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Toilets as a Feminist Issue: 
A True Story
Taunya Lovell Banks†

THE ESSAY

One can measure the degree of equality between the sexes in America by its public toilets. As a child growing up, I remember that most public toilets for women had pay stalls. It often cost a nickel or even a dime to relieve yourself in a public toilet. There may have been one or even two free stalls, but they often were filthy and usually lacked toilet tissue.

Comparing notes with a male contemporary, I was surprised to learn that there were pay stalls in the men’s bathroom, but the urinals were free. Thus, women were penalized because no one had created the “feminine” equivalent of a urinal. If women ventured outside the home and were forced by circumstances to relieve themselves, they had to keep nickels, dimes, and tissue handy. The situation was even worse for women of color.

† Professor of Law, University of Maryland. I would like to thank Marley Weiss, Mary Coombs, Kathy Abrams, Regina Austin, and Jana Singer for their comments and suggestions on earlier drafts of this article. I also want to thank Robin West, Judy Scales-Trent, Mari Matsuda, Patricia Williams, Lani Guinier, and many others who read earlier drafts, for their words of support and encouragement.

1 This is an edited version of an essay which first appeared in Baculus, Publication of the Student Bar Association of the University of Tulsa College of Law, 10 (Oct 1988) (see note 17 and accompanying text).

2 In fact, someone has invented a device, Le Funelle, a folded and biodegradable paper funnel with handles and tissue. The inventor, a woman, claims the device is the answer to women’s concerns about contracting diseases from toilet seats. “It is for those times when sitting is simply out of the question, squatting is too difficult, and paper seat covers are either unavailable or too awkward.” Gregg Levoy, Startech: Stand-Up Women, Omni Mag 114 (Jan 1988). The inventor, Lore Harp, was not successful in marketing her product. Radio stations would not accept the ad because they claimed it violated their program standards; many magazines refused to carry the ad; and drugstores and mass merchants who were afraid that the product might offend customers refused to carry the product. Paul Brown, Mission Impossible?, Inc. 109 (Jan 1989). More recently, Kathie Jones obtained a patent for a female urinal called the “She-inal.” US Patent 4,985,940 (Jan 22, 1991). Ms. Jones has started a company called Urinette, Inc. to manufacture the urinal. Edward Gunts, For Relief of Women, “Female Urinal” Considered for New Stadium, Balt Sun A1 (Jan 25, 1991).
who often found that even when armed with nickels, dimes, and tissue, they were denied access to public toilets—both pay and free. 3 No wonder many women were reluctant to leave their homes for lengthy activities in public settings. I wonder how many women see the correlation between the difficulties they face at public toilets and the attempt by men to discourage women from participating fully in activities outside the home.

Even when pay stalls became less common, they were removed first from the men's room and only later, often by law, from the women's bathroom. 4 But the elimination of the pay toilet did not end discrimination against women in this area. Take, for example, the long lines often seen outside the women's bathroom during intermission at the theatre, concerts, or athletic events. There is rarely even a short line at the men's room.

One male friend maintains that men simply hold their waste longer than women because men dislike using public toilets. I am not convinced. I believe that the presence of urinals in men's rooms, along with a few stalls, allows these rooms to accommodate more users than women's bathrooms for approximately the same cost of construction. Men would say that this is economic equality. Granted, economic considerations are valid, but I contend that economic claims mask the deep-rooted reasons for inequality of access: men's desire to keep women at home.

There is no valid reason why women should have less access to bathroom facilities than men. Some may maintain that women insist on privacy, which requires building enclosed stalls, whereas men do not. Another male friend of mine suggested that women's bathrooms be constructed with rows of toilets, making the cost similar to that for a bank of urinals. This suggestion ignores the biological differences between men and women. Men use urinals facing inward, whereas women use toilets facing outward; thus, unless the toilets face the wall, women would have less privacy than men under this arrangement.

Would it really be unreasonable to require by law that public restrooms be constructed to accommodate the same number of users? Two possible results of such a measure would be shorter lines for women and

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3 Until the mid-1960s toilet facilities in most Southern states were racially segregated. See, for example, Jones v Marva Theatres, 180 F Supp 49 (D Md 1960); King v City of Montgomery, 42 Ala App 462, 168 S2d 30 (1964) (reversed conviction for trespassing in a coffee shop required by ordinance to maintain separate toilets for each race); Dawling v City of Norfolk, Va, 260 F2d 647 (4th Cir 1958). More recently, see James v Stockham Valves and Fittings Co., 559 F2d 310 (5th Cir 1977) (employment discrimination suit reversing the decision of a lower court finding no discrimination where there were claims that the employer maintained racially segregated facilities, including toilets for women, as well as other forms of discrimination).

4 In 1975, New York prohibited pay toilets by statute. NY Gen Bus Law § 399-A ( McKinney 1991). The law was challenged unsuccessfully in Nik-O-Lok Co. v Carey, 52 AD2d 375, 384 NYS2d 211, aff'd, 40 NY2d 1089, 392 NYS2d 393, 360 NE2d 1076 (1976). For an example of a similar statute, see Va Code § 32.1-201 (1985), which applies to public gathering places, including service stations. However, service stations were excluded from coverage by the legislature in 1988. Va Code § 32.1-198 (1990 Supp). California is more restrictive, mandating free public restrooms only in government agencies. Cal Health & Safety Code § 3980 (West 1990). This provision was added in 1974.
longer lines for men. Either way produces equality. Another possible alternative, the so-called “European model,” would make the same bathrooms available to both sexes, just like in private homes. Of course, some might say, and rightfully so, that Americans are too uncivilized, violent, sexist, and puritanical to adjust to unisex bathrooms. Certainly Phyllis Schlafly would agree that Americans would reject unisex bathrooms, even if she would not agree with my reasons.

Unisex bathrooms are an interesting alternative because they would give both sexes equal access to the same number of stalls. Such bathrooms would also result in the elimination of urinals, something that might be hailed by many men. I am sure some men find public urinals offensive. Perhaps my male friend is so uncomfortable in public toilets because he fears that his neighbors at the urinals are covertly comparing their genitals to his, urinal curve notwithstanding. If this is the case, then the men most likely to use public restrooms are either those who are secure enough that they do not care about the size of their genitals or anyone else’s, or those men who like to look at men’s genitals. Either way, perhaps women should spend more time looking at who is using the men’s room.

Even if we resolve the equal access issue, women would still not be equal at the public toilet. I am convinced, based on over forty years of experience, that almost all public toilets are designed by men. These men either hate women or have never paid much attention to women’s bathroom needs. I have become adept at contorting my body in ways that will allow me to sit or more likely squat over the toilet bowl.

Men fail to realize that most women, and a few men, have been thoroughly indoctrinated into believing that toilet seats spread all kinds of diseases, including “VD.” Thus, I have never been totally convinced that those paper toilet seat covers provided in some toilets or the strips of toilet paper that you use to cover the toilet seat really protect you from all of those diseases. As a result, many of us still squat over rather than sit on public toilet seats.

It is extremely difficult to squat and accurately aim your discharge when the toilet is off center, in the corner, or so close to the stall door that your nose is smashed against it when you squat. There is a bathroom at my school that has been “redesigned” to accommodate the disabled. Some bright man decided that, rather than remove and reposition the stall walls and toilet bowls, he would simply enlarge the space in the last stall to

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It appears that my fears are justified. Public toilets are full of bacteria, often on toilet seats, faucets, flush and door handles, floors, sinks, toweling, and soap dishes. Anne Cassidy, *Toilet Training for Adults: Learn What You Can Catch In Public Bathrooms*, Redbook 118 (Oct 1987). It is possible, though unlikely, to get herpes or crab lice from sitting on unprotected public toilet seats. However, you are more likely to get a urinary-tract infection or boils from toilet seats or salmonella or shigella from touching handles. Id at 118-19, 198. For an example of implicit judicial acceptance of the idea that venereal diseases are spread by toilet seats, see note 118 and accompanying text.
accommodate a wheelchair. In so doing, he decreased somewhat the space in the neighboring stall and also caused the toilet bowl to be off center. The bowl is very close to one wall, making it difficult, if not impossible, for a large woman to sit comfortably on the seat and requiring us squatters to angle our rears in at forty-five degrees.

A woman would never redesign the bathroom in this way. Of course, if more women were industrial designers, we might have bathrooms designed to accommodate equal numbers of men and women and stalls designed for women's comfort and convenience. Hence another example of inequality perpetuated by the exclusion of women from the workplace.

The final and perhaps most difficult-to-achieve measure of gender equality at the public toilet is guaranteed access to toilet tissue, sanitary pads, and tampons. For years, mothers and grandmothers kept purses stuffed full of tissue because they knew that they would always need tissue when using the toilet, whereas men did not. Failure to provide toilet tissue is arguably a form of sex discrimination, although I am not sure that it would be actionable.

However, at least one court recently concluded that the failure of an employer to provide sanitary restrooms for his female employees constitutes sex discrimination prohibited by Title VII. Specifically, in Lynch v Freeman, the United States Court of Appeals for the Sixth Circuit ruled that a disparate impact claim could lie where a female construction worker alleged that her employer failed to provide adequate sanitary toilet facilities. She claimed that "the portable toilets were dirty, often had no toilet paper or paper that was soiled, and were not equipped with running water or sanitary napkins." She was fired for using a restroom off the employer's worksite.

The employer argued that there was no sex-based discrimination since the restroom facilities for men and women were equal. By "equal," the employer meant that the restrooms were unisex. The federal district court ruled in favor of the employer, reasoning that the restroom facilities did not constitute a barrier to equal employment opportunities for women because the women could eliminate any increased health risk from using the toilets by bringing their own toilet paper.

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6 In fact, Dr. Roger McFadden, a friend and former student of mine, pointed out that there are differences between the male and female pelvis. Women have a wider pelvis (the pelvic arch or outlet is usually at an obtuse angle), while men have a narrower pelvis (the pelvic arch or outlet is usually at an acute angle). Henry Gray, Anatomy of the Human Body, 245-47 (Lea & Febiger, 28th ed 1966). Thus, while sitting on the toilet seat, men fit nicely and find it quite comfortable. That is why a man will take a newspaper or book to the bathroom to read while sitting. On the other hand, women find toilet seats uncomfortable because their pelves are wider and hit the seat.

7 817 F2d 380 (6th Cir 1987).
8 Id at 381.
9 Id at 382.
10 Id at 387.
11 Id at 386 (emphasis added).
asserted that the women could protect themselves from dirty toilet seats by covering the seats with toilet paper or by refraining from sitting directly on the seat—the good old squat! The appellate court rejected these arguments.

Men can get very hostile when their bathrooms are threatened, causing one to suspect that men see bathrooms as indices of power. Maybe that explains why corporate executives covet that key to the executive washroom, or even better, the private bathroom. Of course, it could also be the fear of exposing oneself at the public urinal, something that women do not experience because of the exclusive use of stalls in women’s bathrooms.

I know of one former law school dean who incurred the wrath of her male faculty members when she converted one of the many bathrooms for men into a facility for women. It mattered not that the men still had many more bathrooms than the women. Even with this change, the women, who constituted approximately one-third of the school population, had only two bathrooms. Nevertheless, the men perceived that they had suffered a great loss. Perhaps the men who complained the most were those who still secretly wished for the “good old days” when women seldom enrolled in law school and were totally absent from the faculty.

The male faculty members at another law school were never troubled by the fact that the one bathroom in the faculty lounge was clearly labeled “men.” When asked why female faculty were forced to leave the faculty lounge to share bathroom facilities with women students or staff, one faculty member remarked that the building had been constructed before there were any women on the faculty. Obviously, he felt it appropriate to constantly remind women faculty of this fact, subtly indicating that despite their presence, women still are not welcome, at least at that law school. After some faculty embarrassment, the bathroom was converted to a unisex bathroom by removing the sign and installing a lock—how simple and how equal!

It is time for feminists to realize that access to public toilets is a feminist issue. We must realize that continuing inequality at the toilet reflects this male-dominated society’s hostility to our presence outside of the home. This hostility is often most apparent in public settings that traditionally have been closed to women.

Women need to start measuring their degree of equality by public toilets. When the lines are gone, when each stall is clean and always has toilet tissue, when the stalls are reasonably comfortable, and when the dispensing machines are stocked with sanitary supplies, we probably will be much closer to achieving equality between the sexes than we are now. In the meantime, remember the tissue, ladies!

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12 Id.
13 Id at 388. One judge dissented, objecting to what he characterized as a “reasonable accommodation” analysis. Id at 389-91 (Boggs dissenting).
"Well, what about lavatory seats?" [Rachel] suddenly shouted at Gregory

"When I sit there . . . I think, this was made for men by other men."  

A few years ago, when I could not find a vacant toilet in the Dallas airport while changing planes, I wrote the preceding satirical piece about the problems women have using public toilets in the United States. Writing the article caused me to remember past complaints about public toilet facilities, things I had just accepted without question. I started to seriously question why there is usually a line at the women's but not the men's bathroom. Having never seen the inside of a men's restroom, I spoke to a few men about their facilities. Next, I started monitoring public bathrooms, noticing the number of stalls; whether they were clean; whether there was toilet paper in each stall; whether stall doors swung out or in; and whether stalls for the disabled were really wheelchair accessible. Initially, I penned the title of the article, Toilets As A Feminist Issue, tongue in cheek. But I have since concluded that the title is right on point.

A few friends read the final draft and thought it very funny. A male colleague suggested I turn the article into a legal essay by adding some footnotes. I thought briefly about rewriting the piece with a few footnotes but decided the topic was not important enough for a legal journal. Another male colleague said it was fine as long as I intended it as satire, but warned me that I would be ruined professionally if I published the piece in a legal journal. His comments should have prepared me for what was to come, but I was not convinced that equality at the toilet was a threat to "male privilege."

During the summer of 1988, two of my students asked me to write a piece for the school newspaper. On a whim, I gave them the toilet arti-

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15 I use the term toilet or bathroom in this article to refer to public facilities usually found in gasoline stations, department stores and shopping malls, restaurants, bus and train stations, sports arenas, theaters, auditoriums, schools and universities, and public buildings. These facilities may be referred to in state codes as public toilets, comfort stations, restrooms, bathrooms, lavatories, washrooms, and water closets. These facilities are also referred to as latrines, outhouses, cans, johns, and privies. Writer Anna Quindlen calls female johns "the jane." Living Out Loud 36 (Random House, 1988).

16 Charles Lawrence, in an extremely personal article, describes a dream which forces him to confront his fear of being considered for a permanent teaching position at a prestigious law school. His colleagues cautioned him to edit or make the article "more abstract and theoretical—less concrete and personal." A Dream: On Discovering the Significance of Fear, 10 Nova L J 627 (1986). Fortunately, he disregarded their advice.

Too often women and men of color and white women suffer silently in the legal academy thinking that they are alone in their suffering. Belatedly, I realized that we (the "other" or "outsiders") are all hungry for validation of our perceptions and both anxious and ashamed to admit "the privatized damage" we normally keep buried. For a moving personal description of gender bias in law teaching, see Sheila McIntyre, Gender Bias Within the Law School: "The Memo" and its Impact, 2 Canadian J Women & L 362 (1987-88).
A shorter version of the original (unpublished) article appeared in the first fall issue of the law school newspaper. On the day the paper was distributed, approximately twenty young white males (ages 22 to 26) became openly outraged, claiming the article was in bad taste. They did not understand what bathrooms have to do with the women's movement. The editors of the newspaper were attacked for printing the article. One even had coffee spilled on him "accidentally" during class. On the other hand, dozens of women of all ages, support staff included, stopped to tell me how much they enjoyed the article. They said it made them laugh, and all too often they added, "and it's so true."

My article was not the most controversial piece in the newspaper, and there were plenty of "trivial" articles. I later learned that several young men had approached the most senior male professor at the law school and asked him to write a response. He declined, saying it was satire, but made a point of telling me he had been asked. This professor also mentioned that an alumnus had called him to ask if the article was serious. Obviously, satire is becoming a lost art form.

Students, colleagues, and friends reported that my article was an agenda item at the weekly meeting of a large local law firm; it was discussed at a faculty meeting of another law school in the state; and it was circulated by a woman law teacher to faculty members at an east coast law school, where some male faculty considered it vulgar or trivial.

None of this distressed me. In fact, I was amused. However, two subsequent events did upset me. The first occurred, ironically, in the women's toilet at the law school. It was crowded, and I mumbled something to myself about toilets. A former student in my constitutional law class who overheard my comment responded that she thought my article on toilets was trivial and not worthy of space in the newspaper. She said there were more important issues and compared the thrust of my article to an incident that occurred at the oil company where she clerked. According to the student, a woman lawyer "caused" the company to close its company gym because it did not have shower and changing facilities for women employees. The company offered to pay the membership fee to a private health club in another building that did admit women, but the woman refused. She insisted that the accommodation be made at her employer's gym. The company subsequently closed the gym. My student blamed the woman for causing so much trouble over such a trivial matter.

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18 For example, there was a more "controversial" article advocating removal of the divorce process from the judicial system, relying instead on binding mediation. Larry Losoncy, *We Need a Better Mouse Trap*, Baculus 6 (Oct 1988). In addition, there were four articles on sports, two on intramural football alone, covering two full pages, or one-seventh of the paper. Only one, *Torts In Sports: The Marc Buoniconti Case*, Baculus 12 (Oct 1988), was related to a legal topic. Even the Administrative Assistant to the Dean had a small section of "witticisms."
I tried to explain that "trivial" things like equal toilet facilities can operate to deprive women of equal employment opportunities,¹⁹ but the student could not see my point. Obviously, I had failed as a constitutional law teacher. I smiled to myself—she will learn once she has been in the legal profession for a few years.²⁰ Even with her intelligence, ambition, and "dress for success" suit, she will never fit in at that oil company because she is not a man.²¹

The second incident seems minor, but it deeply wounded me. Shortly after the newspaper was published, I received a large envelope marked "confidential." It came from an African-American man who holds an administrative but non-tenured position on campus. I opened the envelope and found a copy of my article with a note attached which read: "I thought this a rather crude piece. Wasn't there a better way to

¹⁹ See notes 86-94 and accompanying text. Traditionally, private men's clubs were places where many important business transactions occurred. The exclusion of women from some of these facilities may violate the law. See Roberts v U.S. Jaycees, 468 US 609 (1984); Board of Directors of Rotary International v Rotary Club, 481 US 537 (1987); N.Y. State Club Ass'n, Inc. v City of New York, 487 US 1 (1988).

²⁰ Gender bias is still very much alive in the legal profession. Most major law firms hire women as associates, but few become partners. "The message that women are far from fully assimilated into the profession was reinforced in interviews with a score of women who are lawyers and in testimony of more than 60 lawyers before a commission appointed by the American Bar Association to assess the status of women in the profession." Tom Goldstein, Women in the Law Aren't Yet Equal Partners, NY Times, B7 (Feb 12, 1988); Nancy Blodgett, I Don't Think That Ladies Should Be Lawyers, 72 ABA J 48 (1986). In Hishon v King & Spalding, 467 US 69 (1984), a female associate in a large law firm brought a sex discrimination suit under Title VII when the firm failed to consider her for partnership. The Court held that consideration for partnership in a large law firm may constitute a term and condition of employment under Title VII.

²¹ Kathryn Abrams asserts that the demand by men that women conform to preexisting norms in the workplace can be viewed as a way of protesting the access of women to the workplace. Abrams, 42 Vand L Rev at 1189 (cited in note 14). But she also notes that most male workers are not conscious of the fact that the accepted workplace norms are partial because they were developed by men for men. Id at 1189-90. But when women try to conform, they are often penalized. See, for example, Price Waterhouse v Hopkins, 490 US 228 (1989), where a female partnership candidate in an accounting firm was denied admission as a partner because she was not "feminine enough." The Court ruled that the firm's action constituted sex discrimination under Title VII. "In my view, most women, struggling to survive in hostile environments, often go dead in a variety of ways. Mostly, we make little compromises with our selves: we become silent, withhold our selves, and disengage in situations we care deeply about so that we trade self-respect for what we hope to secure by invisibility and male acceptance." McIntyre, 2 Canadian J Women & L at 371 (cited in note 16). More recently, Vicki Schultz wrote: "Cases involving blue-collar work emphasize the 'masculinity' of the work, drawing on images of physical strength and dirtiness. Cases involving white-collar work focus on the 'femininity' of women, appealing to traits and values associated with domesticity." Telling Stories About Women And Work: Judicial Interpretations of Sex Segregation In The Workplace In Title VII Cases Raising The Lack Of Interest Argument, 103 Harv L Rev 1749, 1800-1801 (1990).
make the point? Regrets, —-" 22 I was stunned. Then I realized that he, too, was threatened by the underlying truth of the article. These incidents convinced me that equal public toilets might not be such a trivial matter.

This feeling was confirmed when the next issue of the student paper appeared. There were several letters to the editor about my article. The author of one letter (whose name was withheld upon request) said that the “virtually unanimous response” to my article he or she had heard “has been ridicule and astonishment that a tenured law professor doesn’t have more serious causes to occupy her time and effort.” 23 Four women students wrote that after reading my article they took “an impromptu tour” of the men’s toilet and noticed the inequality. 24 A letter by a male second-year student noted that if the tables were turned, men would never take this long to complain about the inequality. 25

The final letter in that edition was from a fourth-year student who wrote that he was “appalled to think that a fine publication like this would stoop so low as to publish such a completely nonsensical and tasteless article.” 26 The student could not believe “that Any Professor would spend his/her valuable time writing about such an irrelevant, tangential topic,” and he wondered “who has really thought about the toilet crisis in public places anyway? Leave it to a law school professor to make an issue out of something NOBODY cares about.” 27 The editors of Baculus informed me that in the unedited version of this letter, the student also called me a “left-wing neo-nazi,” but that reference was deleted by those editors.

I thought I had heard the last of the toilet issue, but there were three more incidents. A law professor from another law school in the state referred to me, in my presence, as a “loose cannon.” Having just met him, I was surprised. Subsequently, I asked a young white male colleague of mine who knew the professor if he, my colleague, had referred

22 Note (dated Oct 26, 1988) on file with Berk Women’s L J. This administrator’s action confirms the notion that educated men of color often adopt white male norms in an attempt to gain entry into the hierarchy. Many fail to realize that while they may gain limited access because they are male, their color precludes complete entry because people of color can never gain entry into a system structured to exclude them.

23 Letter to the Editor, Baculus 14 (Nov-Dec 1988) (emphasis added). The student went on to say: “On one hand, I think Professor Banks goes too far in her claim that inadequate access to ladies’ restroom facilities is part of a sinister and deliberate conspiracy to ‘keep the women at home.’ On the other hand, most of us have gone too far by treating her point as altogether ludicrous.


27 Id.
to me in such a derogatory manner. He replied that he had not used those precise terms, but, after all, I wrote "that article about toilets."

A little later, the senior male professor at my school "casually" mentioned that there was graffiti in the men's bathroom offering to buy me a one-way ticket to Baltimore. I felt violated! I also felt betrayed—first, because none of my male "friends" told me, and second, because no one had removed the offending words from the toilet.

Finally, I was approached after class by a student who showed me a copy of the May issue of the American Spectator, a new conservative publication. The following appeared on a page entitled "Current Wisdom":

In a memorable essay titled "Toilets As A Feminist Issue" Taunya Lovell Banks, professor of Law at the University of Tulsa and a lecturer of both Criminal and Constitutional Law, displays the powers of high ratiocination that would make her a natural collaborator with other distinguished authors of The Federalist Papers, if only she were writing in the late eighteenth century and all her readers were drunk by 8:00 a.m.

An excerpt of my article followed. Included on the same page were pieces from the Washington Post, New York Times, San Francisco Chronicle, and Los Angeles Times Magazine. Also included was a handbill from the Women Lawyers Association of Michigan. The tenor of the page was anti-feminist and anti-intellectual.

For reasons not totally unrelated to the article, I decided to leave the school and as a going-away present wrote a follow-up piece detailing state legislative attempts to ensure "toilet parity." That article, The

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28 Professor Sheila McIntyre discusses anti-feminist graffiti in men's bathrooms at her law school. She refers to this graffiti as pornography because the women faculty were denigrated in sexual terms whereas the male faculty were not. She recounts her feelings walking into a classroom where she knows the men have read the pornographic references about her. McIntyre, 2 Canadian J Women & L at 383-84 (cited in note 16). Although I do not know if the bathroom graffiti reference to me used sexual terms, I had the gut-wrenching feeling that McIntyre described. I felt personally violated in much the same sense that I would feel if my home had been burglarized. One of my male colleagues later admitted seeing sexual references to women faculty in the men's restroom. He also said that the only time he ever saw a reference to a male faculty member, the reference graphically described the alleged sexual preference of this professor. Kathryn Abrams points out that sexual messages in the workplace "have the effect of reminding a woman that she is viewed as an object of sexual derision rather than a credible co-worker." Abrams, 42 Vand L Rev at 1208 (cited in note 14).

29 Current Wisdom, American Spectator 50 (May 1989).

30 The Women Lawyers Association of Michigan announcement mentioned that the guest speaker for the February meeting was the president of the Metaphysical Association of Flint who would be discussing palmistry and palm reading. The item from the Washington Post was a letter bemoaning Cat Stevens' support of the Ayatollah Khomeini's death sentence for Salman Rushdie. From the New York Times was a piece by J. Anthony Lukas speaking "for the literary nerds of the 'writerly community'" in comparing the Ayatollah's death threat controversy with the Art Institute of Chicago student exhibit "What is the Proper Way to Display a Flag?" controversy. Id.

Also included on the Spectator Current Wisdom page was an excerpt from Angela Davis' book, Women, Culture And Politics; a Los Angeles Times Magazine article by Susan Littwin about a clash with a male "intruder" in her aerobics class; and short excerpts from the San Francisco Chronicle and that "great American gazette" the Ferndale Enterprise. Id.
Final Flush (Pun Intended), appeared in the last issue of the paper. Although I saw students reading the article, no one said anything to me about it, and the paper received no letters.

Around this time, I received a letter from a law professor in another state saying that he saw the excerpt of my article in the American Spectator and wanted a reprint. He enclosed an article he had written entitled On Answering The Call Of Nature. The article decries government regulation as a contributing factor to the disappearance of the public restroom—bans on pay toilets serve to hasten the disappearance of all public toilets. It also blames the difficulty in finding public toilets on the legal obligations imposed by the judiciary on owners and occupiers of buildings accessible to the public.

In June, I noticed a newspaper article about an attempt in the New York state legislature to pass a “toilet parity” law. I reproduced it and posted it on my door. It was still there when I left the school for the last time.

The Second Article

A few states are taking equality at the toilet seriously. In January 1989, the “restroom equity” act went into effect in California. The act, the first of its kind, was passed to “end the inequitable delays which women face when they need to use restroom facilities in public places when men are rarely required to wait for the same purpose.” The measure requires all new or remodeled sports or entertainment facilities, both public and private, to be equipped with the minimum number of toilets recommended by the plumbing industry’s uniform code for restrooms. The measure recommends that places attracting 200 to 400 women have a minimum of eight toilets for women plus two more per additional 300 women. The measure also recommends that these places have three

32 Letter (dated Apr 17, 1989) on file with Berk Women’s L J.
34 Id at 1555-57.
35 Id at 1555-56.
37 This section is an edited version of The Final Flush (Pun Intended) which first appeared in Baculus 11 (Apr-May 1989).
39 Id. Section 3981 reads: “(a) Publicly and privately owned facilities where the public congregates shall be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours.”
40 Id. “(b) In conformity with the State Plumbing Code, and except as otherwise provided in this section standards shall be adopted in order to enforce this section . . . .”
41 Ann Bancroft, Bill Tackles Long Lines at Women’s Restrooms, UPI NEXIS (Jan 27 AM cycle, 1987).
urinals and three toilets for men.\textsuperscript{42}

The California law was introduced by State Senator Art Torres, a Democrat from Los Angeles, who got the idea after several very long waits while his wife stood in line outside of crowded women's restrooms at the Hollywood Bowl, the Rose Bowl, and the Forum, a Los Angeles sports arena.\textsuperscript{43} A legislative committee subsequently heard testimony from women who related similar experiences.\textsuperscript{44}

On March 1, 1989, Virginia became the second state to legislate for equality at the public toilet.\textsuperscript{45} Almost a year earlier, Virginia State House Delegate John A. (Jack) Rollison, a Republican from Woodbridge, introduced a resolution calling for hearings to determine whether the state plumbing code's 50-50 ratio for men's and women's toilets in public buildings was unfair to women.\textsuperscript{46} Delegate Rollison cited two recent studies—one from Cornell University\textsuperscript{47} and another from Virginia Tech\textsuperscript{48}—indicating that a restroom stop takes a woman up to 2.3 times as long as it takes a man.\textsuperscript{49}

Rollison proposed that public buildings provide women with at least two toilets for every one designated for men.\textsuperscript{50} He argued that there are several reasons why women need more toilets. First, women's public restrooms are underdesigned for their flow.\textsuperscript{51} Although the state plumbing code calls for equal restroom space for women and men, urinals occupy less space than toilet stalls, and, as a result, men's restrooms often have more facilities.\textsuperscript{52} Second, the elderly and the physically disabled take longer to use the bathroom, and there are more elderly and disabled women in the country than men.\textsuperscript{53} In addition, more women take small

\textsuperscript{42} Russell Snyder, "Potty Parity" Bill Advances in Senate, UPI NEXIS (Apr 8 BC cycle, 1987) ("Potty Parity").
\textsuperscript{43} Snyder, "Potty Parity" Bill Whizzes Through Committee, UPI NEXIS (July 7 BC cycle, 1987).
\textsuperscript{44} Snyder, Potty Parity (cited in note 42). Yolanda Nava, Senator Torres' wife, told of waiting in line behind 56 other women at the Ahmanson Music Center and how she and a few other women raided a men's restroom. Another woman told of having to relieve herself behind some bushes because the line to the restroom was so long. Id.
\textsuperscript{45} "Potty Parity" Rules Go Into Effect Wednesday, UPI NEXIS (Feb 28 BC cycle, 1989) ("Feb 1989 UPI").
\textsuperscript{46} Donald Baker, Relief Sought From Restroom Traffic: Va. Delegate Hopes His Bill Will Lead to More Stalls For Women, Wash Post C6 (Feb 4, 1988).
\textsuperscript{47} The Cornell study was conducted by an undergraduate student for the Department of Transportation in Washington State. Larry O'Dell, Virginia To Study Restroom Equity, AP NEXIS (May 9 PM cycle, 1988) ("Virginia Equity Study").
\textsuperscript{48} John Banzhaf, III, Final Frontier For the Law?, Natl L J 13, 14 (Apr 18, 1988). Sandra Rawls at Virginia Polytechnic Institute wrote a doctoral dissertation about behavior patterns in the use of male-female bathrooms. Professor Savannah Day conducted a funded study to determine what people do in public restrooms. Id.
\textsuperscript{49} G.L. Marshall, "Potty Parity" Measure Moves Along, UPI NEXIS (Oct 17 PM cycle, 1988) ("Measure Moves Along").
\textsuperscript{50} Id.
\textsuperscript{51} O'Dell, Virginia Equity Study (cited in note 47).
\textsuperscript{52} Id.
\textsuperscript{53} Id.
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children to the bathroom than men.\textsuperscript{54} Other factors contributing to longer bathroom stays for women are menstrual periods; urinary tract infections, more common in women than in men, which require more frequent trips to the toilet; pregnancy, which reduces bladder capacity; and, finally, clothing (women have more clothes to manipulate than men do).\textsuperscript{55}

There was no organized opposition to Rollison's proposal despite the fact that it would inflate construction costs in new theatres, concert halls, and sporting arenas (shopping malls are exempt).\textsuperscript{56} New churches, museums, and theatres would also be affected by the new plumbing codes.\textsuperscript{57} The primary reason for the lack of opposition may be that the measure applies only to new buildings.\textsuperscript{58} Flushed with success, Rollison next intended to present the Virginia plan for "potty parity" to the national conference of Building Officials and Code Administrators during its March 1989 meeting.\textsuperscript{59}

Most observers agreed that public toilets in many older buildings and stadiums, as constructed, were inadequate for women and reduced their enjoyment of public events. However, at least one critic claimed that taking mirrors out of women's bathrooms would substantially shorten women's bathroom stays.\textsuperscript{60} Nevertheless, one of these critics conceded that women probably need 15 to 20 percent more bathroom stalls than men do due to biological differences.\textsuperscript{61}

Other states have not been so progressive. In 1988, the male members of the Illinois House Executive Committee voted 7 to 3 to defeat the Equitable Rest Rooms Act that would have required three bathroom stalls in women's bathrooms for every two urinals in men's bathrooms.\textsuperscript{62} In 1987, the Oregon State House killed a bill that would have required more toilets for women in public restrooms.\textsuperscript{63}

\textsuperscript{54} Id.
\textsuperscript{55} G.L. Marshall, Restroom Parity Examined, UPI NEXIS (Oct 17 PM cycle, 1988); Quirks in the News, UPI NEXIS (Oct 17 PM cycle, 1988).
\textsuperscript{56} Marshall, Restroom Parity Examined (cited in note 55).
\textsuperscript{57} Feb 1989 UPI (cited in note 45).
\textsuperscript{59} Feb 1989 UPI (cited in note 45).
\textsuperscript{60} Id. In reply, one reader responded: "The suggestion that the long lines could be reduced by the removal of all these mirrors is not frivolous. I am familiar with a private girls' school where this is done, and it shortened the time spent by each individual in the restroom by at least 50 percent.

We do not need legislation to solve this problem. All we need is the elimination of all accessories in these places that encourage the expression of female vanity while people are waiting in line to use the facility. (signed) Charlotte Halstead," (letter responding to Potty Parity article), Wash Post D6 (Nov 27, 1988).

Both the original critic and the reader overlook the fact that women are standing in line to use the toilets, not the mirrors! Both expressions evidence a disdain for women and rely heavily upon stereotypical notions of women for support.

\textsuperscript{61} Id.
\textsuperscript{62} But Aren't You Always Supposed to Give Seats to Ladies?, Student Lawyer 19 (Dec 1988) ("Give Seats to Ladies").
\textsuperscript{63} UPI NEXIS (June 17 BC cycle, 1987).
The so-called "potty parity" measures received considerable national attention. For example, California Senator Torres received letters from across the state, the nation, and the world. A woman approached him and said, "Thank you, senator. I've waited 60 years for this bill." The Virginia bill's progress generated an essay in the National Law Journal and was followed for several months by National Public Radio. The December 1988 issue of Student Lawyer noted the defeat of the Illinois measure.

Just think, if Virginia Delegate Rollison is successful, "potty parity" may become the norm. However, until those potties are constantly stocked with toilet paper, remember the tissue, ladies and gentlemen.

TOILETS AND FEMINISM

From a feminist perspective, my experiences with toilet inequity illustrate the extent to which males' epistemological power defines equality. Bathrooms are not an issue for them; therefore, bathrooms are not an issue, period. But toilet inequity is just one of many instances where men tend to ignore women's problems because they are not a part of a man's world.

Historically, courts have recognized that equality is an illusive term. It may mean the same treatment or treatment without regard to differences; substantial equality in the sense that certain inequalities are acknowledged, but not considered constitutionally important; or, when they are important, taking conscious action to remedy past inequalities. The problem with so-called "neutral" equality concepts is that often women and men are not similarly situated, and thus these concepts

64 Jerry Gillam, Anti-Gridlock Bill, Carrying Fines of $50 to $500, Signed By Governor, LA Times A29 (Sept 19, 1987).
65 Id.
66 Banzhaf, Natl L J at 13 (cited in note 48). The author ended the piece:
"If the Restroom Equity Bill does nothing else, it may help to free us from constraints and assumptions accepted for so long without even a second thought. At the very least, it provided one law professor with the inspiration for a somewhat tongue-in-cheek article finalized on April Fools' Day!" Id at 14, 17.
67 Give Seats to Ladies, Student Lawyer at 19 (cited in note 62).
68 See, for example, Mississippi University for Women v Hogan, 458 US 718 (1982) (exclusion of male from nursing program at state college for women unlawful); Brown v Board of Education, 347 US 483 (1954) (racially separate, but "substantially" equal public school facilities violate the equal protection clause).
70 See, for example, Johnson v Transportation Agency, 480 US 616, 631 (1987) (upholding the validity under Title VII of a voluntary affirmative action plan for women who were underrepresented in traditionally segregated job categories, citing United Steelworkers of America v Weber, 443 US 193, 197 (1979)).
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reflect men's and not women's needs.\textsuperscript{71}

Numerous examples come to mind. Traditionally, women's clothiers refused to make free alterations, while men's clothes were routinely altered without charge.\textsuperscript{72} One proffered justification is that the cost of alteration is built into the price of men's, but not women's, clothes. Undoubtedly, this way of thinking has roots in stereotypical notions about the traditional roles of women and men. Historically, many women learned to sew and made or altered their own clothes, whereas men, without willing mothers or wives, had others alter their clothes. Alterations were seen as a problem for men only. Even as social conditions and women's roles changed, no thought was given to their problems.

A similar problem arises when women are charged more than men for laundering shirts. The explanation is that laundry presses are designed for men's shirts, not women's. Since women's shirts require more labor, laundries charge more.\textsuperscript{73} The result is plain inequality. Formal equality would at least require all shirts that fit the press to cost the same. This would include some, but not all, women's as well as men's shirts. But real equality would require asking why the press was designed only for men's shirts, or why there is not another, smaller press for women's shirts. From the perspective of equal price for equal value, all simple, unruffled shirts should cost the same to launder.

Another area of unequal treatment is health care—a matter most people do not consider trivial. Yet physicians, mostly male or male-trained, historically discounted medical complaints made by their female patients.\textsuperscript{74} As a result, illnesses like Premenstrual Syndrome (PMS) and

\textsuperscript{71} As Kathryn Abrams points out: "Even the successful attacks on the exclusion of women have failed to reach many attitudes about the differences between men and women, attitudes that continue to shape the institutions in which women now find themselves. Challenging the pervasive influence of these norms is the next feminist task." Abrams, 42 Vand L Rev at 1185 (cited in note 14).


\textsuperscript{73} A suit was filed against a Los Angeles cleaners for charging more for women's blouses than for men's shirts. Mary Ann Galante, \textit{The Long Sleeve of the Law}, Natl L J 63 (Sept 24, 1984).

\textsuperscript{74} See, for example, Gena Corea, \textit{The Hidden Malpractice: How American Medicine Mistreats Women} 78-89 (Harper & Row, updated ed 1985). Abigail Trafford, writing in the Washington Post, recounts the reaction of women to an article by a woman who tried to find a physician who would take her symptoms seriously. It took five years before a physician told her she had advanced Hodgkin's disease, a cancer of the lymphatic system. Trafford points out that traditional stereotypes persist, notably the impression that heart disease is a man's disease. The result of this history of sexism in medicine is that women tend to be treated less aggressively than men and are less likely to be recommended for coronary bypass surgery. Abigail Trafford, \textit{Sexism in Medicine}, Wash Post (Health Sec) 9 (May 31, 1988).

Women, unless covered under employer group health policies, may pay more for individual health coverage. Id. Published with Trafford's article was a page of letters from other
post-partum depression have only recently been taken seriously. Common medical studies have often completely excluded women from tested sample populations. As a result, "women are often treated according to scientific protocols that have been done only on men," even though it is likely that women would have distinct biological responses. Women also have been excluded from drug clinical trials, with most studies restricted to middle-aged men.

With toilets, the formal equality requirement might be met through

women recounting similar incidents. Doctors Listen Less to Female Patients, Wash Post (Health Sec) 8 (May 31, 1988).

Another medically-related instance when male-centered norms work to the disadvantage of women is learning disabilities. Reading disabilities are biologically-based and were long thought to be more prevalent among boys than girls. Recent studies indicate that this assumption is incorrect. Sally Shaywitz, Bennett Shaywitz, Jack Fletcher, Michael Escobar, Prevalence of Reading Disability in Boys and Girls, 264 JAMA 998 (1990); Patricia M. Phipps, The LD Learner Is Often a Boy—Why?, 17 Academic Therapy 425 (1982); Ellen D. Rie, Herbert E. Rie, Reading Deficits and Intellectual Patterns Among Children with Neurocognitive Dysfunctions, 3 Intelligence 383 (1979). Two of the earlier studies also found that girls with reading disabilities are less likely than boys to be identified, Rie, 3 Intelligence at 383, and when finally identified are often more severely impaired, Phipps, 17 Academic Therapy at 429. The most recent study concluded that the gender disparity in identification of learning disabled children reflects teacher bias in ascertaining the condition. The researchers found that classroom teachers, who do the bulk of identification, are more likely to identify and refer students as reading disabled who are more active, more inattentive, less dexterous, and who have problems in behavior, language, and academics. Children who were researched and identified as learning disabled, almost an equal number of girls and boys, had more problems in attention, motor skills, language, and academics, but not in activity level or behavior. The researchers conclude that most boys may simply be more active than most girls and that academic difficulty is a more reliable basis for referral. Shaywitz, et al, 264 JAMA at 1001-02.

Women have described PMS symptoms to health care providers for thousands of years. As early as 1931, two medical researchers described the condition and suggested possible approaches to treatment, but only within the past decade have physicians become more cognizant of the need for better understanding and treatment. There is persistent disagreement as to whether PMS should be defined as an emotional or a physical disorder. Howard Ososky, Efficacious Treatments of PMS: A Need for Further Research, 264 JAMA 387 (July 18, 1990).

"Most of the research on protective qualities of aspirin was performed on 22,071 men, and like so many medical studies, no women. And a study measuring the links between high cholesterol, lack of exercise, smoking and heart disease likewise featured 12,866 men—and no women." Leonard Abramson, Uncaring Health Care For Women, Balt Sun A9 (June 5, 1990). In 1987, the National Institutes of Health spent only 13.5 percent of their research budget on women's health. Id.

Sally Squires, A Look at Research Involving Women, Wash Post 29 (Dec 12, 1989) (quoting Sally Rynne, a health care consultant in Evanston, Illinois).


Squires, Wash Post at 29 (cited in note 77) (citing fear of potential harm to the fetus; monthly menstrual cycle fluctuations; different risks for men and women); Kinney, et al, Annals Intern Med at 495 (cited in note 78) (FDA regulations placed restrictions on using women with childbearing potential). I hasten to point out that such middle-aged men have also been overwhelmingly white; people of color have also been underrepresented in clinical drug trials. Craig Svensson, Representation of American Blacks in Clinical Trials of New Drugs, 261 JAMA 263 (1989).

Women have been excluded from such trials because their inclusion would make the trials larger and more costly. However, researchers commonly cited concern about women's reproductive organs as the overriding reason. In 1987, the National Institutes of Health advisory committee on women's health issues recommended that women always be included in NIH-sponsored clinical trials unless researchers could present scientific reasons for their exclusion. Squires, Wash Post at 29 (cited in note 77).
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an equal allocation of money for the construction of bathrooms, or alternatively, through a requirement that men's and women's bathrooms occupy identical square footage. Other options might include the provision of an equal number of toilets for women and men, even if this means spending more money and allocating more space for women's toilets. This approach, however, ignores the fact that women, due to biological and cultural differences, need more toilets than men do.

At a superficial level, the equal toilet facilities problem resembles the "equal cost versus equal benefits" problem under Title VII and the Equal Pay Act. But the issue is different here because the greater cost for women's benefits is tied to methods of benefit calculation and culturally developed differences in benefit utilization rates rather than merely to any biological differences between the sexes. To better ensure equality for women, "benefits" must be defined from the recipients' perspective to provide equal "value."

What these examples have in common is that they write women out of existence by defining the problem in terms of its male aspects. Thus, toilet inequality is yet another example of how so-called "neutral" equality principles are, in fact, not neutral. The law's tendency to ignore or

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80 Virginia state laws already mandate equal space for women's and men's public toilets. They also require an equal number of stalls for women and men. See notes 46 and 52 and accompanying text.

81 See notes 48, 53, 54, and 55 and accompanying text.

82 In City of Los Angeles Dept. of Water & Power v Manhart, 435 US 702 (1978), the Supreme Court held that section 703(a)(1) of the Civil Rights Act of 1964, commonly known as Title VII, prohibited employers from requiring female employees to make larger contributions to an employer-operated pension fund. The employer argued that since women as a group live longer than men, male employees would be subsidizing female employees if all employees made equal contributions to the fund. The Court indicated that the weakness in this argument was in treating women as a group rather than as individuals, some but not all of whom live longer than men. Manhart, 435 US at 716-17. This argument holds true for all individuals, regardless of gender. More recently, in Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans, et al v Norris, 463 US 1073 (1983), the Court struck down a compensation plan offered by the state which paid women lower monthly retirement benefits than men who had made the same contributions. As had the City of Los Angeles Department of Water and Power in Manhart, Arizona had relied on the argument that women, as a group, live longer than men.

83 On the surface, the value issue may seem analogous to the comparable worth argument, raised unsuccessfully under Title VII, that sex discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications occupied primarily by men when these jobs, despite their dissimilarities, are of equal value to the employer. The problem with the comparable worth argument lies in deciding what to compare to determine equal value. However, unlike comparable worth, present in the toilet issue are objective criteria to determine value. Toilets are provided for both women and men; the focus in determining value is simply an issue of quantity. For a discussion of comparable worth issues, see Judith Brown, Phyllis Baumann & Elaine Melnick, Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric, 21 Harv CR-CL L Rev 127 (1986); Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv L Rev 1728 (1986); Norman Vieira, Comparable Worth and the Gunther Case: The New Drive for Equal Pay, 18 UC Davis L Rev 449 (1985); Martha Chamallas, Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs, 1984 U Ill L Rev 1.

trivialize these issues illustrates how male-centered formal equality doctrines fail to address many important problems in women's lives.

This notion that male needs are universal is reflected in an EEOC guideline to Title VII which arguably could be construed to prohibit an employer from providing more toilets for female than for male employees. The result is not true equality: such formal equality fails to recognize that parity would require that facilities be constructed to accommodate equally the real, but different, needs of each sex. These differences and needs should be taken into account, especially where women are shown to suffer some economic detriment, like unequal access to employment because of inadequate bathroom facilities.

Employment cases involving women and access to the toilet cover a wide range of issues. One of the earliest cases imposed a duty of care on employers who provided women employees with toilets on the job site. The employer provided a toilet, but the stall door could not be secured from inside, and a female employee mangled her hand trying to hold the door closed. The issues presented were whether the employer was negligent in maintaining the toilet and whether the female employee was contributorily negligent. The court held that the employer had a duty to maintain a toilet that could be safely closed and that, in the emergency situation in which the employee found herself, her actions did not amount to contributory negligence.

But the Lynch case, mentioned previously, is more typical of cases reaching the courts today. Such cases involve employers who harass women working in blue collar jobs (from which they were once excluded) by restricting access to the toilet. There are also race-based employ-
ment discrimination cases involving segregated toilet and locker facilities.92

The employment discrimination cases illustrate how differences, such as biology and race, are used to discourage entry into traditionally white male domains and how "trivial" issues, like access to toilets, are used to oppress subordinated groups. This oppression can take two forms. The first occurs when access to the toilet is used as a pretext for denying employment, or where an employer intentionally adopts a facially neutral policy because of, rather than in spite of, its adverse impact on all women or men of color. This is blatant discrimination. A second, more subtle form of oppression occurs when the disparate treatment, from the victim's perspective, causes exclusionary effects. For example, an employer provides a toilet, but no toilet tissue, as in Lynch. This would constitute discrimination from a woman's perspective whereas a man, like the employer in Lynch, might simply respond that women employees should bring their own toilet tissue.93

So-called "difference" feminists,94 while rejecting formal equality, do not agree on what differences between women and men the law should take into account when defining equality, nor on how the law should respond to these differences. Some argue that limited exceptions to formal equality should be made for substantial physical differences.95 Others argue that we must first determine the real sources of these differences and how they operate.96 Still other feminists argue that the law

court affirmed a magistrate's finding that two women traffic controllers at a road construction site were constructively discharged because of a continuing pattern of sexual harassment which created a hostile and abusive work environment. The magistrate had found that as part of this harassment the women were denied use of the company truck to go to town for a bathroom break and were observed by male crew members through surveying equipment when they had to relieve themselves in a ditch. Id at 1012, 1018. See also Leonard Buder, Hearing Faults Building Field On Wide Bias, NY Times B4 (Mar 13, 1990) reporting that women in the construction industry told New York City officials about the widespread gender bias still in the industry. In addition to sexual harassment, women complained of "having insufficient toilet and changing facilities on the job . . . ."

92 See, for example, James v Stockham Valves & Fittings Co., 559 F2d 310 (5th Cir 1977). Here the employer persisted, more than ten years after the enactment of Title VII of the 1964 Civil Rights Act, in maintaining racially segregated toilets, cafeteria seating, drinking fountains, locker rooms, and showers. Id at 319-21.

93 817 F2d at 386.


96 See MacKinnon, Feminism Unmodified at 38-39 (cited in note 94).
should consider biological differences between women and men.\textsuperscript{97} This approach would address most of the toilet parity concerns women face in an employment context, but it ignores any cultural differences between women and men which affect women's freedom in public places outside the workforce.\textsuperscript{98} Therefore, a fourth group of difference feminists argues that cultural as well as biological differences should be considered.\textsuperscript{99} However, this fourth approach is also fraught with problems, the very least of which is determining which cultural attributes should be considered.\textsuperscript{100}

This discussion does not attempt to resolve the argument among difference feminists. Instead, I use toilet inequity to illustrate that current male-centered equality models often fail to achieve full equality for women because they fail to reconcile legally significant biological or biocultural differences between women and men. Powerful men traditionally define what is trivial, and issues like toilet parity are not things which make a difference in their lives. Thus, the issue of toilet parity is a gateway to other issues considered trivial or nonissues from an androcentric perspective.

\underline{Toilets and Equality—Beyond Feminism}

In truth, formal equality rhetoric is used as a cover for many other things. For example, at one level toilet parity is really a controversy over economic resources. In the employment context, the concern is over who will bear the cost of incorporating women into the workforce.\textsuperscript{101} Outside the workplace, the concern is who will bear how much cost in the public arena.\textsuperscript{102} In and outside the workplace women are the "addons"—we are blamed and often penalized for not fitting into a male-designed world,\textsuperscript{103} and we are not allowed to engage in self-help methods


\textsuperscript{98} For example, women, not men, usually take small children to the toilet, and women's clothing makes it more difficult to use the toilets quickly. See notes 54-55 and accompanying text. These are cultural, not biological, differences.

\textsuperscript{99} Minow, 101 Harv L Rev at 10 (cited in note 94); Littleton, 48 U Pitt L Rev at 1043 (cited in note 94); Colker, 61 NYU L Rev 1003 (cited in note 94).

\textsuperscript{100} For criticisms of this approach see Abrams, 42 Vand L Rev at 1193-95 (cited in note 14); Joan Williams, \textit{Deconstructing Gender}, 87 Mich L Rev 797, 813-21 (1989).

\textsuperscript{101} This same concern is a factor in resistance to so-called affirmative action efforts. The courts openly express concern for measures that unduly trample the rights of innocent third parties, primarily white males. See \textit{United Steel Workers of America v Weber}, 443 US 193, 208 (1979) (upholding union-bargained affirmative action training programs which reserved 50% of openings for blacks until their numbers were commensurate with the percentage of blacks in the local labor force as permissible under Title VII of the Civil Rights Act of 1964).

\textsuperscript{102} During the discussion of the Virginia toilet parity law, one newspaper editorial noted: "The objections to the bathroom bill are limited to this: More bathrooms of any sort will cost more. The more serious problem for the bill is that so many people—to be specific, so many men—refuse to take it seriously." \textit{The Bathroom Bill} (Editorial), Fairfax J A14 (Oct 19, 1988).

\textsuperscript{103} Maryland State Senator Barbara Hoffman introduced legislation that would require any public or private building built after July 1, 1990 to have as many toilets for women as for men. John Free, \textit{Restroom Legislation Intends Equal Opportunities in New Buildings}, Balt Sun A1 (Feb
to rectify the lack of forethought regarding our need to eliminate our waste. For example, Denise Wells was fined $200 and escorted out of a concert in Houston for using the men's bathroom because the line at the women's bathroom was "unbearably long."104

Denise Wells' problem stemmed from city officials' assumption that more men than women attend sporting events and concerts, and thus men need more toilets.105 The city code was changed after a study challenged the validity of the initial assumption, but the fact remains that even if fewer women did frequent these public places, we would still need more bathrooms than men do.106 Formal equality, as protected by the American judiciary, cannot accommodate differences, be they physical or cultural.107 The courts consistently measure equality in male terms from a liberal, eurocentric perspective—assimilate or remain different, the "other," in the eyes of the law.


104 Lisa Belkin, Seeking Some Relief: She Stepped Out Of Line, NY Times A6 (July 21, 1990). A Houston city ordinance makes it unlawful to knowingly and intentionally enter any public restroom designated for the opposite sex. Id (citing Houston City Ordinance 72-904 (1972): "It shall be unlawful for any person to knowingly and intentionally enter any public restroom designated for the exclusive use of the sex opposite to such person's sex . . . in a manner calculated to cause a disturbance."). Another woman was also fined. Ms. Wells encountered long lines (30 or more women) during her two attempts to use the women's restroom. Ironically, both the mayor and chief of police in Houston are women. Id.

105 Id. Thus, until 1985, Houston plumbing codes for large public gathering places allowed a higher number of combined toilets and urinals in men's bathrooms than in women's bathrooms. Id.

106 Id.

107 The courts consistently uphold educational decisions that reinforce the "Americanization" process which heavily influenced the formative stages of public education in the late 1800s and early 1900s. The original aim of Americanization efforts was "to assimilate and to amalgamate [European immigrants] as part of our American race" by forcing them to adopt Anglo-Saxon culture and values as superior. H. Prentice Baptiste, Jr., Multicultural Education and Urban Schools From a Sociohistorical Perspective: Internalizing Multiculturalism, 6 J Ed Equity & Leadership 295, 295-366 (1986) (quoting E. Cubberly, Changing Conceptions of Education (Riverside Educational Mimeographs, 1909)). Today, eurocentric culture and values are presented as superior to other cultures and values, a form of cultural imperialism.

One notable example of American cultural intolerance is the treatment of bilingual education. In Lau v Nichols, 414 US 563 (1974), the Supreme Court held that Title VI of the Civil Rights Act of 1964 required English instruction for Chinese children who spoke no English. These children were considered linguistically disadvantaged. Following Lau, there was concern that the decision conflicted with the mandate of Brown v Board of Education, 347 US 183 (1954), that schools be racially integrated because racial isolation of children of color, when enforced by law, disadvantages those children, as opposed to disadvantaging all children. The policy of racial integration reinforces efforts to force assimilation of American culture on children from different cultural backgrounds. See Comment, Bilingual Education and Desegregation, 127 U Pa L Rev 1564, 1565-67 (1979). (However, the student author believes that a pluralistic approach to this issue is not incompatible with the goals of integration.) In Martin Luther King, Jr. Elementary School Children v Ann Arbor School District, 473 F Supp 1371 (ED Mich 1979), the court treated "black English" as a separate language and ordered school teachers to learn the language to help students overcome the language barrier. In each instance, the school children's failure to speak standard English is viewed as a sign of inferiority. They are not encouraged to learn English as a second language, but to forego their "home" language for "superior" standard English.
At another level, the refusal to consider biological and cultural differences when measuring equality reflects the extent to which formal equality models permit the continued subordination of all women and men of color. Full-scale recognition of biological and cultural differences in measuring equality could result in a radical restructuring of American society in ways that go beyond gender and include race, ethnicity, sexuality, physical ability, and even class. Because toilets are essential to human dignity in our culture, they are a good place to start.

Feminist and civil rights attorney Flo Kennedy contends that restricting access to bathrooms is an easy way to make people feel that they are other. In 1973, Harvard Divinity School “reluctantly agreed that a limited number of women could sit for entrance exams,” but the administration refused to let the women use the only bathroom in the building. Instead, they were offered facilities across the street, a 15 minute trip—time which few women were willing to lose.

More recently, several male Naval Academy midshipmen carried a female midshipman, Gwen Marie Dreyer, into a bathroom, handcuffed her to a urinal, and photographed her. Dreyer resigned. Oddly enough, Jane Good, the civilian dean of advising and counseling, remarked that while women midshipmen are admitted to the Academy, “we’re not confident about assimilation and acceptance.”

It is no accident that Gwen Dreyer was cuffed to a urinal and not to a toilet. As one news reporter noted: “A urinal is used for elimination, and only by men. Handcuffing a woman to one is symbolism of the high-

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108 This form of cultural pluralism would reflect an “open society in which a variety of cultures, value systems, and lifestyles not only coexist but are nurtured.” Delmo Della-Dora & James E. House, Education For an Open Society 3 (Association for Supervision and Curriculum Development, 1974).

109 Irene Davall, To Pee or Not To Pee: Celebrating Women’s History, XV On The Issues 20, 21 (Summer 1990). “A man can urinate in urinals even when the stalls require change, or he can go off to some corner and inconspicuously pee. Whereas a woman always has to pay in public places unless she chooses to use the sink or that one free toilet that either has no door or no paper or a puddle or something just to remind you you’re a n—r.” Id. (I refrain from using the racially derogatory term Flo Kennedy used because I have come to believe, like Mari Matsuda, that use of racial hate words, even in a scholarly context, still hurts people of color and legitimizes these terms. For a more complete discussion of this concept, see Mari Matsuda, Public Response To Racist Speech: Considering The Victim’s Story, 87 Mich L Rev 2320 (1989).)


111 Id. The women at Harvard, assisted by African-American lawyer Flo Kennedy, demonstrated in colorful and graphic fashion.


113 The males are still midshipmen. The male midshipmen admitted that the woman struggled during the incident, but they remarked that she smiled or laughed during the incident and therefore was not offended. The female midshipman reported that she was smiling to get through the incident; she was trying to fit into a male-defined and -dominated world. Mary Cantwell, Annapolis and Karen Finley, Balt Even Sun A8 (May 29, 1990). The Naval Academy has since issued an order that any future hazing or physical or emotional abuse of a midshipman is punishable by expulsion. Jay Merwin, Navy to Crack Down on Abuse, Balt Even Sun B1 (May 29, 1990).

114 Barringer, NY Times at A22 (cited in note 112).
est, and the lowest, order." To assimilate is to become like white males and deny one's self, one's culture. Total acceptance is impossible in androcentric America because it requires elimination of differences, like gender and color, which are immutable. Therefore, formal equality can only result in the continued subordination of oppressed groups.

The toilet incidents at Harvard Divinity School and the Naval Academy reflect men's continuing hostility toward women trying to enter traditionally male structured and dominated occupations. In each instance, the toilet was used to reinforce the notion that women are unwanted, unassimilated, and alien to that environment. Both examples support Flo Kennedy's claim about the use of the toilet by white men to oppress others. The basic nature of the need to eliminate waste, and the humiliation entailed in having to overcome obstacles to meet this need, make toilets the ideal choice, conscious or unconscious, for those bent on excluding outsiders from white male preserves.

African-Americans of both sexes also have experienced similar incidents. However, the issue becomes more complex when race is added. With white women, the argument centers on biological and/or cultural differences, but with people of color, the argument is more openly derogatory of difference.

The City of Memphis tried to justify its refusal to integrate toilet facilities at the newly-desegregated public library by claiming that there were valid health reasons for racially separate toilets. The city relied on the allegation that African-Americans in that county had a higher incidence of venereal disease than whites. The notion is that people of

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115 Cantwell, Balt Even Sun at A8 (cited in note 113).
116 Despite the often articulated myth of America as a melting pot, suggesting an intermingling of various cultures, or cultural democracy, what occurred was acculturation, the adoption of different cultural patterns. However, for many, acculturation did not result in real assimilation—acceptance by and into the dominant groups' institutions and infrastructures—only a loss or devaluation of the outsider's own culture and values. See note 107.
118 Turner v Randolph, 195 F Supp 677, 679-80 (WD Tenn 1961); see Cassidy, Redbook at 118 (cited in note 5).
color are “unclean.” The same idea was conveyed in a separate incident in 1985 when a “Spanish-Filipino” woman was subjected to sexist and racist comments from a fellow passenger when she tried to use a restroom in the first class section of an airplane.119

In Turner, the Tennessee federal district court rejected the city’s claim, saying instead that people who use the library, whatever their race, are not likely to have venereal diseases.120 Illiteracy rates are higher among poor people, and so there is a subtle class bias implicit in the court’s ruling. That court’s class bias works against all poor people as well as people of color. The court suggests that only poor people are unclean. While poverty is not limited to people of color, a disproportionate percentage of people living in poverty are people of color. Thus, the court’s perpetuation of this class bias only reinforces, perhaps unconsciously, the notion that people of color are unclean and diseased, as well as poor.

There are other examples of the toilet’s use as a means to oppress subordinated groups. Patricia Williams recounts the story of a transsexual student’s search for a bathroom at her law school.121 Neither women nor men law students wanted to share a bathroom with a person attempting to define her own sexual identity in a nontraditional way. Their discomfort with difference led them to ignore the fundamental and universal need of all individuals to eliminate their waste. The students’ actions only reinforced the otherness of the transsexual student.

The class bias reflected in both the airline passenger’s comment and the Tennessee judge’s opinion continues today. The poor are routinely oppressed by being denied access to public bathrooms. American businesses by law and custom are permitted to restrict use of their bathrooms to paying customers.122 Still others, including fast food businesses, have

119 Woman Wins Award in Airliner Fracas Over Restroom, UPI NEXIS (Jan 30 PM cycle, 1987). When she tried to enter the restroom, a male passenger seated in first class shoved her and yelled a variety of vulgar, sexist, and racist comments, including “ch—k slut” and “whore.” Id (expletive deleted). He continued: “Get out of first class where you don’t belong. Someone like you would dirty the first class bathroom.” Id. When the male passenger refused to apologize, insisting he had done nothing wrong, the woman, a news employee at a television station, sued and was awarded $8,000 by the court. Vaccaro v Stephens, 1989 US App LEXIS 5864 at *6 (9th Cir 1989), appeal dismissed, 879 F2d 866, 1989 US App LEXIS 10268 (9th Cir 1989) (unpublished disposition).

120 Turner, 195 F Supp at 680. “In fact, in the absence of proof, one would be led to believe that venereal disease would not be expected to occur at any appreciable extent among that segment of the population, whether white or Negro, using the facilities and services afforded by the public libraries of the city.” Id.


122 For example, Maryland does not require that commercial establishments provide public restrooms, and even allows these businesses to deny access to employee bathrooms by custom- ers in most instances. Md Health-Gen Code Ann §§ 24-209, 24-210 (1989). Maine requires eating establishments licensed for 13 or more seats to “provide at least one toilet facility for the use of its customers” (emphasis added), a requirement that does not apply in certain circumstances when other toilet facilities are available elsewhere. 22 Me Rev Stat Ann § 1686 (1989).
even stopped providing customers bathrooms to avoid providing facilities for poor and homeless men, women, and children. Our response to the homeless is to "decry the fact that [the homeless] use the rest rooms, shut the rest rooms, and then be outraged that they defecate and urinate in the streets." "

Perhaps only people who have been denied access by law to bathrooms can fully understand the impact both on body and dignity of this form of discrimination. As an African-American child in Washington, D.C. in the 1950s and as a lawyer in Mississippi in the late 1960s, I experienced this form of oppression. In the South you had to plan ahead if you might need to use a toilet away from home. If you did not plan ahead, you faced possible humiliation—either because you had to crouch in the grass behind some bushes or trees exposing your most private parts, or because you had to urinate in your pants. The availability of a bathroom, even one marked "colored women," was a luxury. Too often African-Americans traveling south by train had to use the fields near train stops to relieve themselves. Even now, I have not forgotten my experiences, nor the habits developed and still with me to cope with the denial. As long as the law continues to be defined by moneyed white men and based on male-centered Eurocentric norms, the outsiders of American society have no chance at full equality, an equality that recognizes and values difference.

POSTSCRIPT

In retrospect, it is not surprising that my initial article caused such a stir, but the reasons for the reactions are complex. My reference to male genitals and the issue of men wanting (perhaps) to see and to be seen raised in some men deep-seated and profound fears of sexual inadequacy or homosexuality. And, in this sense, male cries of triviality are denials of those fears.

In addition, bathrooms are the only admittedly "gendered" institu-

123 It is almost impossible to find a fast food restaurant in New York City with a bathroom available for customer use. In addition, I have stopped at a few McDonald's in other cities which do not have bathrooms for customers.
124 Richard Conniff, In Washington: A Guide to Discomfort Stations, Time 13 (Oct 3, 1988) (quoting the late political activist for the homeless, Mitch Snyder). "What's happened is that the number of homeless has mushroomed, and we haven't come to grips with that ... When street people started to use part of a Metro station in Farragut West as a nighttime rest room last year, the Metro responded by fencing off the station at night." Snyder suggested, "Why not install a public restroom?" They replied that it was "a terrible idea." Id at 13-14.
125 In her novel Sula, Toni Morrison graphically portrays the dilemma of African-American women traveling through the South during the Jim Crow era. Toni Morrison, Sula 23-24 (Allen Lane, 1974).
126 "[A]s long as what is male-defined and male-centered about law remains unacknowledged, unexplored, and unexpressed, women's interests, experiences, and perspectives will be excluded, devalued, and subverted. ..." McIntyre, 2 Canadian J Women & L at 373-74 (cited in note 16).
tions in law school. My article was a direct attack on this institution, the one place in law school where men are secure from women. If the hierarchy of legal education reinforces or reproduces negative attitudes toward women, it is not surprising that there is anti-feminist graffiti in the men’s room. What is unfortunate, and yet reflects American society, is that these same male graffiti-writers will be some of the lawyers, legislators, and judges of tomorrow. These men, if unchallenged, will continue to reproduce a legal hierarchy of exclusion and subordination that harms women.

It is also not surprising that there were personal attacks on me. These attacks reflect hostility toward me as an authority figure. First, I am a woman writing about women’s issues. Second, as an African-American woman, my opinions are even less “credible.” Only white male views are “neutral,” valued, and accurate, and only if they are white male-centered, writing all others out of the picture where they differ from men. My views are doubly “biased” because I am a woman and an African-American with vision which perceives us all.

Some white male students were especially angry because my status as a “tenured full professor” gave me a certain amount of “credibility” even my gender and race could not fully diminish. In the law school hierarchy, a tenured professor outranks a student, even when the student is a white man and the professor an African-American woman. My criticism of toilet inequality as an example of male privilege carried more weight than it might have if I were merely a student or untenured assistant professor.

I wish my experiences were unique. Insensitivity and indifference to all women, men of color, poor men, and other societal outsiders continues, especially in law school. Unfortunately, the incidents I just described could happen at almost any law school in the United States.

127 I took this phrase from Christine Boyle’s article, Teaching Law as if Women Really Mattered, or, What About the Washrooms?, 2 Canadian J Women & L 96, 102 n30 (1986).
128 In all fairness, this argument cuts both ways. Women’s public toilets are places of retreat for women as well. Anna Quindlen calls them “settings for the free exchange of ideas.” Quindlen, Living Out Loud at 36 (cited in note 15). Marilyn French in her novel The Women’s Room (Summit Books, 1977) uses the toilet as both a place of retreat and a setting for the free exchange of liberating ideas.
129 See discussion of this issue in note 28 and accompanying text.
130 McIntyre, 2 Canadian J Women & L at 400 n42, 401 (cited in note 16).
131 In the fall of 1988, condom machines were installed in the bathrooms of the library at my current institution as part of a university-wide study. This action did not go unnoticed. One third year male wrote to the law school newspaper that the library bathrooms were inappropriate places for condom machines. (letter from Richard Ingrao) The Raven 4 (Jan 1, 1989).
One woman student wrote in response: “In general I agree with the editorial . . . however, . . . an issue remains to be addressed . . . . The installation and maintenance of condom dispensers reminds female students of the administration’s refusal to fill tampon/feminine napkin machines. These machines in the library ladies’ rooms are left empty. One bears a note which reads: ‘The University provides no mechanism for filling these machines. However outrageous that may seem, the Library staff has exhausted all possible avenues for solving this problem . . . .’ I rarely run into a bathroom and realize that I absolutely must have a
Tolerance for differences is a lesson too seldom taught in law schools these days.

condom. Yet I do, from time to time, have an immediate need for a tampon. The presence of a filled condom machine next to an empty tampon machine makes the predicament not only comical but insulting. (signed) A Female, JD.” The Raven at 13 (Feb 27, 1989).
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