social understandings that women are inherently vulnerable and in need of protection when in public, while men are inherently predatory. Moreover, the two-restroom model teaches that there are two, and only two sexes, a message highly problematic to the public's acceptance of transsexual and intersexual people.

Debates in Congress in the 1970s over the Equal Rights Amendment (ERA) confirm that sex-separated restrooms continue to convey such messages. Opponents of that amendment raised the specter that passage would require men and women to use a single public bathroom.<sup>233</sup> In explaining the dangers of this eventuality, opponents cited the "God made physiological and functional differences between men and women,"<sup>234</sup> differences that naturally impose upon "men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitation homes, and to furnish nurture, care and training to their children."<sup>235</sup> These ar-

232. See, e.g., Kogan, *supra* note 29, at 1228 (public restrooms as a social institution that powerfully impact the social sense of sex and gender).

233. In leading the opposition to the amendment, North Carolina Senator Sam Ervin stated:

[T]here are Federal and State laws and regulations which are designed to protect the privacy of males and females. Among these laws are laws requiring separate rest rooms for men and women in public buildings, laws requiring separate restrooms for boys and girls in public schools, and laws requiring the segregation of male and female prisoners in jails and penal institutions, and I might add, institutions for the mentally ill.

If the Equal Rights Amendment should be interpreted by the Supreme Court to forbid legal distinctions between men and women, it would annul all existing laws of this nature, and rob Congress and the States of the constitutional power to enact any similar laws at any time in the future.

118 CONG. REC. S4263 (daily ed. March 20, 1972) (statement of Sen. Sam Ervin).

234. *Id.* at 9084.

235. *Id.*

guments hearken directly back to the separate spheres ideology of the nineteenth century.

Exposing the historical origins of restroom sex-separation laws helps to make clear that there is nothing inevitable about the ways in which this important public space is currently organized. Moreover, recognizing that real harms result to real people from the practice of sex-separation sets the stage for imagining how this space might be reconfigured. Theorists have proposed several alternatives. Some advocate the development of unisex bathrooms.<sup>236</sup> Others have advocated the development of multiple restrooms, including gender neutral spaces open to anyone with alternative or nonconforming sexual identities.<sup>237</sup>

In fact, new configurations of public restrooms have begun to appear. College campuses across the country have begun to experiment with unisex restrooms.<sup>238</sup> Moreover, in part as a result of the Americans with Disabilities Act,<sup>239</sup> family restrooms and separate restrooms for persons with disabilities are becoming commonplace.<sup>240</sup>

Whether the debate occurs in the halls of Congress over the ERA or in the workplace lunchroom over a transsexual employee's desire to switch the restroom she uses, public restrooms have served as a flash-point in debates over the meaning of gender and gender difference in society. Understanding that sex-separation of this architectural space is not natural or inevitable enables us to envision alternatives. ♣

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236. See MARTINE ROTHBLATT, *THE APARTHEID OF SEX; A MANIFESTO ON THE FREEDOM OF GENDER* 92 (1995). Rothblatt argues that human beings should not be viewed as strictly divided dimorphically into men and women. Rather, she argues for an alternative vision, dubbed "sexual continuum," which advocated the considering human sexual differentiation as taking place along a continuum. *Id.* at 19.

237. See Kogan, *supra* note 29, at 1246–47.

238. See, e.g., "Unisex Restrooms Becoming More Widespread on Campus," <http://www-instadv.ucsb.edu/93106/2000/nov20/restrooms/restrooms.html>.

239. 42 U.S.C. §§ 12101–213. See Kogan, *supra* note 29, at 1255.

240. See, e.g., Jason Renner, *Facilities for Families: Family Restrooms Make Facilities More Accessible*, Buildings.com, <http://www.buildings.com/Articles/detail.asp?ArticleID=1701>.

