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Making Sex Matter: Common Restrooms as "Intimate" Spaces?*

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Abstract

This Essay identifies and critiques a common trope used in litigation and public policy debates by opponents of allowing transgender people to use common restrooms (multi-user/shared gendered restrooms) consistent with their gender identity rather than the sex they were assigned at birth. The rhetorical tactic they use is to characterize such facilities as "intimate" spaces.

This Essay considers and rejects four conceptions of intimacy that the restrooms-as-intimate-spaces trope might be invoking. It examines notions of intimacy as relational, intimacy as a sharing of personal information, intimacy as emotional safety, and intimacy as in intimate anatomical parts. This Essay argues that each notion fails either to accurately describe common restrooms or to justify denying transgender persons gender-appropriate access to such facilities, or both.

Finally, this Essay suggests that deployments of the "intimate" spaces trope seek to make sex matter more in a time when sex/gender divisions seem again to be widely criticized. Those who embrace the intimate restrooms trope are trying to insist upon an intimacy of sex/gender, an intimacy among the sex classes of men and of women, an imagined sex intimacy whose phantasmatic character might help explain why they do not appear to regard various exemptions from laws designed to police common restroom usage as compromising the "intimacy" of those spaces that they claim transgender people violate.

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†. Newton Professor of Constitutional Law, University of Southern California Gould School of Law. My thanks to the audience at the Berkeley Journal of Gender, Law & Justice symposium on Gender, Sexuality, and Kinship: Cultural Narratives of Intimacy and their Legal Discontents (Mar. 20, 2017), especially commenter and symposium organizer Darius Dehghan; my colleagues Nomi Stolzenberg and Camille Gear Rich; USC Gould School of Law 2021 alum Ryan Gorman for excellent research assistance; and the editors of *Law & Inequality* for their excellent work on this Essay.

Introduction

On February 19, 2021, the Gloucester County School Board (the School Board) returned to the Supreme Court of the United States once again to seek certiorari in its litigation with Gavin Grimm over his access as a transgender person to gendered restrooms consistent with his gender identity.[1] Gavin, a young transgender man, sued the School Board in 2015, after his sophomore year of high school, when it adopted a policy stripping him of his access to the boys' restroom.[2] He argued that the School Board's policy violated his rights under Title IX of the Education Amendments of 1972 (Title IX), which forbids sex discrimination in educational programs receiving federal funding, and under the Equal Protection Clause.[3] He initially secured a preliminary injunction in June of 2016, but the Supreme Court stayed it later that summer[4] and granted certiorari in October.[5] The U.S. Court of Appeals for the Fourth Circuit had deferred to the Obama-era Department of Education's interpretation of Title IX as requiring transgender students be allowed to use gendered restrooms consistent with their gender identity,[6] but that guidance was withdrawn just 33 days into the Trump administration.[7] Thereafter the Supreme Court, in March of 2017, vacated the judgment below and remanded the case for further consideration by the Court of Appeals in light of that withdrawal.[8] Ultimately, the Court of Appeals held, in August of 2020, that the School Board had violated Grimm's rights under both Title IX and the Equal Protection Clause.[9] It is this Fourth Circuit decision for which the School Board sought Supreme Court review, but the Court rebuffed its efforts in June of 2021.[10]

Gavin Grimm's case is perhaps the most high-profile litigation involving conflicts over restroom use by transgender people. But in

1. Petition for a Writ of Certiorari, Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (Mem.) (No. 20-1163), 2021 WL 723101.

2. Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 736–38 (E.D. Va. 2018).

3. *Id.* at 738.

4. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016) (Mem.).

5. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 369 (2016) (Mem.).

6. *Grimm*, 302 F. Supp. 3d at 740.

7. *Id.*

8. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (Mem.).

9. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

10. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (June 28, 2021).

recent years, the issue of transgender persons' access to gendered, multi-user restrooms—which this Essay will call "common restrooms" (or sometimes just "restrooms")—consistent with their gender identity—which I'll question-beggingly refer to as "gender-appropriate" or "appropriate access"—has been an extremely contentious one in the United States.[11] Opponents of such usage, denominated here as "opponents" for convenience, have deployed a variety of rhetorical moves. The focus of this Essay is the common assertion by opponents that restrooms are "intimate spaces," and therefore, by reasoning often apparently left implicit, that transgender persons should not be permitted to use restrooms consistent with their gender identity.

After introducing the issue further, this Essay will recount a small sample of the restrooms-as-intimate trope. It will then take up different possible meanings of "intimate" in this context: intimacy as relational, as a sharing of personal information, as emotional safety, and as in intimate anatomical parts. This Essay will also show that these conceptions of "intimacy" fail to either accurately describe common restrooms or justify denying transgender persons gender-appropriate access to such facilities, or both. Lastly, this Essay will address what may lie at the root of the proliferating invocation of the restrooms-as-intimate trope.

I. Deployments of the Common-Restrooms-as-Intimate Trope

Other than, perhaps, the restroom provision of North Carolina's HB2,[12] which was but one part of an extremely pernicious anti-civil-rights law,[13] probably the most high-profile restroom

11. Michael Lipka, *Americans Are Divided Over Which Public Restroom Transgender People Should Use*, PEW RSCH. CTR. (Oct. 3, 2016), https://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/ [https://perma.cc/DE5U-LXGT].

12. 2016 N.C. Sess. Laws 3. HB2 required government buildings including public schools and universities to sex-segregate multi-user restrooms and locker rooms, and to limit access to such facilities by "biological sex." *Id.* at §§ 1.1–1.3. HB2's full title is "An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations." 2016 N.C. Sess. Laws 3.

13. For example, HB2 repealed the municipal laws of Charlotte and six other local governments that prohibit sexual orientation and gender identity discrimination, and preempts any such local laws that might in the future be adopted. *Id.* § 3.1. As originally enacted, it eliminated private employees' ability to sue to vindicate their state law rights against discrimination based on race, national origin, religion, color, age, or sex. *Id.* at § 3.2; *see generally* Brian Clarke, *Employment Law Easter Eggs in North Carolina's HB 2*, PRAWFSBLOG (Mar. 29, 2016, 8:00 AM),

dispute came out of Virginia, the home of high school student and transgender boy Gavin Grimm, as noted in the Introduction.[14] Although he initially used the boy's restroom without incident,[15] complaints, seemingly originating from some parents, led the School Board to adopt a policy limiting restroom use by the undefined notion "biological gender."[16] As a result of this policy, Gavin was barred from using the common restrooms reserved for boys at his school.[17] He sued and secured a preliminary injunction from the Fourth Circuit on his claim under Title IX,[18] but the Supreme Court stayed that order and granted certiorari.[19] After the Education and Justice Departments under Trump withdrew the Guidance that had interpreted Title IX to protect appropriate restroom access for transgender students,[20] the Supreme Court vacated the lower court's decision and remanded the case for fresh consideration.[21]

The School Board's final certiorari petition invoked the common-restrooms-as-intimate trope twice. First, referring to "restroom facilities" separated "on the basis of sex," the petition insisted that "[t]he biological differences between the sexes allow government officials to separate men and women *in such intimate spaces*."[22] Then, using quotation marks carefully to allow it to deploy the adjective without technically (mis)representing that the Supreme Court itself has embraced that characterization of common restrooms, the petition writes: "This Court has already recognized the need to 'afford members of each sex privacy from the other sex' in *intimate settings*."[23]

The School Board's earlier Supreme Court brief, and those of many of its amici, profligately deployed the "intimate" spaces trope. From its first page the School Board sought to frame the case with the trope: the School Board claimed that Title IX embodies the principle "that *in intimate settings* men and women may be

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https://prawfsblawg.blogs.com/prawfsblawg/2016/03/employment-law-easter-eggs-in-north-carolinas-hb-2.html [https://perma.cc/4FWU-LEMQ].

14. *See* Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).

15. *Id.* at 737–38.

16. *Id.* at 738.

17. *Id.*

18. *Id.* (citing 20 U.S.C. § 1681(a)).

19. *Id.* at 740.

20. *Id.*

21. *Id.*

22. Petition for a Writ of Certiorari, *supra* note 1, at 31 (emphasis added).

23. *Id.* at 32 (emphasis added) (quoting United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)).

separated 'to afford members of each sex privacy from the other sex.'"[24] Citing an influential 1971 law journal article that sought to support the proposed Equal Rights Amendment to the Constitution by limiting its scope in some respects, the School Board creatively invoked *Griswold v. Connecticut*, a case about "marital bedrooms," for the importance of privacy rights "in *intimate facilities* such as 'public rest rooms[.]'"[25] The brief repeated this "intimate facilities" characterization when it claimed that a requirement that transgender persons be allowed appropriate restroom access would lead either to the abolition of what Jacques Lacan[26] called "urinary segregation,"[27] or to unseemly, case-by-case excretory admissibility determinations, in my own terminology.

Alliance Defending Freedom, the School Board's amicus and architect of much anti-LGBTQ+ litigation,[28] and two anti-LGBTQ+ groups, the National Organization for Marriage and the Center for Constitutional Jurisprudence, repeatedly characterized restrooms as "intimate facilities" in their Supreme Court briefs.[29] Additional amici of the School Board, the National School Boards Association and the School Superintendents Association, similarly characterized restrooms as "intimate settings."[30] Politicians and government officials used the intimacy trope in amicus briefs as well: eighty members of the United States Senate and House of Representatives characterized restrooms as "intimate facilities,"[31]

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24. Brief of Petitioner at 1, *Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730 (No. 16-273) (emphasis added) (quoting United States v. Virginia, 518 U.S. at 550 n.19).

25. *Id.* at 7 (emphasis added) (quoting Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900–01 (1971) (citing Griswold v. Connecticut, 381 U.S. 479 (1965))). I note, though, that Brown et al., while relying on the right of privacy, do not label public restrooms "intimate facilities."

26. Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 213 (Harvey Molotch & Lauren Norén eds., 2010) (quoting Jacques Lacan, *The Agency of the Letter in the Unconscious or Reason Since Freud*, 36/37 YALE FRENCH STUD.: STRUCTURALISM 112, 118 (1966)).

27. Brief of Petitioner, *supra* note 24, at 21–22.

28. *Alliance Defending Freedom*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/JHC8-HYUF].

29. Brief of Amicus Curiae Alliance Defending Freedom in Support of Petitioner, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 219353, at *4–5, *17; Brief of Amici Curiae National Organization for Marriage and Center for Constitutional Jurisprudence in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 167307, at *1, *4.

30. Amici Curiae Brief of the National School Boards Association and AASA The School Superintendents Association In Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 128356, at *16.

31. Brief for Members of Congress as Amici Curiae in Support of Petitioner,

as did U.S. Commission on Civil Rights conservatives Gail Heriot and Peter Kirsanow,[32] and an FBI agent and a sheriff writing as "public safety experts."[33] Two nominally neutral amicus briefs nonetheless supporting the exclusion of transgender girls and women from women's restrooms characterized those restrooms as "intimate space"[34] or "intimate settings."[35]

One also sees the common-restrooms-as-intimate trope in other litigation over access by transgender persons. The Highland School District Board of Education repeatedly characterized girls' restrooms as "intimate facilities"[36] or "intimate environments."[37] The eleven states led by Texas that sued the federal government and persuaded a receptive court[38] to enjoin enforcement of the federal government's Guidance for how to treat transgender students characterized restrooms as "intimate areas."[39] North Carolinians for Privacy challenged that now-withdrawn Guidance, characterizing restrooms as both "intimate environments"[40] and "intimate, vulnerable settings,"[41] as did the plaintiff organization Students and Parents for Privacy.[42]

Gloucester Cnty. Sch. Bd., 137 S. Ct. 1239 (No. 16-273), 2017 WL 192763, at *12.

32. Brief of Gail Heriot & Peter Kirsanow, Members, U.S. Commission on Civil Rights, in Their Capacities as Private Citizens as Amici Curiae in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 219354, at *1, *3, *5–6, *22.

33. Brief of Amici Curiae Public Safety Experts in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 104592, at *1–2, *4, *11.

34. Brief of Amicus Curiae David Boyle in Support of Neither Party, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 344432, at *1, *3.

35. Brief of Amicus Curiae Safe Spaces for Women Supporting Neither Party, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 74871, at *1–2.

36. Verified Complaint for Declaratory and Injunctive Relief at ¶¶ 3, 228, Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016) (No. 2:16-cv-524); Reply in Support of Plaintiff's Motion for Preliminary Injunction at 18, *Bd. of Educ.*, 208 F. Supp. 3d 850 (No. 2:16-cv-524).

37. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 36, at ¶ 32.

38. *See* Emma Platoff, *By Gutting Obamacare, Judge Reed O'Connor Handed Texas a Win. It Wasn't His First Time.*, TEX. TRIB. (Dec. 19, 2018), https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/ [https://perma.cc/52MK-8DH3] (discussing the Texas Attorney General's Office's affinity for filing suit in O'Connor's district).

39. Plaintiffs' Reply in Support of Application for Preliminary Injunction at 14, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. Aug. 3, 2016).

40. Complaint for Declaratory and Injunctive Relief at ¶ 58, N. Carolinians for Privacy v. U.S. Dep't of Just., No. 5:16-cv-00845 (E.D.N.C. May 10, 2016).

41. *Id.* at ¶¶ 121, 202–03, 205.

42. Verified Complaint for Injunctive and Declaratory Relief at ¶ 263, Students and Parents for Privacy v. U.S. Dep't of Just., No. 1:16-cv-4945 (N.D. Ill. May 4, 2016).

And the trope is ubiquitous outside litigation as well. For example, when Texas Lieutenant Governor Dan Patrick and Texas State Senator Lois Kolkhorst unveiled SB6, which would have[43] prevented transgender Texans from using public bathrooms matching their gender identity and which passed the Texas Senate 21-10, Texas Attorney General Ken Paxton praised the bill because "Texans should feel safe and secure when they enter any intimate facility . . . ."[44] Displaying a profound but too common misunderstanding of gender identity, one letter to the editor of the *Wilmington Star News* opined: "The demand that men who decide to 'identify' as a woman be allowed to use *intimate facilities* designated for women only is preposterous and outrageous."[45]

II. Possible Significances of the Common-Restrooms-as-Intimate Trope

The ubiquity of the common-restrooms-as-intimate trope suggests that its propagators believe it supports their efforts to deny transgender persons appropriate restroom access, whether by providing justification or by framing effects. But is their characterization correct? Are restrooms "intimate" spaces? If so, in what sense? And, even if they are, what would follow from that?

Now, a concept like "intimacy" might not be definable in terms of necessary and sufficient characteristics. Rather, since "the meaning of a word comes from the way a word is used in language,"[46] legal privacy scholar Daniel Solove observes that "certain concepts might not share one common characteristic; rather they draw from a common pool of similar characteristics, 'a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.'"[47] Furthermore, I agree with Ethan Leib that "we probably should not

43. The bill was not enacted, and no explicit "bathroom bill" has been enacted in Texas. Emma Platoff, *Dan Patrick Says He Won the Fight Over the Bathroom Bill, but at Schools Not Much Has Changed*, TEX. TRIB. (Jan. 9, 2019), https://www.texastribune.org/2019/01/09/texas-lt-gov-dan-patrick-dismisses-need-bathroom-bill-2019/ [https://perma.cc/M9QT-YWAM].

44. Bobby Cervantes, *Patrick, Kolkhorst Unveil 'Bathroom Bill' Aimed at Transgender Texans*, HOUS. CHRON. (Jan. 5, 2017), http://www.houstonchronicle.com/news/politics/texas/article/Patrick-Kolkhorst-unveil-bathroom-bill-aimed-10838579.php [https://perma.cc/W7CW-A2E6].

45. *Letters to the Editor*, WILMINGTON STAR NEWS ONLINE (Apr. 27, 2016) (emphasis added), http://www.starnewsonline.com/opinion/20160427/letters-to-the-editor-april-27 [https://perma.cc/7PR5-7Q2N].

46. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1097 (2002).

47. *Id.* at 1097 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66–67 (G.E.M. Anscombe trans., 1958)).

collapse all forms of intimacy into one supervening category: the intimacy within a good friendship may be different from the intimacy within the home, which may be different from the intimacy at the workplace."[48] But it is not clear that restrooms should be adjudged "intimate" in any conception of the term. Conceptions of intimacy as relational, as a sharing of personal information, as emotional safety, and as in intimate parts either fail to accurately describe common restrooms or to justify denying transgender persons appropriate access, or both.

A. Common Restrooms and Intimacy as Relational

One sense of intimacy has to do with interpersonal relationships. To quote Lauren Berlant, the notion of *intimacy* "involves an aspiration for a narrative about *something shared*, a story about both oneself and others . . . ."[49] Solove has argued that "[i]ntimacy captures the dimension of the private life that consists of close relationships with others . . . ."[50] Philosopher Julie Inness has similarly argued that "intimate matters or acts draw 'their value and meaning from the agent's love, care, or liking.'"[51] To comparable effect, legal philosopher Jeff Reiman has argued "that what constitutes intimacy is not merely the sharing of otherwise withheld information, but the context of caring which makes the sharing of personal information significant."[52] This conception of intimacy accords with perhaps one of the most famous invocations of the intimate in U.S. constitutional law: *Griswold v. Connecticut*'s declaration that marriage is a relationship "intimate to the degree of being sacred."[53]

On an understanding of intimacy as relational, restrooms would not generally be intimate spaces. While we may routinely encounter familiar faces in a men's or women's restroom in our schools or workplaces, such repeat players are less likely to be common in the myriad other venues in which we use restrooms (e.g., restaurants, department stores, shopping malls, stadiums,

48. Ethan J. Leib, *Work Friends: A Commentary on Laura Rosenbury's* Working Relationships, 35 WASH. U. J.L. & POL'Y 149, 155 (2011).

49. Lauren Berlant, *Intimacy: A Special Issue*, 24 CRITICAL INTIMACY 281, 281 (1998).

50. Solove, *supra* note 46, at 1124.

51. *Id.* at 1122 (quoting JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 78 (1992)).

52. *Id.* (internal quotations omitted) (quoting Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 300, 305 (Ferdinand David Schoeman ed., 1984)).

53. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

courthouses, county clerks' offices, etc.). Rather, restrooms are open to the public, and we routinely share them not with people who might be considered intimates, but with strangers. We do not, I believe, ordinarily consider ourselves to be in close relationships with these to whom we may not speak, with whom we generally are not having sex, with these people whose faces we might not even see as we pass in common restrooms. These are not generally our husbands, wives, spouses, girlfriends, boyfriends, or BFFs, nor does the experience of sharing these multi-user facilities ordinarily result in an intimate bond.

B. Common Restrooms and Intimate Information

A second, not wholly distinct sense of intimacy has to do with "intimate information." Legal philosopher Charles Fried treats "'intimate' information" as "information necessary to form and foster relationships involving respect, love, friendship, and trust."[54] Certainly the state of one's genitalia might be considered "intimate" information—it is information about body parts often considered "intimate" with which physical contact is shared restrictively. But, while recognizing that my knowledge of practices in women's restrooms is overwhelmingly derivative and not first-hand, the general point of restrooms is *not* to share such information.

Indeed, urinal shields in men's restrooms and toilet stalls in men's and women's restrooms are designed precisely to preclude or reduce the sharing of such information. Common restrooms do not conduce self-revelation of that kind. Moreover, most transgender people are not rushing to "share" such "intimate" information about themselves; witness, for example, Janet Mock's rejection of Piers Morgan's questioning her about her anatomical details.[55] As transgender people in some of the restroom litigation have argued, it is not sharing restrooms that facilitates sharing of "intimate" information. Rather, it is requirements—such as North Carolina's HB2—that people use restrooms consistent not with their gender identity but with their "biological sex," curiously and positivistically defined as the sex assigned on one's birth certificate,[56] that threaten to out many transgender persons as transgender, implicating their

54. Solove, *supra* note 46, at 1111.

55. CNN, *Janet Mock Joins Piers Morgan*, YOUTUBE (Feb. 5, 2014), https://www.youtube.com/watch?v=btmMVM23Ekk.

56. *See* An Act to Provide for Single-sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, N.C. Session Law 2016-3, § 1.2 (Mar. 23, 2016) (adding G.S. 115C-521.2(a)(1) to state law).

birth anatomy and breaching the secrecy with which people often treat their genitals.

C. Common Restrooms and Intimacy as Emotional Refuge

Nor does a conception of intimacy as "emotional safety" succeed in rendering common restrooms "intimate" spaces, *pace* such appeals in various disputes over transgender persons' restroom access. Washington State Representative Luanne Van Werven, for example, argued that the now-withdrawn Obama administration Education Department/Department of Justice Guidance invaded the privacy of cisgender[57] persons by "[m]aking children, the elderly and the disabled share restrooms . . . with the opposite sex" when they "deserve to feel safe in intimate settings . . . ."[58] She was appealing to a notion of intimacy as emotional safety. Therapist Thomas Fitzpatrick has argued that "emotional safety is intimacy, the thing we most seek in a relationship."[59] Yet these are not feelings common restrooms routinely arouse. They are too often not comforting, but rather unclean, odoriferous, and harshly or otherwise ill-lit. Moreover, the very fact that defenders of denying appropriate access to transgender persons rely on safety as justification, or rather, rationalization—acknowledging that batteries and other serious crimes do occur in common restrooms—makes common restrooms, like so many other spaces public or private, places of risk, not safety.

To the extent that (some) women may conceive of common restrooms as a "safe space" or "haven," "a place to escape from a

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57. "Cisgender" commonly refers to persons whose gender identity matches the sex assigned to them at birth, the complement of transgender persons. *See, e.g.*, Sophie Saint Thomas, *What Does It Mean to Be Cisgender?*, COSMOPOLITAN (Nov. 24, 2018), https://www.cosmo.ph/relationships/cisgender-meaning-definition-src-intl%20-a898-20181124?ref=feed_1 [https://perma.cc/6JSJ-TB8V] ("[C]isgender . . . means you agree . . . with the gender you were assigned at birth." (internal quotations omitted) (quoting Jimanekia Eborn, sex educator and trauma specialist)); *see also* A. Finn Enke, *The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies*, *in* TRANSFEMINIST PERSPECTIVES IN AND BEYOND TRANSGENDER AND GENDER STUDIES 60, 61 (Anne Enke ed., Temple University Press 2012) (recounting use of "cisgender to describe the condition of staying with birth-assigned sex, or congruence between birth-assigned sex and gender identity").

58. *Rep. Luanne Van Werven Says New Transgender Restroom, Locker Room Rule Needs to be Repealed*, WASH. STATE HOUSE REPUBLICANS (Jan. 7, 2016), https://luannevanwerven.houserepublicans.wa.gov/2016/01/07/rep-luanne-van-werven-says-new-transgender-restroom-locker-room-rule-needs-to-be-repealed/ [https://perma.cc/7EV6-Q2HW].

59. Thomas C. FitzPatrick, *Making Marriage Work*, 87 MICH. BAR J. 42, 43 (2008).

browbeating boss or importunate suitor,"[60] feminist legal scholar Mary Anne Case's responses seem apt. First, Professor Case has observed that "at least for some, the colored restroom could serve much the same function in the Jim Crow South,"[61] and that notions of contamination underlie both forms of restroom segregation, racial and gendered.[62] Further, Case notes that "[a] woman can escape her boss in the office women's room only if the bosses are men. The flip side of this safe space for female subordinates is a safe space for male bosses, free from the intrusion of women seeking professional advancement."[63] For women with woman bosses, however, restrooms are scant haven.[64] Similarly, though Case does not make this point in exact terms, respite from "suitors" is only available in common restrooms from suitors of a different sex; a women's restroom *simpliciter* shields no woman from a female suitor, just as a men's room without more shields no man from a male suitor.[65]

So, to the extent there may be some emotional safety aspect to common restrooms, it trades on occupational sex stratification and on the privileging of different-sex dating and the interests of heterosexually-identified persons over same-sex dating or the interests of gay, lesbian, and bisexual persons. Neither such oversimplification of the gendered contours of workforces nor such naked heterosexism should be understood as a persuasive justification for excluding transgender persons from restrooms consistent with their gender identity, let alone the "exceedingly persuasive justification" demanded of sex-discriminatory laws by equal protection doctrine.[66] And, of course more fundamentally, opponents have not explained how affording transgender persons gender-appropriate access would impair any sanctuary function of restrooms.

60. Case, *supra* note 26, at 221.

61. *Id.*

62. *Id.* at 211–12.

63. *Id.* at 223.

64. *Id.*

65. "Suitor" may be too romantic a term to describe some persons who may be looking primarily to have sex with the social "refugee" at issue.

66. *See* United States v. Virginia, 518 U.S. 515, 524 (1996) (reiterating that government must provide an exceedingly persuasive justification to sustain action based on sex classifications challenged as denying equal protection (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

D. Common Restrooms and "Intimate Parts"

Now, there is also a sense of "intimate" that refers to certain anatomical parts of persons, most particularly genitalia but also female breasts, sometimes anuses, and perhaps buttocks.[67] For example, in her article *Plotting Privacy as Intimacy*, Heidi Reamer Anderson treats "bodily intimacy" as an important "objective indicator[]" of intimacy,[68] though she too talks about "intimate body parts"[69] without defining them or explaining in what sense these parts are intimate. Professor Anderson does assert, without defense, that "sexual organs" (by which I'm guessing maybe she means genitalia, though there is a question whether she also would include bodily parts such as Fallopian tubes) are "the most intimate of body parts."[70] Are common restrooms "intimate spaces" because most people who use them for excretion do so using what might be considered "intimate" body parts?

I think not. Again, the point of common bathroom architecture and U.S. custom is that we excrete in private. Setting aside trough urinals, which are not provided in women's rooms (if built as such) and which we would not expect those transgender men with genitalia traditionally regarded as female to use, restrooms facilitate shielding one's genitalia (and one's buttocks and anus) from view. If the mere thought that a transgender person with genitalia or "intimate parts" different from one's own might be using a neighboring stall upsets a person, it is hard to see why the law ought to throw its weight behind such literally disturbed thoughts. Transgender and gender-nonconforming people have reported the hostility they've faced when using restrooms deemed "proper" for them based on sex assigned at birth.[71] Regardless of these harms,

67. None of the federal Fourth Amendment cases I've found that use the terms "intimate parts" or "intimate body parts" actually define the phrases, nor do the few state statutes I've examined. There's even a question in case law whether internal organs should be considered intimate body parts subject to special Fourth Amendment protection.

68. Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 315 (2013).

69. *Id.* at 319.

70. *Id.* at 326.

71. Zack Ford, *Study: Transgender People Experience Discrimination Trying to Use Bathrooms*, THINK PROGRESS (June 26, 2013), https://archive.thinkprogress.org/study-transgender-people-experience-discrimination-trying-to-use-bathrooms-34232263e6b3/ [https://perma.cc/K6WK-ZJVA] (citing a study demonstrating that 70% of transgender individuals in the Washington, D.C., area experienced some form of discrimination or harassment while using restrooms); Nico Lang, *What It's Like to Use a Public Bathroom While Trans*, ROLLING STONE (Mar. 31, 2016), https://www.rollingstone.com/culture/culture-news/what-its-like-to-use-a-public-bathroom-while-trans-65793/ [https://perma.cc/2VAZ-AD7T].

to make transgender people use common restrooms inconsistent with their gender identity does not protect the privacy of anyone's "intimate parts."

Water closets are where we closet our excretory activity. One can see how spouses or romantic partners voiding in the presence and in sight of their partner in a bathroom in their home, for example, might be viewed as engaging in intimate activity. And because of the conventionally closeted nature of the activity, one person assisting another with their literal toileting might similarly be adjudged "intimate." But co-presence, so often with strangers, in different stalls in a common restroom does not by itself seem particularly intimate. True, our society has conventions that many such facilities are sex-segregated, but it does not appear that such gendered privacy is protecting "intimacy." "Private" and "intimate" are not the same thing. There are lots of things people may do in private that are not especially intimate, so our traditions of excretory privacy do not mean that tending to one's excretory (by which I mean to include menstrual) needs in stalls in common restrooms is intimate activity.

III. Common Restrooms and "Making Sex Matter"

Given the failures of numerous ways to try to understand the notion that common restrooms are "intimate spaces," why then are so many opponents of transgender persons' using gender-identity-consistent restrooms invoking "intimacy," characterizing restrooms as "intimate spaces," "intimate settings," or "intimate facilities"? I think it is in part because they know at some level that transgender persons are not, as such, threats to their excretory privacy or any other version of intimacy that might plausibly occur in restrooms. It is not the boundaries of "the private" or even really "the intimate" in any sense that are at stake in questions of who may access which common restrooms under what conditions. It is the boundaries of gender being contested, and continued efforts to instill gendered intimacy within sex-based classes—to make sex matter in a time when sex's social or public significance may seem greatly diminished compared to the past.

Opponents do not accept transgender women as women, or transgender men as men. I know this is obvious on one level just from the terms of these laws, which may, like North Carolina's, provide for the first time a prescriptive definition of the two most commonly perceived sexes[72] and preclude local jurisdictions from

72. *See, e.g.*, Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are*

embracing a different conception of sex. But I think that the "intimate spaces" trope underscores part of why opponents think sex-segregation is valuable: not just to protect gendered privacy, but gendered intimacy, or rather, the intimacy of gender. It is an intimacy, even if phantasmatic, that one imagines one shares by virtue of a common sex.

Unsurprisingly, laws predicated upon an imagined gendered intimacy are often not ideologically pure. Like most values, the perceived value of gendered intimacy yields when it conflicts sufficiently with the interests of those within the ambit of lawmakers' concern and respect—an attitude which too often is denied to transgender persons. Consider, for example, Texas Senate Bill 6, approved by its Senate though ultimately not signed into law.[73] It first would have barred local jurisdictions from regulating use of restrooms and certain other facilities,[74] and required public school districts, certain charter schools, local jurisdictions, and state agencies broadly defined[75] to restrict their common restrooms and other facilities by "biological sex,"[76] defined in oddly positivistic terms as "the physical condition of being male or female, which is stated on a person's birth certificate."[77] But a later section of the bill made an exception for parents and authorized caregivers, school employees, and authorized school volunteers "to accompany a student needing assistance in using" common restrooms at schools,[78] and allowed a child under age 8 to enter gendered government restrooms with an accompanying person who is caring for the child.[79] Other anti-trans bathroom laws, like the one enacted

Not Enough, THE SCIENCES, Mar.–Apr. 1993, at 20, 20–25. *But see* Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RSCH. 174, 174 (2002) (criticizing Fausto-Sterling's definition of intersex and characterization of sex as a continuum rather than a dichotomy).

73. S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017). *See supra* note 43 and accompanying text.

74. *Id.* at § 3 (adding section 250.008(b) to Chapter 250 of the Texas Local Government Code).

75. *See id.* at § 5 (adding section 769.001(8) to Title 9 of the Texas Health and Safety Code).

76. *Id.* (adding sections 769.051 and 769.101 to Title 9 of the Texas Health and Safety Code).

77. *Id.* (adding section 769.001(1) to Title 9 of the Texas Health and Safety Code).

78. *Id.* (adding section 769.053(4) to Title 9 of the Texas Health and Safety Code).

79. *Id.* (adding section 769.104(2) to Title 9 of the Texas Health and Safety Code).

for a time in Oxford, Alabama,[80] have contained similar exemptions.[81]

Perhaps "immature" genitalia impair intimacy, real or imagined, less than mature genitalia, and to the extent misplaced fears of sexual molestation have been sincere, that may describe some opponents' feelings. But, strikingly, the Texas school exception as written lets a "biological male" father with mature genitalia accompany his "biological female" daughter into girls' or women's restrooms if she needs assistance using them.[82] In general it seems likely that the supporters of these legislative exemptions have not thought through their beliefs about intimacy and restrooms, that they are accustomed to parents taking children into common restrooms regardless of the children's gender, and that, at least as a matter of revealed preferences, they value the convenience of heterosexually-identified parents—whose situations they readily grasp—more than the safety and wellbeing of transgender persons, about whom so many are so ill-informed.

I recognize this next observation likely will be contentious, but these caregiver exemptions from trans-exclusive sex-segregated restroom laws in some ways echo Louisiana's railroad racial segregation law disgracefully upheld by the U.S. Supreme Court in *Plessy v. Ferguson*.[83] That statute's first section required passenger railways to provide "equal but separate accommodations for the white, and colored races," and its first and second section required officers of the passenger trains to enforce those exclusions.[84] Yet its third section provided an exemption for "nurses attending children of the other race."[85] As Justice Harlan recognized in his deeply flawed but important dissent, the statute's overall purpose, "was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches."[86] The act thereby limited the reach of

80. *See* Ashley Fantz, *Anti-trans Bathroom Ordinance Repealed in Oxford, Alabama*, CNN (May 5, 2016), https://www.cnn.com/2016/05/05/us/oxford-transgender-bathroom-repeal [https://perma.cc/DXA4-EZ5K] (reporting 3-2 repeal of ordinance unanimously adopted the previous week but not yet signed by mayor).

81. For an *ad hominem* and infelicitously entitled blog post noting this exception, see Evan Hurst, *Inbred Alabama Hicks Can't Even Spell Why They Hate Transgenders So Much*, WONKETTE (Apr. 27, 2016), https://www.wonkette.com/inbred-alabama-hicks-cant-even-spell-why-they-hate-transgenders-so-much [https://perma.cc/8WW2-FPK6].

82. S.B. 6. § 769.053(4)(b).

83. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

84. *Id.* at 540–41.

85. *Id.* at 541.

86. *Id.* at 557.

its discriminatory racial exclusion command in the service of the convenience of children's caregivers. These modern exemptions from restroom exclusion laws make similar child-focused exemptions from the gendered "intimacy" invoked, pretextually or unreflectively, by some defenders of these measures.

Conclusion

The "intimacy" defenses of laws seeking to make gender identity an insufficient basis for assigning transgender persons to particular gendered common restrooms fail. The Supreme Court does not currently have before it a case concerning whether federal statutory bans on sex discrimination or the Equal Protection Clause require that transgender people be able to use gender-appropriate common restrooms. The Court expressly did not reach the question whether the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) requires such access for workers when it decided *Bostock v. Clayton County* in June 2020.[87] But it did not need to do so in that case, and the now late Justice Ruth Bader Ginsburg, who joined the *Bostock* majority in holding that firing "someone simply for being . . . transgender" discriminates on the basis of sex in violation of Title VII,[88] has been replaced by conservative jurist Amy Coney Barrett. Although the Supreme Court ultimately closed its doors to the Gloucester County School Board as it sought to vindicate its exclusion of Gavin Grimm, who is no longer in high school, from common boy's restrooms, we could see the Court take up the common restroom issue sooner rather than later. If it does, the Justices should not be led astray by the "intimate spaces" characterization of restrooms.

Opponents of gender-appropriate use of common restrooms by transgender persons often appear taken aback when confronted with the reality of the people who would have to use men's rooms or women's rooms under their benighted proposals: conventionally, binary-gendered trans men who look like other masculine men in women's rooms or conventionally, binary-gendered trans women who look like other feminine women in men's rooms.[89] Yet in Texas

87. Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020).

88. *Id.* at 1737.

89. *See, e.g.*, Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/ [https://perma.cc/7E34-2ZPK] (discussing political arguments behind Houston's HERO repeal); Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 559 (2019) (describing and critiquing LGBTQ+ rights groups' "assimilationist" use of "all-but-fully transitioned, conventionally

and other places opponents persist; they support and vote for these laws. Even when someone like Texas Attorney General Ken Paxton recognizes that trans people have been using restrooms consistent with their gender identity for many years, and will likely do so going forward—perhaps because to do otherwise might threaten their safety or even lives—he nonetheless supports these laws.[90] Under such circumstances, it's hard to deny that the, or at least a, point of these laws is precisely to mark transgender persons as *not* intimates, as not even part of the respectable community, by rendering them lawbreakers. It was hardly a defense of sodomy laws to point out that they would often be disregarded; they rendered otherwise law-abiding persons outlaws for no good reason. That is what trans-exclusionary restroom laws do, and that is an important reason informed people of good will, transgender or cisgender, binary gender or nonbinary, ought to do what we can to oppose such measures.

attractive men and women" in campaigns against measures targeting sexual orientation-and-gender identity antidiscrimination rules).

90. *See* Cervantes, *supra* note 44.