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## YALE LAW & POLICY REVIEW

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### Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex

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*This Article challenges two widely-embraced theories about how public intimate spaces (e.g., toilets, locker rooms, showers, etc. hereinafter called "bathrooms") first became separated by sex. The first challenged theory claims that the very first instance of sex-separation in public bathrooms occurred in 1739 at a ball held at a restaurant in Paris. Under this first view, sex-separation first emerged as a sign of upper-class gentility and elitism. The second challenged theory argues that a consistent practice of differentiating bathrooms by sex did not emerge until the late nineteenth century. According to this view, bathroom sex-separation was imposed when authorities overreacted to the notion of the intermingling of the sexes as women entered the workplace during the Industrial Revolution. Thus, the second view holds that bathroom sex-separation is rooted in sexism, paternalism, and outdated Victorian notions of modesty.*

*This Article argues that both of these theories are wrong. With respect to the first theory, the author's research indicates that the ball in question was not at a restaurant. It was an invitation-only, royal masquerade ball for some 14,000 people. It was hosted by King Louis XV at the Hôtel de Ville in Paris to celebrate his daughter's wedding. Moreover, it was not the first instance of sex-separation in bathrooms. That ball may, however, evidence an attempt to extend heterosexually-centered bathroom norms into spaces like the masquerades. The author argues that the masquerades*

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were likely a “safe space” for sexual minorities and places where, by consent, flexible sex and gender norms usually prevailed. The expansion of sex-separation into the masquerades and similar gatherings was likely driven by religious and royal authorities, and were likely supported by powerful sexual minorities among them. The result was that less powerful sexual minorities were pushed further into the closet.

As for the second theory, which argues that sex-separation first emerged in the late nineteenth century, the Article establishes that sex-separation well preceded that time and, indeed, dates back to ancient times. Generally speaking, as public policy, the practice was rooted primarily in safety and privacy concerns, although patriarchal norms affected it. Indeed, this Article argues that nineteenth century laws mandating sex-separation in factories were among the earliest anti-sexual harassment laws in the nation. These laws fell short in the effort, however, because they lacked supporting legal structures, because the problems of sexual assault and sexual harassment proved enduring, especially for the female-bodied, and because they did not sufficiently consider the safety of male-bodied persons who were similarly vulnerable to assault and harassment.

The Article concludes that the alternative bathroom histories fail. As they propose an explanation of sex-separation that advances the interests of some sexual minorities, they offer a narrative that oppresses women and the female-bodied. They ignore the stories of women’s lives and, in particular, their struggles with sexual assault and sexual harassment. They similarly ignore the struggles of the poor for safe intimate spaces. Women and others must push back on approaches that contort women’s history, for they are rooted in sexism and patriarchy, even when they may be intended to advance the freedom of other groups.

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INTRODUCTION

This Article addresses the issue of sex-separation in public intimate spaces, e.g., public bathrooms, changing rooms, locker rooms, shower rooms, etc. (collectively called "bathrooms"). It challenges widely-circulated claims that sex-separation in bathrooms was a historical development of the late nineteenth century and that the primary reasons for it were sexism, patriarchy, Victorian modesty, and class elitism. Instead, it argues that sex-separation in bathrooms dates back to ancient times, and, in the United States, preceded the nation's founding. It argues as well that a key purpose of sex-separation in bathrooms was to protect women and girls from sexual harassment and sexual assault in the workplace and other venues.

In recent years, a national debate has erupted over bathrooms. The questions raised by this debate include: (1) Should all public bathrooms be

separated by biological sex,<sup>1</sup> should they be accessible by self-declared gender identity or, alternatively, should they be unisex? (2) Must public bathroom spaces that can only be used by one person at a time and can be locked (“single-entry spaces”) be sex-separated?, (3) When multi-entry sex-separated bathrooms are offered, should there always be a third option of one or more all-gender-identity public bathrooms, and should transgender persons whose gender identity differs from their biological sex (or any persons) be *required* to use these third option spaces?

By the highest estimate, about .06% of adults in the United States self-identify as transgender.<sup>2</sup> Some of these persons may identify as nonbinary, that is, they do not self-identify as either male or female. Not all transgender persons cross-dress.<sup>3</sup> Not all who self-identify as transgender

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1. A word about vocabulary is merited. For centuries, women have fought for the right to have their stories heard and the right to *define* their own experiences as women. Against this historical backdrop, I use the terms “trans men” or “trans women” to reference the same when speaking particularly of those groups. Because I view pronouns and names as uniquely personal, I choose to refer to trans persons by their preferred pronouns and names, but always distinguish sex from gender or gender identity. I use the terms “women” or “biological women” in their historical perspective. Thus, in this Article, “women” or “biological women” or the “female-bodied” does not merely describe anatomy. It references those whose experiences of oppression and access to rights have been tied to the fact that they are female-bodied. “Male-bodied” refers to those who would have been treated as men in these earlier periods. I appreciate and recognize the different histories of those who do not fit neatly into established categories, including intersex persons. I use “gender” to reflect the social significance that individuals and societies attach to sex; not as a term identical to sex. These approaches are rooted in my own historical research and in my own personal sense of freedom and dignity. They are also, I believe, necessary to reflect the historical oppression of the female-bodied as a class and to ensure that that oppression, as opposed to other experiences which are also valid, is addressed in law and policy. These choices are mine alone. They do not indicate the views of the *Yale Law & Policy Review*, its Board of Editors, the institution with which it is associated, or of anyone else who assisted with this piece.
  2. See Flores et al., *How Many U.S. Adults identify as Transgender*, WILLIAMS INST. 3-4 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/YZA4-VQX9>]. The Williams Institute supports LGBTQ advocacy through research.
  3. According to the advocacy group Human Rights Campaign, “Cross-dressing is a form of gender expression that is not necessarily indicative of a person’s

persons experience gender dysphoria, a condition leading them to identify so strongly with a sex other than the one designated according to biological norms, that they feel they must transition to public demonstration of that gender identity.<sup>4</sup> Gender identity is not visible, and it does not always align with one's sexual orientation. With male access to female spaces being the most controversial, only about 23% of transgender male-to-female persons have had a vaginoplasty.<sup>5</sup> Not all want such surgery;<sup>6</sup> not all can afford it.<sup>7</sup> Like all serious surgeries, sex

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gender identity or sexual orientation." Meghan Stabler, *Transgender FAQ*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-faq> [<https://perma.cc/RW8V-BQUP>].

4. The American Psychiatric Association states that "Gender dysphoria involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender." *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/74NE-KZBQ>].
5. See Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE 79 (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) [<https://perma.cc/2NXX-MAQA>]. The report says that 33% of transgender persons have surgically transitioned, but that analysis includes all types of transition-related surgery. *Id.* at 26. Twenty-three percent of male-to-female transgender persons have had a vaginoplasty. *Id.* at 79. See also Parker Marie Molloy, *Debunking the "Surgery is a Top Priority for Trans People" Myth*, ADVOCATE (Mar. 13, 2014, 9:39 AM EDT), <https://www.advocate.com/politics/transgender/2014/03/13/watch-debunking-surgery-top-priority-trans-people-myth> [<https://perma.cc/52S3-942W>] (citing Grant, et al.'s study, *supra* note 5, at 26).
6. Grant et al.'s study asserts that 64% of those interviewed expressed a desire for vaginoplasty. See Grant et al., *supra* note 5, at 79. According to the report, 72% of female-to- male transgender persons expressed that they did not desire phalloplasty. *Id.*
7. See Grant et al., *supra* note 5, at 79. Whether a person's insurance will cover sex-reassignment surgery depends on the source of the coverage. Section 18116 of the Affordable Care Act, a nondiscrimination provision, prohibits "any health program or activity, any part of which is receiving Federal financial assistance" from denying the benefits of or participation in

programs “on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).” 42 U.S.C. § 18116(a) (2018). The statutes identified in Section 18116 expressly prohibit discrimination on the basis of “sex” and other factors, but they do not specifically mention gender identity or even gender. *See, e.g.*, 20 U.S.C. § 1681 (2018) (generally prohibiting discrimination in educational programs or activities “on the basis of sex”). The Department of Health and Human Services (“HHS”) is authorized to issue regulations that interpret Section 18116. *See* 42 U.S.C. § 18116(c). The Obama Administration’s HHS interpreted the word “sex” as used in the Act as including transgender status or gender identity. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016). In mid-October 2018, news broke that the Trump Administration was considering reversing some of these interpretations. *See* Laura Meckler et al., *Trump Administration Considering “Different Concepts” Regarding Transgender Rights, with Some Pushing Back Internally*, WASH. POST (Oct. 24, 2018), [https://www.washingtonpost.com/national/trump-administration-considering-different-concepts-regarding-transgender-rights-with-some-pushing-back-internally/2018/10/22/0668f4da-d624-11e8-83a2-d1c3da28d6b6\\_story.html](https://www.washingtonpost.com/national/trump-administration-considering-different-concepts-regarding-transgender-rights-with-some-pushing-back-internally/2018/10/22/0668f4da-d624-11e8-83a2-d1c3da28d6b6_story.html) [<https://perma.cc/G97C-QDRE>] (discussing possible plans to rely more heavily upon biological sex rather than gender identity in interpreting laws).

A number of states have issued Medicare coverage guidelines for transition surgery. *See* Virgil Dickson, *Nevada Becomes Third State in Trump Era to Cover Sex Reassignment Under Medicaid*, MOD. HEALTH CARE (Mar. 1, 2018), <https://www.modernhealthcare.com/article/20180301/NEWS/180309990> [<https://perma.cc/28SJ-ARBY>] (noting that sixteen states plus the District of Columbia have such guidelines). For a discussion of Medicare and its interaction with sex reassignment surgery, see Christina Brady & Shira Stein, *Medicare Pay Uncertainty Limits Gender Reassignment Surgery*, BNA (July 19, 2018), <https://www.bna.com/medicare-pay-uncertainty-n73014477688> [<https://perma.cc/57LT-RYGE>].

While some private insurance companies cover the surgeries and related care, others consider the surgery or other affirming care cosmetic and, therefore, not covered; some also impose prerequisites to approval of coverage. Some states have moved to require coverage. Anemona Hartocollis, *Insurers in N.Y. Must Cover Gender Reassignment Surgery, Cuomo Says*, N.Y. TIMES (Dec. 10, 2014), <https://www.nytimes.com/2014/12/11/nyregion/in-new-york-insurance-must-cover-sex-changes-cuomo-says.html> [<https://perma.cc/VVG5-WNR5>]. *See also* *Finding Insurance for Transgender-Related Care*, HUM. RTS. CAMPAIGN (Aug. 1, 2015), <https://www.hrc.org/resources/finding-insurance-for-transgender-related-healthcare> [<https://perma.cc/63KY-6W9C>] (providing list of companies

reassignment surgery carries with it substantial risks.<sup>8</sup> Some argue that neither surgery nor court orders should be prerequisites to having one's gender identity recognized.<sup>9</sup>

Some also object to any attempt to verify whether a person "belongs" in a sex-separated bathroom (e.g., by inquiring or calling police on the belief that a "man" is in a woman's bathroom"). They label the action "gender policing."<sup>10</sup> Moreover, some trans men, although they self-identify

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providing coverage and discussing how employers can negotiate around contractual exclusions).

Insurance coverage of transitional surgeries is also the subject of litigation. *See, e.g.,* Boyden v. Conlin, 2018 U.S. Dist. LEXIS 158491, at \*57, \*60-61 (W.D. Wis. Sept. 18, 2018) (finding denial of coverage to transgender state employee violated Title VII, the antidiscriminatory provisions of the Affordable Care Act, and the Equal Protection Clause under heightened scrutiny and leaving damages and attorney's fees for trial); Tovar v. Essentia Health, 857 F.3d 771, 779 (8th Cir. 2017) (finding that employee-parent had no standing to assert Title VII claim against employer for denial of coverage of child for transitional surgery.)

8. There are many transgender people who celebrate their surgeries. Others are less happy and have detransitioned. *See* Nigel Barber, *The Gender Reassignment Controversy*, PSYCHOL. TODAY (Mar. 16, 2018), <https://www.psychologytoday.com/us/blog/the-human-beast/201803/the-gender-reassignment-controversy> [<https://perma.cc/PK9B-42PK>]; Olivia Petter, *Gender Reversal Surgery is More In-Demand Than Ever Before*, INDEP. (Oct. 3, 2017, 13:15), <https://www.independent.co.uk/life-style/gender-reversal-surgery-demand-rise-assignment-men-women-trans-a7980416.html> [<https://perma.cc/WWC7-E8LF>]; Renee Sullivan, *A Different Stripe*, PSYCHOL. TODAY (Mar. 7, 2018), <https://www.psychologytoday.com/us/articles/201803/different-stripe> [<https://perma.cc/WSA5-YZM9>] (female-bodied person detransitioning from male to become an androgynous woman). Some tie the failure of surgeries to a lack of acceptance in the new gender, harassment, or surgical complications, *see* Barber, *supra*, Petter, *supra*, while others say the transition was not what they needed, *see* Sullivan, *supra*.
9. A handful of U.S. jurisdictions have statutes or regulations that allow changes to sex designations on birth certificates without requiring surgery or a court order. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 103425(a) (West 2018) (requiring only "clinically appropriate treatment" and not requiring a court order); *see also* WASH. ADMIN. CODE § 246-490-075 (2018) (allowing adult to change sex designation without physician backing and by filling out an application).
10. *See, e.g.,* Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom That Matches Gender Identity—Are Coed Bathrooms Next?*, 83

as men, may feel safer or more comfortable in bathrooms that are designated for “women,” especially if they continue to look physically like women to others.

Some have claimed that predators will take advantage of mixed-sex bathrooms to prey upon women and girls.<sup>11</sup> Supporters of mixed-sex spaces (or, at least, access by gender identity) argue that such claims conjure up “imaginary predators” and are merely efforts to perpetuate, a stereotype that transgender people are dangerous and/or mentally unstable.<sup>12</sup> All the while, the #MeToo movement has reconfirmed that sexual harassment also remains a widespread and a serious issue for

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UMKC L. REV. 57, 69-70 (2014) (arguing gender-specific bathrooms lead to “gender policing”); David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 550-51 (2010) (discussing “gender policing” in other contexts); Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN’S L.J. 137, 155, 159 (2007) (same).

11. See e.g., Elizabeth Edens, Opinion, *Commentary: Keep Men Out of Women’s Restrooms*, CHI. TRIB. (Apr. 7, 2016, 5:50 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-bathrooms-transgender-north-carolina-women-men-perspec-0408-20160407-story.html> [<https://perma.cc/K64Q-KJHE>]; Marc A. Thiessen, Opinion, *Yes We Should Protect Transgender People But We’re Going About It in a Dangerous Way*, WASH. POST (May 16, 2016), [https://www.washingtonpost.com/opinions/yes-we-should-protect-transgender-people-but-not-by-opening-restrooms-to-predators-who-pretend-to-be-transgender/2016/05/16/3a9713ce-1b76-11e6-b6e0-c53b7ef63b45\\_story.html](https://www.washingtonpost.com/opinions/yes-we-should-protect-transgender-people-but-not-by-opening-restrooms-to-predators-who-pretend-to-be-transgender/2016/05/16/3a9713ce-1b76-11e6-b6e0-c53b7ef63b45_story.html) [<https://perma.cc/5A84-GVB3>].
12. See, e.g., Alia E. Dastagir, *The Imaginary Predator in Today’s Bathroom Wars*, USA TODAY (Apr. 28, 2016, 5:34 PM ET), <https://www.usatoday.com/story/news/nation/2016/04/28/transgender-bathroom-bills-discrimination/32594395> [<https://perma.cc/59UP-QPQM>]; Erin Fitzgerald, *A Comprehensive Guide to the Bathroom Predator Myth*, MEDIA MATTERS (May 5, 2016, 1:51 PM EDT), <https://www.mediamatters.org/research/2016/05/05/comprehensive-guide-debunked-bathroom-predator-myth/210200> [<https://perma.cc/3SS3-USR6>]; Katy Steinmetz, *Why LGBT Advocates Say Bathroom “Predators” Argument Is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument> [<https://perma.cc/9TUE-UHQY>]. While I believe that the risks of unisex bathrooms for women are very real, I reject any suggestion that transgender persons are inherently more violent than any other group.



women and girls.<sup>13</sup> And while less common and receiving less attention, threats to boys and men continue as well.<sup>14</sup>

13. In October 2017, Jodi Kantor and Meghan Twohey, reporters for the *New York Times*, and Ronan Farrow, writing for the *New Yorker*, broke the story of widespread workplace sexual harassment and assault by movie mogul Harvey Weinstein. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM) <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/MH6G-VPGL>]; Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017) <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/8NJM-MF4Q>]. On October 15, 2017, actress and activist Alyssa Milano tweeted that victims of sexual harassment or assault should signify their survivor status by tweeting the hashtag "#MeToo." See Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/5F57-REA7>]. Milano was not the first to use the term #MeToo. A decade earlier, the term had been coined by Tarana Burke to designate a movement of women coming out to declare that they had been sexually harassed or assaulted and would no longer stand for it. See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/9JP9-Z4SH>]. Hundreds of celebrities and persons in authority have been revealed as serial harassers and abusers of women. See Anna North et al., *252 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April, 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> [<https://perma.cc/DZL8-MWL3>].
14. In 2017, actor Terry Crews accused a Hollywood agent of sexually groping him. See Yohana Desta, *In the Wake of Weinstein News, Terry Crews Shares His Own Sexual-Assault Story*, VANITY FAIR (Oct. 10, 2017, 6:23 PM), <https://www.vanityfair.com/hollywood/2017/10/terry-crews-harvey-weinstein> [<https://perma.cc/VX5F-V73B>]. Actor Kevin Spacey was accused of sexually assaulting numerous young men, some of whom were minors. See *Kevin Spacey Scandal: A Complete List of the 15 Accusers*, USA TODAY (Nov. 7, 2017, 5:41 PM ET), 2018 <https://www.usatoday.com/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001> [<https://perma.cc/DP9Q-SDL9>]. In 2018, a young man accused female actress Asia Argento of sexually assaulting him when he was a minor working on a set with her. See Kim Severson, *Asia Argento, a #MeToo Leader, Made a Deal with Her Own Accuser*, N.Y. TIMES (Aug. 19, 2018), <https://www.nytimes.com/2018/08/19/us/asia-argento-assault-jimmy-bennett.html> [<https://perma.cc/86E9-YVCN>].

Beginning in 2011-12, these “bathroom debates” (as I shall call them), surged in the public square as the government sought to alter the landscape of bathroom sex-separation. For example, in 2012 the Equal Employment Opportunity Commission (“EEOC”) interpreted Title VII’s reference to “sex” to include gender identity.<sup>15</sup> It further held that employers cannot condition a transgender person’s access to a bathroom on sex-reassignment surgery.<sup>16</sup> In 2016, the EEOC proposed guidelines that defined the persistent failure of employers and coworkers to recognize the sex that matches an employee’s gender identity to be harassment in violation of Title VII.<sup>17</sup> And in 2016, the Department of Justice and the Department of Education issued a “joint guidance” to all schools receiving federal funds, interpreting the word “sex” under Title IX similarly and, thus, requiring access to sex-separated spaces according to a student’s gender identity.<sup>18</sup>

The election of President Donald J. Trump in November 2016, however, marked a reversal in this trend. Among its first acts, the Trump Administration withdrew the joint guidance and later, withdrew other consistent directives.<sup>19</sup> During the Trump presidency, the EEOC’s efforts to

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15. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, 13-14 (E.E.O.C. Apr. 20, 2012). Title VII makes it unlawful to discriminate against an individual because of the person’s “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2 (2018).
  16. *Lusardi v. McHugh*, No. 0120133395, 2015, WL 1607756, 10, 13, 17 n.3 (E.E.O.C. (Apr. 1, 2015)).
  17. EEOC, *Proposed Enforcement Guidance on Unlawful Harassment* 7-8 (2017), <https://www.regulations.gov/document?D=EEOC-2016-0009-0001> [<https://perma.cc/MM72-EEKU>].
  18. See U.S. Dep’t of Just., Civ. Rts. Div., & U.S. Dep’t of Educ., Off. for Civ. Rts., Dear Colleague Letter on Transgender Students (May 13, 2016).
  19. For information on the reversal of the joint guidance, see U.S. Dep’t of Just., Civ. Rts. Div., & U.S. Dep’t of Educ., Off. for Civ. Rts., Letter to Colleagues (Feb. 22, 2017). The Trump Administration voluntarily dismissed cases the Obama Administration brought to enforce the earlier guidance. See, e.g., Joint Stipulated Notice of Dismissal at 1, *United States v. State*, No. 1:16-cv-00425-TDS-JEP (M.D.N.C. Apr. 14, 2017). It reversed rules that required transgender prisoners be housed consistent with their gender identities and not simply by sex. Julie Moreau, *Bureau of Prisons Rolls Back Obama-Era Transgender Inmate Protections*, NBC NEWS (May 14, 2018, 2:19 PM EDT), <https://www.nbcnews.com/feature/nbc-out/bureau-prisons-rolls-back-obama-era-transgender-inmate-protections-n873966>. [<https://perma.cc/TD>

interpret Title VII as including gender identity have been hampered by conflicts with the Administration.<sup>20</sup>

In the bathroom debates, the question of how bathrooms *first* became sex-separated has become a central one. Two theories have been widely disseminated in the press as fact.<sup>21</sup> One is associated with Professor Sheila Cavanagh, who argues that the very first instance of sex-separated public toilets occurred at a ball held in a Parisian restaurant in 1739.<sup>22</sup> She argues that the Parisian upper-classes initiated this separation "to indicate class standing and genteel respectability."<sup>23</sup>

Professor Terry S. Kogan has offered a second theory that purports to explain how sex-separation became such a widely-embraced norm.<sup>24</sup> He

54-WAH7] (prisons will now "use biological sex as the initial determination" for prisoner placement decisions).

20. In a Sixth Circuit case brought by the EEOC, now before the Supreme Court on a petition for certiorari, the individual party in interest, represented by the ACLU, intervened to press the matter. The EEOC filed no response, and the motion was granted. *See* Order Granting Motion to Intervene at 3, EEOC v. R.G. & G.R. Harris Funeral Homes Inc., (No. 16-2424), 884 F.3d 560 (6th Cir. 2018), *petition for cert. filed*, (U.S. July 24, 2018) (No. 18-107), (available at <https://www.aclu.org/legal-document/eeoc-v-rg-gr-harris-funeral-homes-order-granting-motion-intervene> [<https://perma.cc/FS8C-H7LH>]). The Solicitor General has told the U.S. Supreme Court that he will represent the position of the United States in the case. *Cf.* Letter from Noel J. Francisco, Solicitor General, to Hon. Scott S. Harris, Clerk of the U.S. Supreme Court (Aug. 14, 2018), [https://www.supremecourt.gov/DocketPDF/18/18-107/59454/20180814160841546\\_Extension%20Letter%2018-107.pdf](https://www.supremecourt.gov/DocketPDF/18/18-107/59454/20180814160841546_Extension%20Letter%2018-107.pdf) [<https://perma.cc/N75J-B7N7>] (seeking an extension of time to file government's response to petition).
21. For evidence of this wide dissemination, see the discussion beginning at p. 239 *infra*.
22. SHEILA L. CAVANAGH, QUEERING BATHROOMS: GENDER, SEXUALITY AND THE HYGENIC IMAGINATION 20 (2010). Cavanagh is an Associate Professor of Sociology and former Sexuality Studies Coordinator at York University, in Toronto, Canada. *See Faculty Profiles: Sheila Cavanagh*, YORK U., <http://profiles.laps.yorku.ca/profiles/sheila> [<https://perma.cc/3ERU-KUPH>].
23. CAVANAGH, *supra* note 22, at 10.
24. *See* Terry Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety, in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 145 (Harvey Molotch & Laura Norén eds., 2010) (hereinafter Kogan, *Sex Separation Cure-All*). Kogan is a Professor of Law at the University of Utah College of Law. *See Terry Stuart Kogan*, U. UTAH, [https://faculty.utah.edu/u0028895-TERRY\\_STUART\\_KOGAN/hm/index.html](https://faculty.utah.edu/u0028895-TERRY_STUART_KOGAN/hm/index.html) [<https://perma.cc/U9TJ-WJJF>]. Before that,

claims that the practice arose in the late nineteenth century.<sup>25</sup> Kogan maintains that when the Industrial Revolution brought large numbers of women out of the home and into factory workspaces, authorities believed that a practice of men and women using the same toilets would be indecent.<sup>26</sup> Authorities also worried, Kogan argues, that the spectacle violated their ideal that men and women by nature occupied “separate spheres.”<sup>27</sup> Kogan argues that a Massachusetts labor law statute, passed in 1887, was the first U.S. law mandating sex-separation.<sup>28</sup>

For ease of reference, I will call Cavanagh’s theory the “*Parisian elitism and gentility*” theory. I will call the Kogan theory the “*Victorian modesty and separate spheres*” theory. I will call them, collectively, the “alternative bathroom histories.”

I will demonstrate that both theories are badly flawed. Contrary to Cavanagh’s and Kogan’s theories, I argue that the 1739 Paris Ball was not the first incidence of bathroom sex-separation. The practice dates back to ancient times, was common in Europe before the Victorian period, and, in the United States, preceded the founding of the nation. It was rooted, I contend, in protecting women and children from harassment and violence, including sexual assault. I will show that laws like the 1887 Massachusetts law were among the first state-wide anti-sexual harassment laws in the United States. To support some of my arguments, I also use artwork contemporary to the times referenced. In addition to discussing the works,

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Kogan published another article on the subject. See Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 15 (2007). For more recent treatment, see Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017).

25. See Kogan, *Sex Separation Cure-All*, *supra*, note 24.
26. *Id.* at 146-48, 153-54.
27. *Id.* at 160. “Separate spheres” ideology, as applied to women’s history, held that women and men had different appropriate fields of influence. *Bradwell v. Illinois* captured this belief. *Bradwell v. Illinois*, 55 Ill. 535 (1872), *aff’d*, *Bradwell v. Illinois*, 83 U.S. 130 (1872). In denying Myra Bradwell the right to practice law, the Supreme Court of Illinois stated that it was regarded an “axiomatic truth” that “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws . . .” See *id.* at 539.
28. See Kogan, *Sex Separation Cure-All*, *supra* note 24, at 156. For details on the Massachusetts law that Kogan references, see Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668 (titled “An Act to secure proper sanitary provisions in factories and workshops”).

I reproduce some of them at the end of this Article. These works are referenced in the text in the form "[See Figure X]."

Part I of this piece gives essential background for understanding how and why these alternative bathroom histories go astray. It discusses the evolution of bathrooms, the vocabulary of an earlier period, and the statuses of women and the poor in the nineteenth and earlier centuries.

Part II specifically addresses Cavanagh's *Parisian elitism and gentility* theory. Cavanagh, and others who claim that sex-separation originated at a 1739 Paris ball, do not further identify the ball. Having researched it, I argue that the ball in question was a masquerade ball held to celebrate the marriage of the daughter of French King Louis XV. It was held in the courtyard of the Hôtel de Ville. It fêted some 14,000 people.<sup>29</sup> I show that the handling of bathroom spaces at the ball was consistent with notions of safety and privacy and mirrors the way that bathrooms spaces have been traditionally designed in modern times. Moreover, I will show that sex-separation preceded that ball. Rejecting the *Parisian elitism and gentility* theory, I also offer my own alternative theory of the 1739 Paris ball's significance within history, pointing to evidence that sexual minorities frequented masquerade balls and that some may have considered them a safe space.

In Part III, I address Kogan's *Victorian modesty and separate spheres* theory. Building on the evidence of bathroom spaces discussed in Part II, I show that sex-separation as a norm dates from ancient times and that the approach to it during the Industrial Revolution was consistent with that preexisting norm. The commercial context that drove the Industrial Revolution required authorities to develop rules to overcome the tremendous pressure to sacrifice worker protections in favor of economic gain. The bathroom separation laws that Massachusetts and other states implemented are best seen as part of the larger labor movement to ensure employee rights. I argue that laws requiring sex-separation in bathrooms were among the earliest noncriminal, anti-sexual harassment statutes passed in the nation. The flaws in these statutes did not lay in the fact that they protected women. Rather, they lay in the absence of supporting structures to accomplish the goals of ending harassment, in the intractability of sexual assault and sexual harassment as a social problem, and also in the fact that authorities did not give much attention to protecting vulnerable male-bodied persons, irrespective of sexual orientation or identity.

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29. By "multi-entry," I mean bathroom spaces that are intended to be used by many people at the same time. See discussion *infra* p. 245.

In Part IV, I offer a corrected theory. Bathroom sex-separation arose naturally in most spaces, and it arose out of safety and privacy needs, particularly those of the female-bodied. The fact that patriarchy or sexism also shaped such intimacy norms is not surprising, nor does it change the underlying reality that the standard grew so expansively because it was needed for women's protection.

In conclusion, I reject the tales of the alternative bathroom histories as too narrow.<sup>30</sup> I suggest that their worst error is not merely factual, but rather an approach that ignores and even contorts the histories and experiences of other vulnerable groups, in this case, women and the poor, even as they seek rights for transgender persons. Women have fought for centuries to recover and preserve these histories. These stories are key pillars supporting their current claims to protections against discrimination.

To understand the import of the alternative bathroom histories, the reader must appreciate how widely they have been disseminated. As early as 2013, in an article about a transgender child, the editorial board of *Bloomberg.com* told readers, "The purpose [of bathroom separation] is to protect modesty and eliminate the potential for prurience in the bathroom."<sup>31</sup> The *San Francisco Examiner* reported on February 3, 2015 that mandatory "sex segregation" was initiated by the 1887 Massachusetts statute, emerging from an era when women were viewed as weak, and that sex-segregated bathrooms were "a holdover from a truly bygone era."<sup>32</sup> On November 17, 2015, the *New York Times Magazine* told readers that sex-separated bathrooms had their "roots in the Victorian era"; that "[s]tates started to require sex-segregated 'water closets' in the [nineteenth] century, when women entered spaces that men previously dominated"; and that "[p]rivacy and sanitation" justified those approaches, in addition

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30. My focus here is on the historical story. A discussion of whether times have changed so much that norms should change as well is for a different time.

31. Editors, *Coy Mathis and the Next Civil Rights Fight*, BLOOMBERG (June 27, 2013) (Oct. 25, 2018; 9:28 a.m.), <https://www.bloomberg.com/view/articles/2013-06-27/coy-mathis-and-the-next-civil-rights-struggle>.

32. Joe Eskenazi, *The Bizarre, Antiquated Origins of Sex-Segregated Restrooms*, S.F. EXAMINER (Feb. 3, 2015), <https://archives.sfexaminer.com/sanfrancisco/the-bizarre-antiquated-origins-of-sex-segregated-restrooms/Content?oid=2918738> [<https://perma.cc/WH6U-4YEH>].

to "concern for the "'weaker body of the woman worker.'"<sup>33</sup> In the *Associated Press News*, on May 26, 2016, Kogan wrote that "laws in the [United States] did not even address the issue of separating public bathrooms by sex until the end of the [nineteenth] century" with the enactment of the 1877 Massachusetts statute, that there was "nothing . . . benign about . . . these laws," and that the laws were "rooted in the so-called 'separate spheres ideology' of the early-[nineteenth] century."<sup>34</sup> On May 9, 2016, *Live Science* told readers that "having privacy for peeing is a relatively modern phenomenon," that the first instance of sex-separated bathrooms was a Paris ball, but that laws arose in the nineteenth century, and suggested that there was no legitimate reason for them.<sup>35</sup> On May 11, 2016, the *Charlotte Observer* repeated the claims of the *Live Science* article, and said that it would be a "mistake" for readers to think that bathrooms had always been sex-separated.<sup>36</sup> In April 2016, the *Washington Post* told its readers that "[u]ntil the mid-[nineteenth] century, all bathroom facilities were outhouses," single-entry, and that it was not until after "the 1870s rise of post-cholera sanitation awareness" that sex-separation arose.<sup>37</sup> On May 16, 2016, *Time* reported, "Though the first sex-segregated toilets were established in Paris in the 1700s, regulations requiring that American men and women use separate

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33. Emily Bazelon, *Making Bathrooms More Accommodating*, N.Y. TIMES MAG. (Nov. 17, 2015), <https://www.nytimes.com/2015/11/22/magazine/making-bathrooms-more-accommodating.html> [<https://perma.cc/98FY-SMZC>].
  34. Terry S. Kogan, *How Did Public Bathrooms Get to Be Separated by Sex in the First Place?*, AP NEWS (May 26, 2016), <https://apnews.com/634c2e566e024c5b9aff3c04ca7550e7/how-did-public-bathrooms-get-be-separated-sex-first-place> [<https://perma.cc/X7XQ-ET8G>].
  35. Stephanie Pappas, *The Weird History of Gender-Segregated Bathrooms*, LIVE SCI. (May 9, 2016, 5:44 PM ET), <https://www.livescience.com/54692-why-bathrooms-are-gender-segregated.html> [<https://perma.cc/VBK8-ESG7>].
  36. Eric Frazier, Opinion, *The Odd History of Gender Separated Bathrooms*, CHARLOTTE OBSERVER (May 11, 2016, 11:24 AM), 2016, <http://www.charlotteobserver.com/opinion/opn-columns-blogs/o-pinion/article76741582.html> [<https://perma.cc/R73S-B2PW>].
  37. Monica Hesse, *How the Bathroom Became a Political Battleground for Civil Rights*, WASH. POST (Apr. 1, 2016), [https://www.washingtonpost.com/life-style/style/why-america-cant-stop-fighting-over-the-politics-of-public-restrooms/2016/04/01/16af2f94-f6b6-11e5-a3ce-f06b5ba21f33\\_story.html](https://www.washingtonpost.com/life-style/style/why-america-cant-stop-fighting-over-the-politics-of-public-restrooms/2016/04/01/16af2f94-f6b6-11e5-a3ce-f06b5ba21f33_story.html) [<https://perma.cc/AV3B-B7JT>].

restrooms got their start in the late 1800s.”<sup>38</sup> The coverage has also been international. On June 11, 2016, Kogan’s *Associated Press News* interview was reprinted in the United Kingdom’s *Guardian* newspaper.”<sup>39</sup>

On May 6, 2016, CNN posted an online video, purporting to educate readers on bathroom history.<sup>40</sup> Stating that “there’s actually a long and complicated history of people fighting for the right to [go to bathrooms] in private and in peace,” the video claimed that public bathrooms did not exist in public spaces prior to the cholera outbreaks reaching London in the 1800s.<sup>41</sup> According to CNN, legal regulation of public bathrooms reflected discomfort with women and men going to bathrooms alongside each other.<sup>42</sup> The video’s narrator states:

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38. Maya Rhodan, *Why Do We Have Men’s and Women’s Bathrooms Anyway?*, TIME (May 16, 2016), <http://time.com/4337761/history-sex-segregated-bathrooms> [<https://perma.cc/D87A-JRXQ>]; see also Shannon Keating, *The Past 100 Years of Gender-Separated Bathrooms*, BUZZFEED (May 17, 2016, 9:34 AM), <https://www.buzzfeed.com/shannonkeating/gender-segregated-bathrooms-have-a-long-ugly-history> [<https://perma.cc/XK9P-UELB>] (“Men’s and women’s restrooms . . . are the direct result of a long history involving the continual reproduction of outmoded concepts of gender difference.”); Nico Lang, *Why All Public Bathrooms Should be Gender Neutral*, DAILY BEAST (Apr. 18, 2016, 1:00 AM ET), <http://www.thedailybeast.com/why-all-public-bathrooms-should-be-gender-neutral> [<https://perma.cc/JJ3G-LZED>], (arguing that sex-separated bathrooms are “an unnecessary vestige of the nineteenth century”); Ted Trautman, *Sex-Segregated Public Restrooms Are an Outdated Relic of Victorian Paternalism*, SLATE (Apr. 11, 2014, 4:13 PM), [http://www.slate.com/blogs/outward/2014/04/11/sex-segregated\\_public\\_restrooms\\_an\\_outdated\\_relic\\_of\\_victorian\\_paternalism.html](http://www.slate.com/blogs/outward/2014/04/11/sex-segregated_public_restrooms_an_outdated_relic_of_victorian_paternalism.html) [<https://perma.cc/D72Z-Q4HD>] (sex-separated bathrooms are outdated relics of the nineteenth century).

39. Terry S. Kogan, Opinion, *How Did Bathrooms Get to Be Separated By Gender in the First Place?*, GUARDIAN (June 11, 2016, 8:00 EDT), <https://www.theguardian.com/commentisfree/2016/jun/11/gender-bathrooms-trans-gender-men-women-restrooms> [<https://perma.cc/7S24-Y5NW>]. See also AP News article, *supra* note 34 and discussion *supra* p. 241 (*Associated Press News* discussion).

40. *It’s Not the First Time Toilets Have Divided America*, CNN (May 6, 2016), <https://www.cnn.com/videos/us/2016/05/06/public-bathroom-controversy-history-nws-orig.cnn> [<https://perma.cc/R9W9-8Y8D>].

41. *Id.*

42. *Id.*



Women were an early focus. Back in the late 1800's, lots of people were uncomfortable with the idea of women being in public at all, much less using restrooms alongside men. So state regulations of factories created restrooms specifically to keep men and women apart.<sup>43</sup>

The video goes on to discuss "Jim Crow" laws, passed after the end of slavery, which required separation of the races in every virtually aspect of life, including toilets.<sup>44</sup> It later suggests that racial segregation and sex-separation in bathrooms had a common core.<sup>45</sup> (Of course, the point does not explain why even slaves on most slave ships were sex-separated.)<sup>46</sup>

The alternative bathroom histories have also been asserted in other influential spaces, including the U.S. Supreme Court.<sup>47</sup> Law reviews have published articles offering these theories or citing them as fact.<sup>48</sup> *Wikipedia* reflects them.<sup>49</sup>

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43. *Id.*

44. *Id.*

45. *Id.*

46. See, e.g., JAMES T. CAMPBELL, *MIDDLE PASSAGES: AFRICAN AMERICAN JOURNEYS TO AFRICA, 1787-2005*, at 3 (discussing practices in the 1700s). For more on the status of slaves, see *infra* note 222. While all types of discrimination have a common core, I believe that comparisons as they relate to bathrooms gloss over key differences between separation by race in bathrooms and separation by sex.

47. See Brief for Professor Terry S. Kogan as Amicus Curiae Supporting Respondent, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273); Brief for Women's Law Center et al. as Amici Curiae Supporting Respondent at 24, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-723).

48. See e.g., Kogan, *Public Restrooms and the Distorting of Transgender Identity*, *supra* note 24; Kogan, *Sex Separation Cure-All*, *supra* note 24; Kogan, *Sex-Separation in Public Restrooms*, *supra* note 24, at 15, 35-55; I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 895, n.209 (2015); Cohen, *supra* note 10, at 534 n.148; Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 153-157 (2017); Jack. B. Harrison, *"To Sit or Stand": Transgender Persons, Gendered Restrooms, and the Law*, 40 HAW. L. REV. 49, 58-62 (2017). For student writing citing Kogan, see C.J. Griffin, Comment, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409, 412, 414-15 (2009); Jeffrey Kosbie, Comment, *No State Interest in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & M. J. OF WOMEN & L. 187, 243 (2013); -15

The timing of the dissemination of these theories is also important to note. They circulated primarily around the time of the “HB2” debates<sup>50</sup> and when state and federal governments were struggling to frame policies concerning bathroom access and when judges were deciding related controversies. One can fairly wonder to what extent these narratives may have shaped judicial assumptions.<sup>51</sup>

## I. CHALLENGING THE FRAMEWORK OF THE ALTERNATIVE BATHROOM HISTORIES

A critique of the alternative bathroom histories must begin with a challenge to the historical framework from which they proceed. This section makes that challenge and provides additional background information that helps readers understand the Industrial Revolution and earlier eras.

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(2009); Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297, 298 (2008) (using Kogan to argue that sex-separated bathrooms “did not arise naturally”).

49. The relevant *Wikipedia* page contains a notice that “examples and perspective in this article may not represent a worldwide view of the subject.” *Unisex Public Toilet*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Unisex\\_public\\_toilet](https://en.wikipedia.org/wiki/Unisex_public_toilet) [<https://perma.cc/ZHG5-SPWL>]. Anyone with a free account can create or edit a *Wikipedia* page.
50. “HB2” was a North Carolina law that some argued discriminated against transgender persons in denying them access to intimate facilities based on gender identity and others argued preserved the state’s right, for safety and privacy reasons, to distinguish on the basis of “sex” in state policies governing intimate spaces. For more on the battle over HB2, see e.g., Richard Fausset & Alan Blinder, *North Carolina Fails to Repeal Bathroom Law That Prompted Boycotts*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/us/north-carolina-fails-to-repeal-bathroom-law-that-prompted-boycotts.html> [<https://perma.cc/U7LS-LBLU>].
51. Under the Federal Rules of Evidence, courts can take judicial notice of adjudicative facts (the facts of a particular case) if the fact is “not subject to reasonable dispute.” FED. R. EVID. 201(b). In civil cases, a court “must instruct the jury to accept the noticed fact as conclusive.” FED. R. EVID. 201(f). A party is entitled to be heard “on the propriety of taking judicial notice and the nature of the fact to be noticed.” FED. R. EVID. 201(e). Federal Rule of Evidence 201, however, does not govern judicial notice of other types of facts, such as legislative facts (i.e., facts about law or legal matters). See FED. R. EVID. 201(a) (“This rule governs judicial notice of an adjudicative fact only, not a legislative fact.”).

### A. *Evolution of the Bathroom*

Today, the bathroom is a space where we might relieve ourselves, wash our hands, change our clothes, bathe, or shower, among other things. In earlier times, however, with modern methods of plumbing and sanitation having yet to be developed, one could not perform all of these functions in a single space.<sup>52</sup> Thus, histories that focus on the "toilet" miss the larger historical picture that frames how people felt about safety and privacy in intimate spaces and why sex-separation was the dominant choice.

The earliest form of toilet was a "chamber pot" that rested on the floor. The contents of the pot would later be thrown out. Any requirements of safety and privacy could be met by controlling the space where the pot sat. The task of washing or shaving could be done using a separate basin or tub.<sup>53</sup>

Over time, people placed the chamber pot into a stool to raise it up. When the chamber pot was placed within a closed box the unit was called a "close-stool."<sup>54</sup> Here again, the close stool could be placed in a secure location to assure privacy, if such was desired.

People then began to place the close-stool within a closet (or "'cabinet'"). Sometimes the closet had a more permanent seat inside than the typical close-stool. The result was the "privy," usually located outside. One could secure privacy by closing the door of the privy building. The definition of the term "privy" underscores its relationship to privacy. Samuel Johnson's 1768 dictionary defines the term as meaning "[p]rivate, not public, assigned to secret uses."<sup>55</sup> The privy was also called the "place of retirement" or "necessary house."<sup>56</sup> The term comes from the French *privet* and the Latin *privatus*, both meaning private.<sup>57</sup> One operating in private, of course, would necessarily be operating in a zone of safety.

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52. *Accord* LAWRENCE WRIGHT, CLEAN AND DECENT: THE FASCINATING HISTORY OF THE BATHROOM AND THE WATER CLOSET 103 (1960).

53. *See id.* at 112-14.

54. JEFFREY L. FORGENG, DAILY LIFE IN ELIZABETHAN ENGLAND 119 (2d ed. 2010). *See also* JEFFREY L. FORGENG, DAILY LIFE IN STUART ENGLAND 74 (2007) (making similar points). Queen Elizabeth I reigned from 1558 to 1603.

55. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1768) (first reference to "privy," definition).

56. *Id.*

57. *See* MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/privy> [<https://perma.cc/3QAP-587T>].

Bathroom spaces were also used for cosmetic purposes. The term “toilet” (or “toilette”) originally referred to the cosmetic preparation of one’s hair, face, or other parts of the body, including washing the body and getting dressed. In the 1700s, the term was used with respect to both women and men.<sup>58</sup> Of course, formal bathrooms were not always available, especially for the poor. One could relieve oneself where one stood, if necessity called. It was common for men, in particular, to simply find a convenient wall or fireplace against which to urinate.<sup>59</sup> One could also bathe in a spring or a river.<sup>60</sup>

The development of modern sanitation methods led to our current configurations for bathrooms and a merger of various bathroom functions into one space.<sup>61</sup>

### B. Understanding “Single-Entry” Spaces

Kogan’s theory assumes that all early bathrooms were single-use or single-entry spaces.<sup>62</sup> He states, “Early in our country’s history, restrooms were all single-user water closets, privies, or outhouses, which effectively kept two people (of the same or opposite sex) from using that space at the same time.”<sup>63</sup> Thus, he argues that “the multi-user public restroom . . . dates back only to the 1870s” and were made possible by sanitation technology advancements.<sup>64</sup>

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58. See, e.g., *The Toilet of Madame BONAPARTE Is Attended Daily by Many of the Most Distinguished Ladies of the Old Court*, TIMES (London), Oct. 29, 1800, at 2 (caps in original); *Talien, the New Leader of the French Convention*, N.H. GAZETTE, Oct. 28, 1794, at 4 (“[p]articularly careful of his person, he spends much time at his toilet.”).

59. FORGENG, *supra* note 54, at 119. Queen Elizabeth I reigned from 1558-1603. *Id.*

60. For a discussion of river or spring bathing, see Section III.A.1 and note 112.

61. These included ways to pipe water from one place to another, to heat it, and to drain sewage. See, e.g., WRIGHT, *supra* note 52 at 6, 146-147; 250 (discussing efforts at sewage draining). For more on developments of sanitation, see Fred B. Welch, *The History of Sanitation*, 8 SANITARIAN 39 (1945).

62. See Kogan, *Public Restrooms and the Distorting of Transgender Identity*, *supra* note 24, at 1212.

63. *Id.*

64. *Id.*

But history offers many instances in which multi-entry spaces were needed before the late nineteenth century. When communities held large parties (e.g., "balls" or festivals), multi-entry bathrooms were needed. Prisons, bathing houses, and hospitals all utilized multi-entry spaces. To understand how people approached intimacy and sex-separation generally, I argue, we must look at the design of these multi-entry spaces as well.

### C. *Understanding Notions of "Decency" and "Immorality"*

To understand how people of an earlier era thought, one must also understand how people living in that era used language. Kogan argues that authorities saw separation of bathrooms in terms of morality and decency.<sup>65</sup> But terms such as "decency" and "morality" were not limited to imposing moral behavioral codes. They were also commonly used to refer to assaultive conduct. A 1721 London article, for example, reported that enemy soldiers attacked a ship that had several women passengers. It said the men "most indecently abused" the women and robbed them of their valuables.<sup>66</sup> A 1755 Boston article referred to women being "Indecently Talk'd To And... Immodestly Handled."<sup>67</sup> A U.S.-based newspaper reported how women attending the Turkish Baths were "very ill-treated" despite the unsuccessful attempts of men who tried to save them.<sup>68</sup> Translated in modern terms, the story describes harassment and possibly sexual assaults. Another paper referred to the prosecution of a man when a young girl was found beaten and in an "indecent" posture.<sup>69</sup> Indeed, some statutes today still describe crimes of sexual assault or immoral conduct in terms of "decency."<sup>70</sup>

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65. See, e.g., Kogan, *Sex Separation Cure-All*, *supra* note 24, at 161-62.

66. *London, April 11*, AM. WKLY. MERCURY, July 6th to July 13, 1721, at 3.

67. BOS. GAZETTE, July 14, 1755, at 2.

68. *Constantinople (Turkey) July 2*, BOS. NEWS-LETTER, Oct. 31, 1771, at 1.

69. See *Boston*, BOS. POST, June 11, 1739, at 2.

70. See, e.g., 18 Pa. Stat. § 3126 ("indecent assault"); Maine Statute Title 17-A, Ch. 35 § 854; Annot. L. Mass. C. 265, §1 3H (Indecent Assault and Battery on a Person Over Fourteen); Maine Statute Title 17-A, Ch. 35 § 854. Indecent conduct, sex trafficking, prostitution and public indecency. In 2018, actor Bill Cosby was convicted of "aggravated indecent assault." *Bill Cosby Retrial Verdict: Guilty on All 3 Counts of Aggravated Indecent Assault*, USA TODAY (Apr. 26, 2018), <https://www.usatoday.com/story/life/2018/04/26/bill->

People of an earlier time used different language; they were also reluctant to speak of sexuality. As reflected in terms such as “immodestly handled” or “ill-treated,” their terms appear restrained today, but must be interpreted in context.

#### *D. Finding the “Law” of Bathrooms*

Kogan’s theory is that the first “law” mandating sex-separation was the 1887 Massachusetts statute.<sup>71</sup> Thus, he argues, bathrooms were not sex-separated until the late nineteenth century. But it is a mistake to focus on state statutes or state-wide law in researching the origins of bathroom regulation. While statutes did exist before the mid-nineteenth century, the proliferation of such state-wide laws is itself a *nineteenth century* development.<sup>72</sup> Moreover, by definition, state-wide *labor* statutes of any kind did not arise until *labor* itself exploded, i.e., during the Industrial Revolution, in the nineteenth century. Thus, by focusing on state *labor statutes*, Kogan’s approach ensures the very outcome it professes to prove—a nineteenth century development.

A better approach, I argue, is to focus on regulations and ordinances (state and local) and community custom. When we do this, we find that sex-separation in multi-entry venues was the norm, except in cases in which the persons subject to the rules were not considered worthy of concern. An example of such groups, as I will show, is prisoners, as to whom society sometimes just threw away the key.<sup>73</sup>

#### *E. The Statutes of Women and the Poor*<sup>74</sup>

The approaches of Kogan and Cavanagh also do not pay sufficient attention to the status of women and the poor in earlier centuries. They fail to note that women, speaking in their own voices about their own lives, are only minimally represented in sources from before the late twentieth century. Most educational institutions of the nineteenth century did not

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cosby-retrial-day-14-deliberations-resume-after-hearing-defense-star-witness/553644002/ [https://perma.cc/NM43-YZGZ].

71. See Kogan, *Sex Separation Cure-All*, *supra* note 24.

72. Cf. WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 52–53 (5th ed.2009).

73. See *infra* p. 273.

74. For evidence of sexual minorities in an earlier era, see *infra* pp. 264–68.

admit women.<sup>75</sup> Barred from most schools, they could not become judges and lawyers or join other professions in appreciable numbers. Sometimes, even when they passed the bar, they were barred from practice on account of sex.<sup>76</sup> Women could not even serve on juries.<sup>77</sup>

Until the mid-1800s, under the doctrine of coverture, when women married, they lost their separate legal existences.<sup>78</sup> Married women had no right to own property in their own names, to contract without a husband's consent, or even to bring lawsuits in their own names.<sup>79</sup> American women could not vote in federal elections and many state elections until the passage of the Nineteenth Amendment in 1920.<sup>80</sup>

Biological realities also affected women's progress. Consider that, in the 1920s, Margaret Sanger was arrested and tried for disseminating information on birth control information to women.<sup>81</sup> It was not until 1965 that the Supreme Court decided that even married couples had a right to

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75. Indeed, in the late nineteenth century, Harvard Medical School twice turned down grants of sufficient money to include women in their medical education. See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 120, n. 397 (1997) (discussing 1878-79 offer to establish a permanent fund for the education of women and 1881-82 offer to establish an endowment for the purpose). The story of Associate Justice Ruth Bader Ginsburg's battle against education discrimination demonstrates that women faced hurdles even in the twentieth century. See, e.g., Carol Pressman, *The House That Ruth Built*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 311-315 (1997).
76. See, e.g., *Blackwell v. Illinois*, *supra* note 27, (discussing a state ban on women lawyers); Pressman, *supra* note 75.
77. See Holly McCammon et al., *Becoming Full Citizens: The U.S. Women's Jury Rights Campaigns, the Pace of Reform, and Strategic Adaptation*, 113 AM. J. SOC. 1104, 1104-05 (2008).
78. See WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 442-445 (1765) ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband"); see also *Barber v. Barber*, 62 U.S. 582, 601 (1858) (Daniel, J., dissenting, and discussing merger into husband and contractual limits).
79. See BLACKSTONE, *supra* note 78.
80. See U.S. CONST. amend. XIX.
81. See *Arrest Margaret Sanger: Police Break Up Meeting on Birth Control and Seize Two Women*, WASH. POST., Nov. 14, 1921, at 3 (discussing an arrest on disorderly conduct charges in New York for speaking at a mass meeting about birth control).

make their own birth control decisions.<sup>82</sup> Until the late 1970s, a woman could be fired from a job if she got married or became pregnant; if she left due to pregnancy related disability, she had no right to return to her job.<sup>83</sup> In a world that favored men exploiting their economic potential, the job of childcare and homemaking fell disproportionately on women.

In such a system, women who could not marry, did not wish to marry, or did not wish to marry a man, faced economic hardships in finding a way to support themselves. When women did marry, limitations on exploiting their own economic potential and pregnancies placed them at the economic mercy of their husbands.

Of course, race, ethnicity, class, and other factors also determined a woman's rights. In this context, voting rights, educational opportunity, freedom from racial harassment and violence, equal employment opportunity based on race, racial health access were all women's issues too. And in a patriarchal world, when black men did not rise economically, the women and children about whom they cared and for whose support they were responsible did not rise either.

The lower economic classes were also uniquely subject to safety concerns. In 1890, Jacob Riis discussed the impact of poverty on safety in his discussion of New York City tenements in *How the Other Half Lives*.<sup>84</sup> Referring to incidents in the city of Philadelphia, a Kansas newspaper stated in 1935 that "the crime of rape seems to have a great away in this section."<sup>85</sup> It referenced "scores of cases" of assaults and noted:

It is safe to say that few girls or women or even female children can be said to be protected from the attacker in these parts. Life is too packed together for much privacy. A girl must disrobe for bed in a room where others live.<sup>86</sup>

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82. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

83. The Pregnancy Discrimination Act of 1978 amended the Civil Rights Act of 1964 to require that employers treat pregnant women like persons who are disabled with similar temporary impairments. See 42 U.S.C. § 2000e(k) (1984).

84. See JACOB RIIS, *HOW THE OTHER HALF LIVES* 3, 82 (1890).

85. *Philadelphia is a Menace to the Race and to the Nation!*, WYANDOTTE ECHO, Mar. 8, 1935, at 1.

86. *Id.*



Of course, sexual assault and the harassment of women date back from time immemorial. Rape is recorded in ancient scriptures.<sup>87</sup> These ancient sources confirm women's vulnerability to sexual harassment in nonmonitored intimate spaces.<sup>88</sup> Allegations of harassment and sexual assault are also noted in newspapers of earlier centuries.<sup>89</sup> Women's stories were often not believed, and they were expected to resist, even against serious threats to their lives.<sup>90</sup>

Nineteenth century laws recognized the right of a person to counter sexual harassment through a charge of "simple assault" or "assault and battery" and to seek criminal prosecution.<sup>91</sup> Other torts relating to bodily

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87. See THE BIBLE, 34 *Genesis* 11-31 (REVISED STANDARD VERSION CATHOLIC EDITION) (discussing the rape of Dinah).
88. See discussion of Susanna and the Elders, *id.* Daniel 13:7-27. See also *infra* note 137 and related text; Daniel Ross Goodman, *What the Book of Genesis Says About Sexual Harassment and #MeToo*, WKLY. STANDARD (Dec. 7, 2017), <https://www.weeklystandard.com/daniel-ross-goodman/what-the-book-of-genesis-tells-us-about-sexual-harassment-and-metoo> [<https://perma.cc/W9D4-MGHA>].
89. See, e.g., *Constantinople (Turkey) July 2*, n.212 (describing the abuse of Turkish women at their baths); *London, April 26*, CHARLESTON EVENING GAZETTE, June 29, 1786, at 2 (discussing a jury's refusal to find rape because the woman walked to the scene under the direction of the alleged rapist who later hid and held her hostage in the women's baths).
90. See *Rodgers v. State*, 204 Miss. 891 (1948) (finding that a woman traveling alone did not sufficiently resist after three men broke into her residence with a gun, because she complied with the demands of two of them for sex after they put away their pistols). For a modern view, see also Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, ATLANTIC (Feb. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millennials/553409/> [<https://perma.cc/R4UP-JLKE>] (discussing Justice Ginsburg's statement that one reason women did not come forward in large numbers before #MeToo was because they feared they would not be believed). See also discussion *infra* p. 286 (Indian women's claims of sexual assault will not likely be believed). Of course, another reason that victims do not come forward is that they face economic penalties for speaking up. See discussion *infra* p. 287 & note 252 (fear of economic reprisals for seeking factory protections).
91. See, e.g., *Indecent Assault*, SO. RPTR. & CORK COMMER. COURIER, Oct. 7, 1743 (discussing indecent assault upon a woman for grabbing her roughly and talking to her licentiously); *Atkin v. Acton* (1830) *in* REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURTS OF COMMON LAW: WITH TABLES OF THE

integrity, such as false imprisonment and menace, were also available.<sup>92</sup> But these avenues proved insufficient and were complicated by women's economic liberty restrictions and the economic pressures of the Industrial Revolution.

Under the rules of evidence—offshoots of English common law—a defendant could challenge a female's general moral character (e.g., whether she had had sex outside of marriage) to prove she consented to conduct she claimed was harassment, assault, or rape.<sup>93</sup> Moreover, in a case of sexual assault, a woman was expected to resist with all her physical might, even though the duress imposed upon her was subjectively sufficiently strong to compel compliance without physical force. If she did not, a fact-finder might find that she consented.<sup>94</sup> Thus, many cases that we would consider sexual assaults today could never have obtained conviction in the nineteenth and earlier centuries. Thus, our knowledge of

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CASES AND PRINCIPAL MATTERS 478 (1813-1865) (discussing a clerk's firing for sexually assaulting the employer's maidservant); BATH POLICE, BATH CHRON. & WKLY. GAZETTE, Aug. 12, 1869, at 8 (describing a man sentenced to six weeks hard labor for accosting, following, and trying to kiss a married woman); *Hinkley, Assaulting a Barmaid*, LEICESTER CHRON. & LEICESTERSHIRE MERCURY, Jan. 1, 1887 (UK); *Kaspar the Kisser*, DAILY INTEROCEAN, Nov. 10, 1893 (discussing a woman who files charges against man who insists on kissing against her will; he denies the charge, but is required to post \$300 bond); see generally 5 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW AND PRACTICE 741-746 (William McKinney ed. 1910) (discussing and listing cases).

92. False imprisonment involves holding someone without their consent. III Blackstone, ch. 8, <https://ebooks.adelaide.edu.au/b/blackstone/william/comment/book3.8.html> [<https://perma.cc/YZ3N-AWQC>] (explaining the tort as unlawful detention of a person). A menace is a threat that interrupts the conduct of one's affairs. *Id.*
93. See e.g., *State v. Ogden*, 65 P. 449 (1901) (allowing cross examination as to the likelihood of consent, including analysis of whether a woman was of immoral character); *Arkansas v. Moreland*, 188 S.W. 1 (Ark. 1916) (asserting the relevance of whether the victim was a chaste woman, but noting there is no evidence).
94. See *London, April 26*, *supra* note 89; *Rodgers v. State*, 204 Miss. 891 (1948) (holding woman traveling alone and offering uncorroborated testimony a woman did not sufficiently resist, although she claimed three men broke into her residence with a gun, and she complied when, after putting aside their pistols, two of them demanded sex). Notably, early American sodomy laws provided that a man could never consent to sex with another man. But see *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring laws criminalizing consensual sexual behavior between same-sex couples unconstitutional).

how much sexual harassment really affected women is greatly reduced by their exclusion from civil rights and public life.

Where public toilets were not available, people often had to defecate or urinate where they stood.<sup>95</sup> As populations grew, some jurisdictions installed open-air urinals, to prevent people from urinating in the streets. Unlike a man, to relieve herself, a woman had to hike up her dress or otherwise remove some of her clothes.<sup>96</sup> As women pressed forward with the right to leave their homes and participate in public life, the lack of safe, private public bathrooms thus became a civil rights issue for women.<sup>97</sup>

In 1893, women complained that the women's bathrooms at the Chicago World's Fair were hard for women to find and cost money to use.<sup>98</sup> In response, the Fair made the toilets free—on Fridays.<sup>99</sup> As feminist Sheila Jeffreys has argued, the presence of public toilets for women allowed women to *exist in public space* safely, without harassment.<sup>100</sup>

The collision between a lack of public bathrooms and sexual harassment is captured in Louis-Marin Bonnet's 1772 artwork, "A Beau Cacher." [See *infra* Figure 1]. It depicts a younger woman, who, lacking access to a public toilet, must out of necessity relieve herself on a public street. An older woman stands in front to protect her from an approaching

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95. See *Sketches from the Eternal City*, DAILY EVENING BULL., June 29, 1864 (discussing people relieving themselves in the streets of Rome and soiled marks on women's dresses bearing evidence of the same).
96. See *Sketches from the Eternal City*, *supra* note 95.
97. See *Ipswich Conveniences, Local Government Board Enquiry*, EAST ANGLICAN DAILY TIMES, Sept. 3, 1908 (discussing the fact that there were no public urinals available for women and noting the issue had been discussed for years); *Sketches from the Eternal City*, *supra* note 95.
98. See *Free Closets Too Scarce: Toilet Arrangements at the Fair Are Far from Being Satisfactory. Women the Complainants. "Free" System a Farce. One in Agriculture. The Plaisance Is Worse. He Was Misinformed*, CHI. DAILY TRIB., June 14, 1893, at 2 (referring to women's toilet rooms).
99. See *Closets Are Free: Presided Over by Male and Female Attendants. Through the Courtesy of Mr. Clough, Who Has the Concession for the Pay Closets, All the Closets on the World's Fair Grounds Will Be Free Friday Where They May Be Found—Ambulances and Surgeons on the Grounds Ready for Sickness or Accidents. Where the Closets Are Located. Male and Female Attendants. Hospital Headquarters*, CHI. DAILY TRIB., Oct. 20, 1892, at 9.
100. See Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to "Degender" a Woman's Space*, 45 WOMEN'S STUD. INT'L F. 42, 44 (2014).

man's view. Hiding behind the older woman, the younger woman apparently thinks herself safe. However, peeking down from overhead another man catches a full view of the younger woman's bare backside. The title, "A Beau Cacher," offers a double entendre. Translated, it means "A Beautiful Hide." Some will see the art as capturing humor. Many women and some men will see it as capturing sexual harassment.

In some public places, the answer to accommodating women was to separate them entirely from men. This approach accomplished the task of giving women privacy and safety, but it did so at the cost of leaving women out of conversations relating to business and money.<sup>101</sup> Over time, these wholesale separations began to disappear. That people still saw the need for separation in intimate spaces demonstrates that public bathrooms were considered unique public spaces.

The story of women's historical struggles pose a problem for the alternative bathroom histories. Cavanagh tells us that sex-separated bathrooms emerged because the rich foisted their standards onto the public.<sup>102</sup> Kogan says that upper-crust Victorian modesty and patrimony led to sex-separation in bathrooms. Thus, both theories focus heavily on *class* as the key dividing line in society. While Kogan does reference women's history, he uses it to argue that paternalism and sexism drove bathroom sex-separation.<sup>103</sup> But the story of bathrooms cannot be told without including the story of women's struggles with rape and sexual harassment and their fight for safety within intimate spaces.

## II. REBUTTING THE CLAIM THAT "PARISIAN ELITISM AND GENTILITY" CONCERNS CREATED SEX-SEPARATION NORMS

### A. *The Theory that the 1739 Paris Ball was the First Instance of Sex-Separation*

Cavanagh's claim is that sex-separation in public toilets was first instituted at a Paris ball in 1739 for the purpose of establishing markers of elitism and gentility.<sup>104</sup> According to Cavanagh,

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101. See e.g., *Women and Home*, DIXON EVENING TELEGRAPH, Dec. 7, 1886 (discussing sex-separated sections on trains with separate bathrooms in each and inconveniences of women's bathroom design).

102. See discussion *supra* p. 252.

103. See discussion *infra* p. 255.

104. See CAVANAGH, *supra* note 22, at 28.

It is a little-known fact that the first gender-segregated public toilets in Europe were assembled in a Parisian restaurant for a ball held in 1739. The organizers of the ball allotted '*cabinets* with *Garderobes pour les hommes*, with chambermaids in the former and valets in the latter' ... to ensure a proper division by gender.<sup>105</sup>

In Cavanagh's view,

The segregation, first implemented by the Parisian upper classes, was intended to accentuate sexual difference and to project its difference onto public space. Gender-segregated lavatory design in public was, in its original incarnation, meant to indicate class standing and genteel respectability.<sup>106</sup>

As support for the theory, she cites Lawrence Wright's *Clean and Decent: The Fascinating History of the Bathroom and the Water Closet*.<sup>107</sup> In that work, he states:

Perhaps the first mention in history of "Ladies" and "Gentlemen" in this connection is in the report of a great Ball in Paris in 1739, which tells, as of a remarkable innovation, that they had even taken the precaution of allotting *cabinets* with inscriptions over the doors, *Garderobes pour les femmes* and *Garderobes pour les hommes*, with chambermaids in the former and valets in the latter.<sup>108</sup>

There are two points to note here. First, in using the word "perhaps," Wright makes it clear that his theory is tentative. He speculates about whether this was the *first* instance of using the terms "Ladies" and "Gentlemen" for separate bathrooms. Cavanagh presents these issues with more certainty, commenting elsewhere, "Everyone at the ball thought this was sort of a novelty—something sort of eccentric and fun."<sup>109</sup> Second, Wright italicizes the word "*cabinets*" as well as the words *garderobes pour les femmes* and *garderobes pour les hommes*. He makes this point in a chapter recounting the elaborate private bathrooms of French royalty. He

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105. *Id.*

106. *Id.* [sic] Cavanagh clearly meant to reference the sex division although she references only the part of Wright describing bathrooms for men.

107. See WRIGHT, *supra* note 52.

108. *Id.* at 103.

109. Pappas, *supra* note 35 (quoting Cavanagh); Frazier, *supra* note 36.

tells of how bathrooms progressed from the practice of setting the chamber pot inside of a stool, to hiding the stool hidden inside another piece of furniture such as dummy volumes of books (the “close stool”), and then moving close stool to a closet.<sup>110</sup> Then he turns to discuss what he says was treated as if it was a “remarkable innovation.”<sup>111</sup> Thus, Wright may have meant that putting the chamber pots in closets or rooms (“*cabinets*”) with labels (like “Ladies” and “Gentlemen”) on them was considered remarkable, and that the Paris ball was the first instance of this occurring, *not the* sex-separation itself. Indeed, in earlier sections of the book, Wright offers many examples of sex-separated bathing as well as mixed bathing (sometimes with clothes on; sometimes not). Most of the mixed, unclothed bathing appears to be amorous bathing with consensual partners or servants or slaves bathing with a master or mistress while under the master or mistress’s command.<sup>112</sup>

Whatever his meaning, Wright does not identify the ball further. Neither does Cavanagh. I believe that I have tracked it down. On August 30, 1739, King Louis XV hosted a ball to celebrate the marriage of his daughter, Marie-Louise-Élisabeth, to the infant Philip De Bourbon of Spain. It was in the Hôtel de Ville which was decorated as a great banquet hall.

At least two sources survive to tell us of the two-day marriage celebration. One is a daily journal kept by Edmond Jean François Barbier, a lawyer for the French Parliament, who attended.<sup>113</sup> Barbier wrote that the courtyard of the Hôtel de Ville was transformed into brightly decorated and lighted ballroom. Guests were treated to an elaborate display of food, wine, and entertainment, including a fireworks display over the Seine River. He called the array of masks “astonishing.”<sup>114</sup>

The other source is a commemorative booklet (“booklet”) by the wedding planner himself, Jacques-François Blondel. It was published in 1740, a year after the ball. It describes the arrangements and even has illustrations of the event.<sup>115</sup> Here, we learn that the King sent out some

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110. See WRIGHT, *supra* note 52, at 98–102.

111. *Id.* at 103.

112. For pictures of what appears to be amorous bathing, see *id.* at 43–45; 128–29. Wright also discusses that mixed parties entered the Seine River with their clothes on. *Id.* at 99. For separate sex bathing, see *id.* at 53, 59, 60.

113. See E.J.F. BARBIER, II JOURNAL OF E.J.F. BARBIER 242–43 (1849).

114. *Id.*

115. JACQUES-FRANÇOIS BLONDEL, DESCRIPTION DES FESTES DONNEES PAR LA VILLE DE PARIS, A L'OCCASION DU MARIAGE DE MADAME LOUISE-ELISABETH DE FRANCE, & DE DOM PHILIPPE, INFANT & GRAND AMIRAL D'ESPAGNE, LES VINGT-NEUVIEME &

14,000 invitations.<sup>116</sup> Blondel's booklet states that the Hôtel's large courtyard, measuring eighty-four feet long, was turned into a ballroom, with buffet tables, brilliant lighting, decorations, an orchestra, and a dance floor.<sup>117</sup>

For such a large masquerade party, one certainly needed both changing rooms and toilets (The term "garderobe" can mean either or both). And so Barbier reports that the event offered "*Garde robes pour les femmes, garderobes pour les hommes*." He also notes the presence of military personnel posted at the stairs:

On avait même eu la précaution de destiner des cabinets portant des inscriptions au-dessus des portes: *Garde robes pour les femmes, garde-robes pour les hommes*, avec des femmes de chambre dans les unes, et des hommes dans les autres.<sup>118</sup>

Translated, Barbier's language roughly tracks Wright's statement that "they had even taken the precaution of allotting *cabinets* with inscriptions over the doors, *Garderobes pour les femmes* and *Garderobes pour les hommes*, with chambermaids in former and valets in the latter."<sup>119</sup> Thus, Barbier's journal seems to have been Wright's original source and the italics Wright used to describe the garde-robes came from that source. These italics may be why Wright said the ball was described "as if [the report was telling] of a remarkable innovation."<sup>120</sup>

But remember that Wright also italicizes the word "*cabinets*."<sup>121</sup> Barbier does not. This difference indicates that Wright may have considered placing the toilets in *cabinets* with labels to be a part of the remarkable innovation. He may not have meant to say that this was the first time the sexes were ever separated in bathrooms.<sup>122</sup>

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TRENTIEME AOUT, MIL SEPT CENT TRENTE-NEUF 23 (1740) [hereinafter BLONDEL] <http://bibliotheque-numerique.inha.fr/viewer/5024/?offset=#page=10&viewer=picture> [https://perma.cc/7G5B-FSSK]. The book is digitally preserved by the *Institut National d'Histoire de l'Art, Bibliothèque* (France).

116. *Id.* at 17.

117. *Id.* at 18.

118. BARBIER, *supra* note 113, at 242–43.

119. WRIGHT, *supra* note 107, at 103. Instead of "in the former" and "in the latter," Barbier, says, translated roughly, "in one set" and "in the other set."

120. *Id.* at 103.

121. See discussion *supra* p. 253.

122. *Id.*

As is obvious from the booklet's illustrations, the word "cabinet" here refers to relatively large rooms that can hold multiple people. [See *infra* Figures 3A, 3B and 3C] With about 14,000 people attending, one would expect as much. Blondel's booklet makes it clear that these bathrooms were not small spaces with the sexes inscribed on the doors. It tells us that beneath the main floor was another level, accessible by stairs at the courtyard's ends. That lower level had a wide center aisle with rooms along each side. Four of those garderobes were set up as garderobes, two on each side.<sup>123</sup> [See *infra* Figure 3C].

Both Barbier and Blondel note that sentries (or soldiers) were distributed at all the doors and at each staircase.<sup>124</sup> The booklet indicates they were posted at the top and at the bottom of the stairs.<sup>125</sup> [See *infra* Figure 3]. This security arrangement and the use of the word "precautions" tells us that organizers had concerns for everyone's safety on the lower levels where the bathrooms were located as well as on the top.

Thus, the arrangement for accommodating necessary needs at the 1739 Paris ball was similar to that of many modern multi-access bathrooms today. One set was for women and one set was for men. One usually uses security staff to ensure safety and so it is reasonable to conclude that security is why the sentinels were there. While the very production of a commemorative booklet indicates that the planners were proud of the designs, unlike Barbier, Blondel does not mention sex-separation itself as a unique feature of the planning.

### *B. Incidences of Bathroom Sex-Separation Before the Paris Ball*

The 1739 Paris ball was not the first instance of sex-separation. Scholar Lucy Cleveland argued that long before, in ancient times, there were different hours for women and men, and, in some baths, there were separate compartments. She spoke of distinct suites of bathing

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123. The booklet describes various decorations. Then, it proceeds, "On y montoit par différens petits Escaliers pratiqués aux extrémités de cet Amphithéâtre & au - dessous de ce même Corridor en étoit un autre, par lequel on communicoit à plusieurs pièces qui avoient té réservées pour servir de Garderobes." BLONDEL, *supra* note 115, at 20.

124. BARBIER, *supra* note 113, at 243 ("Au surplus, un ordre infini par la quantité de sentinelles distribuées à chaque escalier et à toutes les portes."); Blondel refers to them as "sentries" in the illustration at Figure 3B. For another reference to sentries at a ball, see *infra* note 168.

125. BLONDEL, *supra* note 115.



compartments in each of the baths of Pompeii and the discovery of a "woman's bathing apparatus" in baths near the Roman Forum.<sup>126</sup>

Scholars also agree that between 117 and 138 A.D., the emperor Hadrian issued an edict requiring separation of the sexes in Roman public baths.<sup>127</sup> Any such decree by Hadrian requiring separation of the sexes would have required signs of some sort to indicate which baths or bath times were allocated to which sexes.<sup>128</sup>

One scholar reports an incident referenced in a speech of consul Gaius Sempronius Gracchus, as noted by a scribe. Gracchus's wife wished to use the baths and the quaestor was instructed to send the bathers away from the baths so she could do so. The scholar suggests the bathers were male,

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126. See Lucy Cleveland, *The Women's Baths of Pompeii*, 7 MOD. SANITATION 186, 187-88 (1910); see also MIMARI ARASTIALARI, THE ROMAN BATHS OF LYCEA, AN ARCHITECTURAL STUDY 45, 117 (1995); JÉRÔME CARCOPINO, DAILY LIFE IN ANCIENT ROME: THE PEOPLE AND THE CITY AT THE HEIGHT OF THE EMPIRE 258 (E.O. Lorimer trans., 1940) (discussing mixed bathing before Hadrian, and noting some women preferred separate bathing); JOHN JOSEPH COSGROVE, HISTORY OF SANITATION 42 (1909) (noting that whether there was indiscriminate mixing or whether it occurred only in some baths, the custom of mixing prevailed in Rome prior to Hadrian's edict); JOSEPH LAVALÉE, TRAVELS IN ISTRIA AND DALMATHIA; DRAWN UP FROM THE ITINERARY OF L.F. CASSAS 97 (1805) ("The emperors Adrian, Marcus Aurelius, and Alexander Severus, wished the two sexes to have their baths apart; but the prevalence of licentiousness constantly induced the people to evade the decrees on this subject, and these disgraceful proceedings were not entirely abolished till after Constantine; and even then, perhaps, only to give place to a corruption of another kind, and to satisfy the jealous though not less libidinous passions of a few innovators."); IAN D. ROTHERHAM, ROMAN BATHS IN BRITAIN ch. 3 (2012) (noting the fact that by Hadrian's time, mixed bathing had become "accepted practice," but not indicating whether there was any separation and noting that the baths were for more than bathing: they were centers of social and cultural activities).
127. See e.g., Ray Bowen Ward, *Women in Roman Baths*, 85 HARV. THEO. REV. 125, 139 (1992) (citing 1 SCRIPTORES HISTORIAE AUGUSTAE 57 (David Magie trans., Harvard University Press 1921)) ("The history of Cassius Dio Cocceianus records that Hadrian 'also commanded them [men and women] to bathe separately.'").
128. Cf. discussion of Healing Springs *infra* p. 268 (bathers using a hat and apron to designate when different sexes would use the Springs).

and that she wanted to bathe separately.<sup>129</sup> But he concludes also that mixed baths also likely continued despite Hadrian's edict.<sup>130</sup>

In his classic work, *The Home Life of the Ancient Greeks*, Hugo Blümner discusses Greek antiquity from about the sixth to the third century B.C. He notes that there were large public baths for women, more likely frequented by the lower classes, since the upper classes often had private facilities in their residences.<sup>131</sup>

Artwork also indicates that separation by sex was very widely practiced in public spaces. Indeed, Blümner features an illustration of a women's public bath taken from an ancient vase painting that shows women showering together—but only women.<sup>132</sup> Consider Albrecht Dürer's renderings of the *Men's Bath* and the *Women's Bath*, circa 1496.<sup>133</sup> Various pictures of Greek showers that have survived on vases and artifacts show sex-separated baths.<sup>134</sup> A Japanese bathhouse woodblock print by Torii Kiyonaga from 1780 indicates that sex-separation was normal.<sup>135</sup> A Bas-relief of a tomb at Thebes shows a bathing Egyptian woman, surrounded by female servants.<sup>136</sup> Consider the Biblical story of Susanna and the elders, referenced earlier. Susanna, the wife of an upper-class man, is bathing and asks her female servants to leave her. Seeing her servants leave, men hidden in the bushes come into her space to harass

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129. Ward, *supra* note 127, at 127–28.

130. *Id.* at 135–37. For more on Hadrian and the enduring nature of mixed sex bathing, see CARCOPINO, *supra* note 126; COSGROVE, *supra* note 126; LAVALÉE, *supra* note 126; ROTHERHAM, *supra* note 126.

131. HUGO BLÜMNER, *THE HOME LIFE OF THE ANCIENT GREEKS* 159 (Alice Zimmern trans., Funk & Wagnalls Company 1914) (1895).

132. *See id.* at 158, 161 (Fig. 85 & 87).

133. *See* WRIGHT, *supra* note 52, at 60 (reproduction of *The Women's Bath*, dated 1496); Albrecht Dürer, *The Men's Bath*, METRO. MUSEUM OF ART (date unknown), <http://www.metmuseum.org/art/collection/search/387563> [https://perma.cc/QM7E-KAPA].

134. *See Greek Open-Air Shower Baths for Men*, WELLCOME COLLECTION, <https://wellcomecollection.org/works/c69emt7t?query=LEYDEN> [https://perma.cc/3HHT-4JZJ] (noted as an "Attic Black-Figure Hydria of the sixth century B.C. in the Leyden Museum").

135. *See, e.g.*, Torii Kiyonaga, *Onna Yu*, LIBRARY OF CONG., <http://www.loc.gov/pictures/item/2009615657> [https://perma.cc/LV3Y-6EAT].

136. WRIGHT, *supra* note 52, at 11.

her and threaten to blackmail her unless she has sex with them.<sup>137</sup> In short, while there were exceptions, what we know proves that sex-separated bathing was standard well before 1739.

Satirist Jonathan Swift also provides evidence that sex-separation was the standard before the 1739 ball. In a 1726 satire on bathrooms entitled, *The Grand Mystery, or Art of Meditating over an House of Office, Restor'd and Unveil'd*,<sup>138</sup> Swift mocked the notion of the nobility using the toilet. He argued for the establishment of a corporation to establish "Five Hundred Sh-ting Colleges, to be erected at convenient Distances, in the several Parts of the Town," so that noble people could pay "'the necessary Tribute to Nature.'" <sup>139</sup> The Corporation was to be called "The Necessary Company."<sup>140</sup> As part of his design, Swift suggested that they be built as quadrangles and that "[m]en occupy the Right Hand of the Square, and the other Sex the Cells on the Left from the grand Entrance . . . ." <sup>141</sup> He suggested that pulleys be attached to clothing to shift down the pants of men using the toilets and to pull up the garments of women.<sup>142</sup> Swift not only amuses with the notion of upper-class people using the toilet, he uses the same to comment on other aspects of class behavior and even adds a few misogynistic comments about women.<sup>143</sup> In creating his imaginary College, Swift *assumes* sex-separation.

So too, around 1720, Swift reportedly built two single-entry sex-separated privies on a married couple's country estate.<sup>144</sup> He also spoke of

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137. Daniel 13:7-27 (Revised Standard Version Catholic Edition). The translation stresses that the men were hidden and that she was left alone with them. *Id.* at 13:16.

138. JONATHAN SWIFT, *THE GRAND MYSTERY, OR ART OF MEDITATING OVER AN HOUSE OF OFFICE, RESTOR'D AND UNVEIL'D* (1726).

139. *Id.* at 6, 14.

140. *Id.* at 14.

141. *Id.* at 15.

142. *Id.* at 11.

143. For example, in suggesting a stereotype that women are chatterboxes, he says that the women's stalls should be only "[b]reast high" to facilitate talking amongst them. *Id.* at 15.

144. See Danielle Bobker, *The Shape of Intimacy: Private Space and the British Social Imagination, 1650-1770*, 108 & n.4 (2007) (unpublished Ph.D. dissertation, Rutgers University) (available at <https://rucore.libraries.rutgers.edu/rutgers-lib/24027/PDF/1/play> [<https://perma.cc/A98P-W3QL>] (noting that, "In the late 1720s, during an extended stay with some friends Lord and Lady Acheson at Market Hill, their country estate in County

separate spaces in the 1732 poem, "The Lady's Dressing Room." In the poem, a fictional man steals his way into a ladies dressing room, only to be appalled at how filthy and smelly it is. Swift was making fun of the time needed and the transformative process of an upper-class woman's toilette.<sup>145</sup> But Swift does not seem to question the actual separation itself. Again, it seems unlikely that, with the dominant and preferred approaches to bathrooms in more private spaces being separation, that public spaces would take a different approach.

Wright's work also confirms that privacy was a key concern with respect to early bathrooms. When he speaks of the seventeenth century, open-air Kings and Queens mixed baths in the city of Bath, he notes that most people bathed with their clothes on. Women sometimes entered wearing special gowns of stiff yellow canvas and hats, and they entered through a side door so that they were only seen when they were submerged up to the neck.<sup>146</sup> A 1675 woodcut by Thomas Johnson also confirms the fact that people bathed with their clothes on, and even shows women wearing hats in the pool. Children appear naked occasionally.<sup>147</sup> Wright also notes that a doctor complained in 1756, that, after changes to the area, "now" there was no place to undress without being seen, a problem for an ill bather seeking exposure to water believed to have healing powers.<sup>148</sup> Wright also notes complaints that the public pool was used by some bathers for amorous purposes.<sup>149</sup> Both baths had single-use bathing arches on upper levels surrounding a big center communal pool.

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Armagh, in northern Ireland, Jonathan Swift designed and built a pair of his-and-hers outhouses, then mused on their significance in 'Panegyric on the Dean in the Person of a Lady of the North' . . . "); see also JONATHAN SWIFT, THE WORKS OF JONATHAN SWIFT, 174, 180 (Sir Walter Scott ed. 1883) (referencing "two temples of magnificent size"). Yet, Swift suggests in the poem that modesty and morality plays a role too: "For 'tis profane when sexes mingle . . . . . " and a "bashful maid . . . . . [s]hall creep no more behind a bush." *Id.*

145. Jonathan Swift, *The Lady's Dressing Room*, POETRY FOUND., <https://www.poetryfoundation.org/poems/50579/the-ladys-dressing-room> [<https://perma.cc/4LT7-BCKM>]. Swift, known as "Dean Swift," signs the poem "D---n S----t."

146. WRIGHT, *supra* note 52, at 82.

147. See *infra* Figure 2.

148. WRIGHT, *supra* note 52, at 82.

149. *Id.*

People also stood around the circumference of the communal baths to watch the bathing and horseplay.<sup>150</sup>

### C. *An Alternative Theory of the 1739 Paris Ball's Significance*

The reader will recall that, in describing arrangements for the ball, Barbier italicized his reference to *garderobes pour les femmes* and *garderobes pour les hommes*.<sup>151</sup> What did he mean by that? Assuming that Barbier was Wright's source, Wright (and therefore Cavanagh) appears to have attached significance to the fact that the terms for different bathrooms for the sexes "garderobes" was italicized. Wright opined that "perhaps" Barbier meant to suggest that this ball was the first instance of cabinets being used and/or "Ladies" and "Gentlemen" being placed on the doors.<sup>152</sup> Cavanagh took Wright's statement to mean that the Paris ball was the first instance of bathroom separation.<sup>153</sup>

Departing from both Wright and Cavanagh, I suggest a different interpretation of what Barbier meant. I believe that Barbier meant to say that this masquerade ball, a ball hosted by the King, was *different* from other types of balls occurring around the same time. Gentility was a part of the concern—but so was religion.

We should not forget that the Paris ball was for a *marriage*, an event in which the Roman Catholic Church was very interested. Indeed, a Roman Catholic cardinal was present to perform the ceremony.<sup>154</sup> It must also be remembered that European religious leaders of the day had pseudo-governmental powers and responsibilities. They were the official

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150. Wright includes a picture by Thomas Rowlandson from his series "Comforts of Bath," plate 7 of 12, 1798. It shows people bathing with clothes on. *Id.*; see also 1 JOSEPH GREGO, ROWLANDSON THE CARICATURIST 341 (1880); *infra* Figure 2.

151. See discussion *supra* at p. 254.

152. See discussion *supra* at p. 251.

153. See discussion *supra* at p. 250.

154. BLONDEL, *supra* note 115, at 10 (noting presence of Cardinal de Fleury). André Hercule de Fleury was a French cardinal of the Roman Catholic Church who Louis XV appointed as an advisor to the minor King Louis and who later was appointed a chief minister to Louis XV. See JOHN HARDMAN, LIFE OF LOUIS XVI, 45, 48 (2016) (mentioning de Fleury's role in Louis XV's cabinet). For a detailed treatment of Cardinal de Fleury's life, see EYRE EVANS CROWE ET AL., EMINENT FOREIGN STATESMAN: ANDREW HERCULES, CARDINAL DE FLEURY (1838).

overseers of marriage and family law.<sup>155</sup> Indeed, even when England's King Henry VIII wanted to divorce his wife, he had to obtain permission from the Pope in Rome—at least, until he usurped the Roman Catholic Church's power in England.<sup>156</sup>

Here is the argument then: authorities were attempting to extend bathroom sex-separation norms into the masquerades and other frivolities. In 1739, when Louis XV hosted his Paris marriage ball, masquerade balls were still controversial in Europe. More than fifteen years before, in 1722 and again in 1729, English grand juries sought to shut down *ridottos* and masquerades.<sup>157</sup> Their charges were framed in terms of alleged debauchery and drunkenness and immorality.<sup>158</sup> These balls also allowed the classes to mingle—young and wealthy nobility with mere commoners—much to the dismay of upper-class parents. Many were marked with participants drinking and dancing the night away. We see such a scene in *The Armorous Bugbears Or, the Humours of a Masquerade*,

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155. See *Doctors Commons, Smith Versus Smith*, DERBY MERCURY, Jan. 16, 1794, 2 (divorce case); *Doctors Commons, Adultery of Mrs. Duberly with General Gunning*, JACKSON'S OXFORD J., July 21, 1792. Indeed, early reports contain cases decided by these courts. Doctors Commons was where the Ecclesiastical Courts sat. *C.f.*, I REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS COMMONS AND IN THE HIGH COURT OF DELEGATES (John Haggard ed. 1832).

156. Students of history know that the definition of the term "Church" here is more complicated than it might seem. Famously, Henry VIII sought an annulment of his marriage to his first wife, Catherine of Aragon, in order to marry a younger woman, Anne Boleyn. When in 1534 Pope Clement VII, refused, Henry set in motion a chain of events that essentially deposed the Pope and the Roman Catholic Church as the head of religious affairs in England and made himself, the King, the supreme head of the church. See I HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND, 73–80 (1880) (discussing upheaval); *id.* at 75 (pope's refusal). Henry also made the Anglican Church the official "Church" of England, although it was very much subject to his control. *Id.* at 79–80. And then he had Parliament grant him his divorce. *Id.* at 77.

157. THE THIRD CHARGE OF WHITLOCK BUSTRODE, ESQ. TO THE GRAND-JURY AND OTHER JURIES OF THE COUNTY OF MIDDLESEX, AT WESTMINSTER (Oct. 4, 1722), at 5 (making biblical references, and identifying sins, the charges name among places of vice disorderly houses, play houses, gaming houses, bawdy houses, and the "*Masquerades alias Balls*."); see also THE PROCEEDINGS AT THE SESSIONS OF THE PEACE, AND OYER AND TERMINER, FOR THE CITY OF LONDON AND COUNTY OF MIDDLESEX 88 (1730) (reporting proceedings on Dec. 4–6, 1729).

158. *Id.*

published in 1725 (fourteen years before the 1739 Paris event).<sup>159</sup> It describes raucous drinking and wild sexual behavior. A similar picture is presented in an early poem *The Masquerade* which references drinking, and rule breaking (including married couples cheating on each other).<sup>160</sup> And an illustration published in 1784 entitled *The Return From a Masquerade*, showing a drunk or sleepy young woman possibly headed home, affirms this view. [See *infra* Figure 4].

We also have evidence that sexual minorities enjoyed the masquerades. They may even have considered them safe space. They are possibly referenced in *The Armorous Bugbears*.<sup>161</sup> The 1722 English grand jury charge mentions the possibility of their presence.<sup>162</sup> And from a report of a 1729 court proceeding, we learn of a male-bodies person who regularly assumed a female persona and enjoyed attending them.<sup>163</sup> I

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159. E.W., *THE ARMOROUS BUGBEARS OR, THE HUMOURS OF A MASQUERADE*, Intended as a Supplement to the London Spy 2 (1725); *id.* at 42 (speaking of both sexes drinking freely); *id.* at 49 (speaking of sexes pairing together in lust). The work has been attributed to Edward "Ned" Ward. HOWARD WILLIAM TROYER, *NED WARD OF GRUBB STREET: A STUDY OF SUB-LITERARY LONDON IN THE EIGHTEENTH CENTURY 189-90* (1968).

160. *THE MASQUERADE*, A POEM 6, 9 (1724).

161. E.W., *supra* note 159. The author speaks of "one young Gentleman, to shew his extraordinary Modesty to the Company, and his great regard to the Ladies, had dressed up his Head in a Woman's Night Pinner, and cover'd his Body with a fine lac'd *Holland* Smock, in which he walk'd about the Room like an airy Bride in hot Weather, dish'd up for Man's Meat upon her Wedding Night." *Id.* at 35-36 (emphasis in original). He then describes another person who comes up behind "Miss Molly" and throws a box of snuff on her backside. And he says that both sexes in the crowd were "greatly disordered at the unseemly sight" [with] "Every Body believing him some *Sodomite* or other, that could be guilty of so much Immodesty, in derision of the Fair Sex." *Id.* (emphasis in original). Translated, the word "Molly" was often used to refer to gay men. See RICTOR NORTON, *MOTHER CLAP'S MOLLY HOUSE: THE GAY SUBCULTURE IN ENGLAND* (1992). In E.W. *supra* note 159, the writer launches into a poem or song that curses those who "*at the odious game of Sodom play*." *Id.* (emphasis in original). It is noteworthy that he decries the behavior of these presumed "sodomites" while in the midst of and engaging in debauchery himself. See *id.* at 57-59.

162. The complaints regarding the masquerades included lewdness, debauchery, and women dressing as men and men dressing as women. See *THE THIRD CHARGE*, *supra* note 157, at 5.

163. A "Thomas Gordon" was charged with assault and theft of clothes and money, but the accused denied the charges, alleging s/he was framed. At the

propose that Barbier, in italicizing the words for bathrooms (or dressing rooms), was underscoring that *even the masquerades*, which were to be about fun and frolic, were subject to certain limits. The treatment of bathrooms in this case was a message that there could be absolutely *no* deviations from a binary, heterosexual norm.

But there yet is another wrinkle in the story of the 1739 Paris ball. One of the key players in this wedding ball was the Duke d'Orleans, the King's uncle (who served as regent when Louis XV was a child). He was a participant in the ceremony, standing in for the infant groom.<sup>164</sup> Several historians have described him as having a tendency of wearing female clothing and having male lovers.<sup>165</sup> His involvement raises questions. Were some upper-class, male-bodied sexual minorities in favor of sex-separation in bathrooms, possibly to gain favor with the Church or possibly because they had other interests to protect? Within the same social classes, did the position of gay men with respect to bathrooms differ from that of male-bodied transpeople?<sup>166</sup>

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trial, a witness testified that "Gordon," a male-bodied person, commonly went by the name "Princess Seraphina" and regularly appeared as a woman in women's clothes. "She," the witness said, goes in women's dress to the masquerades so "she" can dance with the men. The jury acquitted. *See THE PROCEEDINGS AT THE SESSIONS OF THE PEACE, AND OYER AND TERMINER, FOR THE CITY OF LONDON AND COUNTY OF MIDDLESEX*, 166, 169–70, (1730) (reporting proceedings on Dec. 4–6, 1729).

164. BARBIER, *supra* note 113, at 237.

165. Several authors have noted the evidence that the Duke d'Orleans was what might today be called gay, bisexual, and/or gender fluid, although they have not always dealt fairly with the question. *See* NANCY NICHOLS BARKER, *BROTHER TO THE SUN KING* 59, 61 (1998); LOUIS CROMPTON, *HOMOSEXUALITY AND CIVILIZATION* 339–42 (2003); 8 *New Standard Encyclopedia* (William A. Colledge et al., eds. 1907) (entry on "Orleans, Phillippe, Duke of, Regent of" brother of Louis XIV and saying he distinguished himself "in spite of his effeminacy"); 1 W. COOKE TAYLOR, *MEMOIRS OF THE HOUSE OF ORLEANS, INCLUDING SKETCHES AND ANECDOTES* 25 (1849); *WHO'S WHO IN GAY AND LESBIAN HISTORY, FROM ANTIQUITY TO WORLD WAR I*, 345–46 (Robert Aldrich & Garry Witherspoon eds. 2003); Christine Pevitt, *The Son of Monsieur and Madame*, N.Y. TIMES (1997), <http://movies2.nytimes.com/books/first/p/pevitt-philippe.html> [<https://perma.cc/C7MP-R4BP>] (Pevitt is author of *Philippe Duc d'Orleans Regent of France* (1997)).

166. An important controversy is worth noting here. Historians disagree about whether sexual minorities existed as a distinct class before the nineteenth century. The debate is sometimes called the social constructionist-essentialist debate. Social constructionists claim that sexual minorities did



Support for my reading of the intent of Barbier's italics might be found in another instance in which bathroom separation is referenced and italicized: Antoine Boudet's report of the trial of Navarro, written in 1768.<sup>167</sup> Navarro was charged with having libeled another by accusing that person of plotting against Spanish Jesuits. To set the time of a key event, one trial witness refers to the day of the twelfth [Spanish] masquerade ball around the time of Carnival. The writer then describes the ball in detail and includes the fact that it had, with italics, *garderobes pour les femmes* and *garderobes pour les hommes*.<sup>168</sup> Should we conclude that the italics used in the report of Navarro's trial and that in Barbier's text mean something similar?<sup>169</sup>

If we come forward a few decades, we find that although the Americans valued religion, America did not adopt the overarching church/state structure that Europe had. Indeed, the new nation affirmed religious freedom even as it rejected the "establishment" of religion found

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not emerge as a distinct class of persons until the late nineteenth century. The origin of the theory has been credited to Michel Foucault. See Matthew Kuefler, Introduction, in *THE BOSWELL THESIS: ESSAYS ON CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* 9-10 (Matthew Kuefler ed., 2006) (discussing MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION*, 43 (Robert Hurley, trans. (1978)). It was most famously rejected by John Boswell in 1980, who argued that sexual minorities were prevalent and recognized in the early Christian Church. See, e.g., JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980). The debate cannot be settled here (This author sides with the essentialists). But note that Rictor Norton has produced valuable guidebooks documenting gay and other LGBTQ history in the eighteenth and nineteenth centuries. See Rictor Norton, *Gay History and Culture*, <http://rictornorton.co.uk> [<https://perma.cc/ZKC9-3J27>]. His work shows that there were male-bodied sexual minorities across class lines. See <http://rictornorton.co.uk/eighteen/index.htm> [<https://perma.cc/6LJQ-72D2>].

167. ANTOINE BOUDET, *LE PROCES CRIMINEL DE NAVARRO*, IMPRIMEUR DU ROI (1768) (referencing carnival in 1766) (emphasis in original).
168. *Id.* at 153n-54n. In BOUDET, the time of the ball is used to describe when an event occurred. The writer goes off track from the trial to describe the ball in greater detail. The book notes that there were musicians and doctors and sentries. It further recounts that there were, separately, bathrooms for men and bathrooms for women. *Id.*
169. My ability to search for such instances of references in French sources or other foreign language sources was limited, and so, it may be that there are other such instances in that time.

in Great Britain.<sup>170</sup> And yet, we see that sex-separated facilities remained the norm, even among lower classes. Was it the inertia of religion? Majoritarian norms? The intractability of the problem of harassment? All of the above? Combined with earlier evidence presented in this work, it seems likely that as a general policy, sex-separation did have important reasons for existing, but the rejection of alternative spaces for those who wanted them or alternative approaches upon consent seems to have been, in part, deep-seated in discrimination and in the enforcement of presumptions about morality and normality.

### III. REBUTTING THE CLAIM THAT VICTORIAN MODESTY AND SEPARATE SPHERES CONCERNS CREATED SEX-SEPARATION NORMS

Kogan's theory proposes that sex-separation in bathrooms did not become standard in the United States until the late nineteenth century, and that in England, it can be traced back to the Victorian period. The theory eschews the notion that safety played any significant role.<sup>171</sup> I have already established that the norm of sex-separation existed in ancient times and later centuries. Moving forward toward the founding of the United States, this Article shows sex-separation continued to be the norm.

#### *A. Sex-Separation Prior to the Victorian Period and Before the Industrial Revolution*

##### 1. America, 1786: The Healing Springs Example

An early example of both the benign and presumptively natural approach of sex-separation is found in a letter written to a New York newspaper in 1786. The letter describes the Healing Springs, so-called because the springs were believed to have healing powers. A year before the United States Constitution was written and absent any overbearing

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170. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also* discussion of tensions between the Roman Catholic Church and King Henry VIII as historical backdrop *supra* at p. 264 and accompanying note.

171. *See* discussion of Kogan's theory, *supra* at p. 237–38.

governmental authority or business directive, bathers established separation by sex as the bathing norm. The letter states:

A description of this very curious mineral spring I presume would not be amiss—The main spring is about twenty-eight feet in circumference; at present it is in a state of nature, being surrounded with an impenetrable thicket, except where there is a small gap, by which it empties itself into the river, and at which place the people go in to bathe; so that those above are entirely excluded from the sight of those in the bath. Give me leave to insert the regulations which they have made, and which they strictly adhere to.—The women have the use of these springs in the morning till nine o'clock;—during this time an apron is suspended upon a pole erected for that purpose at the entrance of the gap; from that time till twelve o'clock the men have the use of them, and then they hang a hat upon the same pole; while these signals are displayed; the springs are sacred from all intruders.<sup>172</sup>

In the case of the Healing Springs in 1786, an apron and a hat on a pole were essentially the signs for "Women" and "Men." That the springs were public space is indicated by a British newspaper. It reported that some men hoped to commercialize the springs by building, on its banks, "a Long room with every Accommodation for bathing."<sup>173</sup>

Thus, the Healing Springs example, from what is now the rural town of Blackville, South Carolina, tells us that, around the time of America's founding, people deemed it natural to separate themselves by sex when performing intimate activities like bathing.<sup>174</sup> Kogan's theory that the

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172. *United States, Charleston, S.C., May 4, Extract of a Letter from Little River, Ninety Six District*, LOUDON'S NEW-YORK PACKET, June 1, 1786, at 2. The aforesaid article appeared in various U.S. newspapers. For the meaning of the word "sacred," see SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768) (providng definitions of "sacred" as including "inviolable"); compare reference to "sacred" *infra* note 187.

173. *London, (Saturday) December 8*, DERBY MERCURY, Dec. 6, 1787, at, 2. Because it could take months for ships to bring news between the United States and Britain, the British report may actually reference events around the same time as earlier *New-York Packet* letter. The significance is that the English would have known of this approach and it is not treated as unusual.

174. The Healing Springs is still open to the public, but the spring has been rerouted so that the water flows through a pipe and people may collect it in bottles. Access is still free and some still believe the water has healing

principle of separation, as initially adopted, was not “benign” is incorrect.<sup>175</sup>

## 2. Commercially-Run Bathhouses of the Late 1700s and Early 1800s

In the United States, commercially-run baths were sometimes called “public baths” because, for a fee, they were open to the public. Americans learned of steam baths from American Indians, but also mimicked the bath designs of Europe.<sup>176</sup> In America, in the late 1700s and early 1800s, several of these baths explicitly advertised that they are open to women, and explicitly noted the separation of the sexes. Given the restrictions on women’s economic potential, these patrons were likely wives or daughters of men with some assets or widows whose husbands had left them some money. Because bathing was tied to health, women who faced reproductive problems sometimes used the baths.<sup>177</sup> It seems possible that women who wanted intimate relationships with other women may have also been customers.<sup>178</sup> As noted below, while many provided individual

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properties. See, e.g., *God’s Acre Healing Spring*, ROADSIDE AMERICA, <http://www.roadsideamerica.com/story/12456> [<https://perma.cc/343C-BBYJ>].

175. See discussion of Kogan, *supra* p. 237–38.

176. In travels through Missouri, Lewis and Clark discovered that American Indians commonly used “vapor baths” or “sweating houses.” The baths, suited for two persons, were reportedly used for health as well as pleasure. *Indian Vapor Bath*, OHIO OBSERVER, Feb. 16, 1837, at 192. The article notes that, Lewis and Clark found Indians they came across in their travels using these baths for relaxation and the healing of diseases. Later, American papers began to advertise “Indian vapor baths.” See *Indian Vapor Bath*, VT. WATCHMAN & ST. J., June 24, 1847 (advertisement). The Annapolis baths were advertised as along the plan of baths at Hamburg. *Public Baths*, MD. GAZETTE & POL. INTELLIGENCER, Apr. 4, 1816.

177. Cf. JOHN WYNTER, OF BATHING IN THE HOT-BATHS, AT BATHE (1728) (advising bathing for “palsie” and “some diseases in women”).

178. See, e.g., *Miscellaneous Essays, A Clear and Factual Account of the Religion of the Turks*, PENN. MERCURY & UNIVERSAL ADVERTISER, July 14, 1786, at 1 (asserting that Turkish women, were allowed to use the baths every Friday, and that the women “under pretext of going to the baths... find an opportunity to give loose to, and gratify their voluptuous desires.”). However, while I do not doubt that lesbians existed in this day, as a precaution, note that the description of these women comes from a male speaker.

bathing, these facilities sometimes had communal changing rooms and other areas where nude or partially-clothed bathers were not entirely separated from each other.

*New York:* In 1796, seven years after the U.S. Constitution was ratified and nine years after it was drafted, a New York bathing house advertised "[c]old bathing for the ladies in the back apartments, two shillings each time."<sup>179</sup> An 1811 source references an unnamed New York bath offering one-person tubs with men's baths in one part of the house and women's baths in the other part.<sup>180</sup> The New York Marine Bath opened in 1817 in the Battery area at what was then called "Mr. James Arden's Wharf, near the Battery," in the "North River." These baths were designed to float, and, thus provided a nearby water source. The advertisement stated, "The large or public bath is exceedingly spacious, and the private baths very numerous and convenient. There is [sic] also two *Shower Baths*, one in the Ladies' and the other in the Gentlemen's apartments."<sup>181</sup> In 1828, the Richmond Hill House offered warm, cold, and shower baths and noted "[s]eparate apartments for Ladies."<sup>182</sup>

*Massachusetts:* In 1808, the Nantucket Bathing House posted an advertisement stating, "Our Bathing-house, like those in *Boston, New-York, &c.* is separated into two main divisions—one for males, the other for females.—The rooms are subdivided into several apartments... accommodating for one person."<sup>183</sup> The reference to "Boston, New-York, &c" suggests that sex-separation was deemed customary at the time.

*Maryland:* In 1816, a Maryland paper reported plans to establish public baths at Annapolis, with some allocated to women.<sup>184</sup>

*Washington, D.C.:* In 1813, one newspaper advertised the Washington, D.C. Public Baths "[o]n C Street, 'near Mr. Davis's Hotel.'" The baths could accommodate nine persons at one time. As the advertisement noted, "Three of the baths are for ladies who can bathe in the most private

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179. *New York Bathing House*, DAILY ADVERTISER, May 5, 1796, at 3.

180. ROBERT SUTCLIFF, TRAVELS IN SOME PARTS OF NORTH AMERICA, IN THE YEARS 1804, 1805, & 1806, 42 (1811).

181. *Marine Bath*, EVENING POST, Sept. 17, 1817, at 5.

182. *See Richmond Hill House*, EVENING POST, Sept. 17, 1817, at 5.

183. *Nantucket Bathing-House*, NEW-BEDFORD MERCURY, Aug. 12, 1808, at 3 (emphasis in original).

184. *Public Baths*, MD. GAZETTE & POL. INTELLIGENCER, *supra* note 176. The article does not specifically say whether the bath is privately or government-sponsored.

manner they please," and "[c]ordials of every description will be kept only for those who make use of the bath." Men were asked to enter at the south of the building and women at the north alley gate.<sup>185</sup>

*Other Spaces.* In reporting on the timing of a 1766 earthquake in Constantinople, a newspaper said the timing was fortuitous because people had finished morning prayers and had left the mosques, none of the students were in the colleges on account of the feast of Bayram, and "the men had left the baths to give place to the women, who were not come to them . . . ."<sup>186</sup> One 1826 article from Vermont speaks of the women using the baths at Algiers and says, "the women of Algiers having a free intercourse with each other, either at their own houses or at the public baths, which are much frequented by them, and in the afternoon they are sacred to their use."<sup>187</sup>

### 3. The Public Bath Movement of the 1800s

As the populations in cities grew, city sanitation concerns increased. Poor sanitation practices posed noxious smells throughout major cities.<sup>188</sup> Authorities began to connect improving sanitation practices and bathing with the prevention of disease. For example, "cholera" reached London in the early 1830s and the late 1840s, highlighting a need to provide greater sanitation options for the growing populace of ordinary people.<sup>189</sup> One

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185. See *Washington Public Baths*, DAILY NAT'L INTELLIGENCER, Aug. 30, 1813.

186. *Arrived in the Mails from France, From the London Papers*, July 11, Constantinople, June 3, CALEDONIAN MERCURY, July 16, 1766.

187. *Ladies' Department—Marriages*, VT. WATCHMAN & ST. GAZETTE, May 2, 1826. The term "sacred" here means simply inviolable. See 1 SAMUEL JOHNSON, ET AL., DICTIONARY OF THE ENGLISH LANGUAGE (1828) (including among definitions of "sacred," "inviolable as if appropriated to some superior being"); cf. *supra* note 174 (Healing Springs "sacred" when used by different sexes).

188. See *The Cholera*, EVENING MAIL, Aug. 1, 1849, at 2 (British newspaper discussing parts of London experiencing deaths and poor health due to inhalations of noxious fumes from poor privy maintenance, poorly regulated slaughterhouses, and other poor sanitation and environmental practices); *To the Citizens of Central City*, WKLY. REG. CALL, Aug. 8, 1879 (Colorado city Health Office complaining of noxious smells from poorly maintained privies, decaying animal matter, stables etc. and noting privies should be maintained so as not to give off noxious vapors).

189. *The Cholera, London, April 27*, WKLY. WATERFORD CHRON., May 5, 1832, at 7 (listing then total of 2,542 cases). Compare *Board of Health, Nov. 11, 1822*, NAT'L ADVOC. FOR THE COUNTRY, Nov. 15, 1822 (New York City ordering

paper reported that the "vast majority of the most fatal cases are to be met with only in the most neglected and impoverished districts, and in places "so close and filthy as almost to invite the approach of any epidemic attack."<sup>190</sup> Out of these and other concerns, a sustained bath movement emerged to afford bathing premises to the ordinary people in Europe.

#### a) The English Public Bath Movement

The elite long had access to private, commercial, bathing establishments throughout Europe before public baths became a movement in England. Robert Owen Allsop reported that in the last quarter of the seventeenth century, a public bath called "The Duke of York's Bagnio" was established in London: "Medals or tokens, bearing the figure of a man for men's baths and a woman for women's baths, with the respective days of admission, were issued."<sup>191</sup> At least one American founder also knew about private baths in Europe. John Adams, a future vice president of the United States and signer of the Declaration of Independence, reported his experience with a bath in Paris in 1782 thusly: "Went into the bath upon the Seine, not far from the Pont Royal, opposite the Tuilleries [sic]. You are shown into a little room which has a large window looking over the river into the Tuilleries [sic]. There is a table, a glass, and two chairs, and you are furnished with hot linen, towels, &c. There is a bell which you ring when you want any thing."<sup>192</sup>

As Wright notes, during the Roman occupation, the city of Bath in England had open-air mixed baths for the public.<sup>193</sup> In some baths, adult users bathed with their clothes on.<sup>194</sup>

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cleaning up of privies and standing water sources; expressing yellow fever concerns). A person called a "scavenger" was assigned to clean them out when homeowners or landlords did not and to charge for the service. *City Ordinances; An Act Authorizing the Appointment of Scavengers and for Other Purposes*, DAILY NAT'L INTELLIGENCER, July 14, 1820.

190. *The Cholera in London*, ATHLONE SENTINEL, Aug. 29, 1849, at 3.

191. ROBERT OWEN ALLSOP, PUBLIC BATHS AND WASHHOUSES 2 (1894).

192. 3 THE WORKS OF JOHN ADAMS 298–99 (Charles Francis Adams ed. 1851).

193. WRIGHT, *supra* note 52, at 80; *see also infra* Figure 2 (Thomas Johnson's illustration of the King's bath).

194. WRIGHT, *supra* note 52, at 82 (Ronaldson's artwork, *The Comforts of Bath*, showing bathers with their clothes on).

The first publicly supported baths in nineteenth century England opened in 1829 in Liverpool. The *Liverpool Mercury* described their separate facilities for men and women:

The gentlemen's baths are behind the north colonade. The large bath is a quadrangle, measuring 45 feet by 27. The dressing rooms are numerous, some with fire places. There are other smaller baths, private. The ladies' baths are in the south wing, the largest 39 feet by 27, with dressing-rooms adjoining, as in the other wing appropriated to the gentlemen. Four warm and two cold private baths are in the ladies' department. . . .<sup>195</sup>

Victoria became Queen in 1837. A second wave of the cholera epidemic in the 1840s caused Queen Victoria and Parliament to consider seriously increasing the government's role in sanitation policy.<sup>196</sup> While Kogan's alternative bathroom history focuses on Victorian prudishness, it ignores the huge beneficial impact the public baths had for women and the poor.

The building of bathhouses and washhouses was spurred by the passage of the Public Bath and Washhouses Act in 1846.<sup>197</sup> The first bathhouse in London opened in 1848. The men went in the morning and midday, while the women went in the late afternoon.<sup>198</sup> Women often served on the committees designing these baths.<sup>199</sup>

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195. *Liverpool, Friday, May 8, 1829, The Corporation Baths*, LIVERPOOL MERCURY, May 8, 1829, at 150. Prior to these, the floating baths served the city. See *The Liverpool Baths and an Appeal in Favour of the Floating Bath*, LIVERPOOL MERCURY, May 8, 1879, at 152; see also MARILYN T. WILLIAMS, WASHING "THE GREAT UNWASHED": PUBLIC BATHS IN URBAN AMERICA, 1840–1920, 7–10 (1991) (discussing St George's bath at Liverpool and growth of the bath movement in Europe).

196. *Id.*; see also WRIGHT, *supra* note 52, at 143–56 (discussing the response during cholera years).

197. An Act to Encourage the Establishment of Public Baths and Washhouses 1846, 9 & 10 Vict. c. 74 (UK). The act was amended in 1847. Baths and Washhouses Act 1847, 10 & 11 Vict. c. 61 (UK).

198. *Model Public Baths & Wash-Houses*, NEWCASTLE GUARDIAN & TYNE MERCURY, July 24, 1847 ("The baths are allotted in equal numbers to men and women, each sex having a separate entrance."); *Nottingham Town Council, Special Meeting*, NOTTINGHAM GUARDIAN, Oct. 4, 1849, at 4 ("That it is proposed, in the first instance, to provide only 24 washing tubs, with suitable drying stoves, six private baths, two large, and two large open tepid baths—one for men, 52 feet by 12 feet—and the other for women, 27 feet by 12 feet. That the



A 1847 newspaper article announced baths erected in Bristol again, noting the sex-separation:

Baths and washhouses are to be erected under the direction of Mr. Baly ... at the estimated cost of 6,500£ .... [S]ufficient space is to be obtained in the building for the construction of 60 bath rooms, 64 washing compartments, and 32 ironing compartments. The bath rooms are placed in the front of the building. The entrances to the first-class men's and women's baths are as far apart from one another as possible, at the opposite ends of the front; and those of the second-class men's and women's baths are in the centre. Each bath room is about 6 feet square, and contains a bath 5ft 3in. long, of an average width of 1ft. 9 in. and 1ft. 11 in. deep. The baths are to be made of cast-iron enamelled.<sup>200</sup>

The 1848 Public Health Act also gave local authorities the power to require any factory that had more than twenty employees of both male and female sex to "construct a sufficient ... number of waterclosets or privies, for the separate use of each sex ...."<sup>201</sup>

Underscoring the uniqueness of bathrooms, is the fact that wash-houses, (for washing clothes), though often located in the same buildings as public baths, were *not* separated by sex. In England, they were more likely to be separated by *class*. [See *infra* Figure 5, depicting the bathhouse/washhouse at Goulston Square].<sup>202</sup>

#### b) The American Public Bath Movement

As already noted, by the late 1700s in America, one could find numerous private baths in the states that emerged from the colonies. At the same time, it was common to see advertisements for the sale of homes

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intended buildings consist of two long ranges of rooms, one set for women, and the other men, and having separate entrances and being one story high, and be laid out with a special view to the benefit of those requiring such ready and cheap advantages.").

199. See, e.g., Proposed: Public Baths and Wash-Houses for the City of Hereford, *HEREFORD J.*, Mar. 21, 1849, at 2.

200. *New Baths at Bristol*, *WORCESTERSHIRE CHRON. & PROVINCIAL RAILWAY GAZETTE*, Nov. 24, 1847, at 3.

201. Public Health Act 1848, 11 & 12 Vict. c. 63 (UK).

202. See *infra* Figure 5, *Washhouse at Goulston Square*.

that mentioned a common single privy shared by several houses. One also finds houses sold with a right to “use” a privy located nearby.<sup>203</sup>

In an 1838 speech, the Mayor of New York City raised the question of whether New York should publicly support baths.<sup>204</sup> In the 1840s, members of the public in Milwaukee, New York, and Philadelphia called for public baths, arguing that the poor needed them for health and comfort.<sup>205</sup> Some private charitable groups sought to set up baths in cooperation with the government, as the People’s Bathing and Washing Association did in New York City.<sup>206</sup>

An architect’s 1897 conception of a New York bathhouse shows men and women on the streets in front of the baths and going in [See *infra* Figure 6]. Some men appear to have a sack of clothes on their backs, indicating that they are planning to wash them. The men and women may have separate doors. But the rendering also shows that while sex-separation in intimate spaces was expected in the late nineteenth century bathrooms, physical sex-separation in the community around those spaces was not as strict.<sup>207</sup>

### c) Sex-Separation in Other Multi-Entry Spaces

Numerous other sources indicate sex-separation before the late nineteenth century. Workhouses followed the practice.<sup>208</sup> An 1820 Parliamentary report of proceedings in the famous Queen Caroline’s

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203. PENN. ADVERTISER & UNIVERSAL CHRON., July 11–18, 1768, at 197 (advertising sale of home with “use” of privy on wharf).

204. *Mayor’s Address*, N.Y. SPECTATOR, May 24, 1838.

205. See e.g., MILWAUKEE SENTINEL, July 16, 1849 (calling for baths in Milwaukee and everywhere); *Public Baths and Washhouses, Bathing*, N. AM. & U.S. GAZETTE, June 23, 1849 (calling for baths in Philadelphia); F.R. Tillou & C.S. Woodhull, Editorial, *Extraordinary Developments of the Administration of Justice in New York*, N.Y. HERALD, Mar. 7, 1844.

206. MAYOR’S COMM., NEW YORK CITY, REPORT ON PUBLIC BATHS AND PUBLIC COMFORT STATIONS 26–34 (1897). This document gives a good history of the public bath movement in New York and elsewhere. In particular, see *id.* at 28 (discussing the need for “suitable isolation for the sexes”); *id.* at 37 (discussing the “People’s Bath House” near Broom Street with sex-separation); *id.* at 151, 157, 159, 161 (noting sex-separation in bath houses).

207. *Id.* at 28–29.

208. 5 ARCHITECTURAL MAG. & J. IMPROVEMENT ARCHITECTURE, BUILDING & FURNISHING 511–14 (1838).

adultery case also provides evidence.<sup>209</sup> By the 1850s, American ships often had bathrooms separated by sex on different ends of the ships.<sup>210</sup> In 1832, a witness testifying in a trial referred to a "men's water closet," which suggests that there was also a women's water closet.<sup>211</sup> Schools educating both sexes followed sex-separation in multi-entry intimate spaces.<sup>212</sup>

Sex-separation in prisons was the usual rule in Europe and America.<sup>213</sup> In the late 1700s, during the French Revolution, the Marquis de Lafayette, his wife, and his children were imprisoned at the dungeon of Olmutz.

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209. 3 Parl. Deb. HL (2d ser.) (1820) col. 499 (Eng.). King George IV had accused his Queen, Caroline Amelia Elizabeth, of adultery and the investigators asked whether the alleged paramour was seen near the women's water closet.
210. *Minutes of Evidence Taken Before the Select Committee on the Passengers Act*, in 13 REPORT FROM THE SELECT COMMITTEE ON THE PASSENGERS ACT 429 (1851) (regarding water closets for females on one side and same for males on the other side of English ships and noting requirements for water closets for males and females for American ships are good and should be followed by the English).
211. 3 LEGAL EXAMINER 156 (1833) (reporting on a legal case from October 25, 1832).
212. JOHN GEORGE HODGINS, HINTS AND SUGGESTIONS ON SCHOOL ARCHITECTURE AND HYGIENE WITH PLANS AND ILLUSTRATIONS 7 (1886) (quoting Section 40 of the Public Schools' Act of 1885 applicable in Ontario, Canada, which appears to have assumed separate water closets for the sexes).
213. Prison reformer John Howard often noted the presence or absence of sex-separation in his reviews of prisons. *E.g.*, JOHN HOWARD, THE STATE OF THE PRISONS IN ENGLAND AND WALES 150-51 (Newgate Prison); *id.* at 230 (Bridewell); *id.* at 82 (French prisons); *id.* at 98 (Swiss prisons); *id.* at 136, 140, 178, 182, 185, 208. Howard believed sex-separation was important for "morals." *Id.* at 44. In 1777, he noted most jails and prisons did not separate women and men in the daytime. *Id.* at 16; *see also Sir R. Phillips' Letter to the Livery of London, Literary Panorama* (Nov. 1809) 252, in 5 THE LITERARY PANORAMA, BEING A REVIEW OF BOOKS, MAGAZINE OF VARIETIES AND ANNUAL REGISTER . . . ; COMPRISING INTERESTING INTELLIGENCE FROM THE VARIOUS DISTRICTS OF THE UNITED KINGDOM; THE BRITISH CONNECTIONS AND FROM THE CONTINENT OF EUROPE 209 (1809) (discussing deplorable conditions of the women's ward at Newgate Prison); *Colleetanea: Description of a Convict Ship*, BOSTON INTELLIGENCER & EVENING GAZETTE, Dec. 11, 1819, 1 (describing sex-separation on a floating convict ship).

Letters written during that period by friends who visited him tell us that men, women, and children were separately celled at Olmutz.<sup>214</sup>

In the 1870s, Chicago's authorities installed in parks what newspapers called a "new" invention: a new "urinal and water-closet" for women, built "entirely of iron," having a roof and walls of corrugated iron and floors of cast iron. The paper reported that the inventor had just finished installing one in Jefferson Park and was also working on a "urinal and water-closet" for men "having four seats" for orders for Lincoln Park, Lake Park, Vernon Park, and Ellis Park.<sup>215</sup> Nearly a decade before the 1887 Massachusetts labor statute, in 1878, the Massachusetts State Board of Health enforced sex-separation in public school bathrooms.<sup>216</sup>

#### d) Exceptions to Sex-Separation

The instances in which sex-separation was not followed in multi-access spaces involved situations in which the safety of women (and often others) was not a serious concern. Typically, these situations involved the poor and dispossessed. A 1725 book reports of a Quaker jailed for itinerant preaching in England in 1652. He describes the jail as "a nasty place" with no bathroom, where women and men were jailed together "against all decency."<sup>217</sup> In an 1818 report, an inspector noted an English prison with mixed cells. One cell, he noted, contained two women confined with eight men. He inquired of the jailor as to whether there had been what he called "criminal conduct." The jailer casually stated that four years earlier a woman left a cell pregnant, but he didn't know of any other

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214. *E.g.*, From the Evening Star, Letters on the Life and Last Days of Lafayette—No. VI, Letter of General La Tour Maubourge, [Writter] from Olmutz, N.Y. SPECTATOR, Dec. 1, 1834 (describing the dungeon at Olmutz and mentioning separate women's quarters). This letter was written by a friend who was imprisoned with Lafayette, but it was released along with others after Lafayette's death in 1834. The letter is reprinted in JULES CLOQUET, RECOLLECTIONS OF THE PRIVATE LIFE OF GENERAL LAFAYETTE 73–85 (1836).

215. *A Much Needed Invention*, CHI. TRIB., Sept. 24, 1870.

216. MASS. ST. BD. OF HEALTH, 9 ANNUAL REPORT OF THE STATE BOARD OF HEALTH OF MASSACHUSETTS 229, 234 (1878) (among questions that should be asked of schools is, "Are there proper provisions for both sexes?"); *id.* at 250–51 (a survey of "nearly all the school-buildings in Boston," and 400 other locations, and noting "separate provision for the sexes is usual").

217. WILLIAM SEWEL, THE HISTORY OF THE RISE, INCREASE, AND PROGRESS, OF THE CHRISTIAN PEOPLE CALLED QUAKERS: INTERMIXED WITH SEVERAL REMARKABLE OCCURRENCES 66 (2d ed. 1725).

incidents.<sup>218</sup> The women, of course, had no say. Women faced concerns about attacks from fellow inmates, as well as a vulnerability to sexual assault by male supervisors.<sup>219</sup>

*B. Viewing the 1887 Massachusetts Labor Legislation as Anti-Sexual Harassment Legislation*

Kogan has characterized the 1887 Massachusetts bathroom legislation as the "strong arm of the law" intervening "to stop a practice that was already developing informally."<sup>220</sup> The characterization is incorrect for two reasons. First, I have shown that, even in Massachusetts, sex-separation in bathrooms was well established long before 1887, not only informally, but by regulations.<sup>221</sup> But second, I will argue here that, in passing bathroom sex-separation laws, authorities sought to prevent private employer economic interests from superseding the health and welfare of the people. Indeed, I will argue here that the bathroom sex-separation laws fit well into labor protection laws of the period. Contrary to being sexist or patronizing, the bathroom sex-separation statutes were among the earliest state-wide attempts to protect women from workplace sexual harassment. Where these statutes failed, I argue, is that they did not have broader support to do the job, they could not counter the intractable social problem of sexual harassment and sexual assault, and they did not assure to vulnerable male-bodied persons the same assurances of safety in intimate spaces as they tried to afford to women.

1. The Insufficiency of Eighteenth and Nineteenth Century Protections Against Sexual Harassment

To appreciate the impact of bathrooms sex-separation laws, we must first appreciate the context in which they arose. Although there were exceptions,<sup>222</sup> sexual harassment and sexual assault by private persons

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218. *State of the Gaol and Bridewell at Great Yarmouth*, TIMES [London], May 11, 1818, at 3.

219. *London, Oct. 26*, AM. WKLY MERCURY, Mar. 16 to 23, 1731 (Prison overseer ("turnkey") charged with committing rape on female prisoner).

220. Kogan, *Sex Separation Cure-All*, *supra* note 24, at 145.

221. See discussion in Part II generally and re Massachusetts, at pp. 264, 272.

222. For example, slaves were exempted from protection from sexual assault while being liable for allegations that they committed it against whites. Indeed, in some states, rape was specifically defined as the rape of a white

upon each other have long been illegal under law.<sup>223</sup> Yet, servants had long been dealing with sexual harassment in the domestic workplace. In 1887, writer and reformer Helen Campbell called household service “synonymous with the worst degradation that comes to woman,” noting that “only here and there is a young girl safe.”<sup>224</sup> In the eighteenth century, when parents could not support their children, states contracted out (indentured) those children to work for employers at early ages. Lacking parental protection, the children had to depend on oversight organizations to advance any abuse claims.<sup>225</sup>

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woman. *See, e.g., Pleasant v. State*, 13 Ark. 360 1863) (in trial of slave alleged to have committed rape, [n]oting “The fact that she is a white woman, is a necessary ingredient to constitute the offence . . .”). In such an environment, there is, not surprisingly, a long history of false accusations against black men for allegedly raping white women. *See, e.g., Emmett Till Accuser Admits to Giving False Testimony at Murder Trial: Book*, CHI. TRIB. (Jan. 28, 2017), <https://www.chicagotribune.com/news/nationworld/ct-emmett-till-accuser-false-testimony-20170128-story.html> [<https://perma.cc/6MSX-B4AJ>]. For digital material on the famous Scottsboro Boys case, see *Digital Collections: Scottsboro Boys*, MICH. ST. UNIV. LIBRARIES, <https://lib.msu.edu/branches/dmc/collectionbrowse/?coll=21> [<https://perma.cc/2BYH-H595>]; *see also UA Launches Website for Studying Scottsboro Trials*, UNIV. OF ALA. (Oct. 19, 2016), <https://www.ua.edu/news/2016/10/ua-launches-website-for-studying-scottsboro-trials> [<https://perma.cc/ZMB5-8YJF>]. I use black history here as an example because of the unique tie to slavery. One can find examples of state failures to prosecute and unequal protection in other histories. After slavery, many Southern states continued to refuse to prosecute sexual assaults by whites against blacks. *See* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 716-36 (2002).

223. *Easton, Md. Saturday Evening*, EASTON GAZETTE & EASTERN SHORE INTELLIGENCER, Aug. 12, 1820, at 2 (describing men breaking into a woman’s home and demanding sex and letter complaining of the judge treated case too lightly on theory she would file civil suit and get damages anyway); *Says Landlord Tried to Kiss Her, Seeks \$25,000*, CHI. DAILY TRIB., Sept 29, 1926, at 4; *The Law of Kissing*, DAILY NAT’L INTELLIGENCER, June 16, 1837 (reporting from story from an English paper on events in Middlesex County; man kissed her forcibly after the woman objected to him doing the same to her sister).
224. HELEN CAMPBELL, PRISONERS OF POVERTY: WOMEN WAGE-WORKERS, THEIR TRADES AND THEIR LIVES 234 (1887).
225. *Boston, By the Desire of Overseers of the Poor . . . , of this Town, the following Act, which passed the General Court in Their Last Sessions, Is Now Published, Viz.* BOS. EVENING-POST (Supp.), Mar. 19, 1759, at 1 (describing an act requiring placement of poor children in employment as indentured

Some employers did seek to protect their employees. In 1830, an English court held, under a breach of contract theory, that an employer could fire a servant and not give him his paycheck for sexually harassing another female servant.<sup>226</sup> In 1882, American employers in a neighborhood banded together to stop a man who was insulting domestic servant girls, accosting them and tapping from outside on their windows when they were sleeping.<sup>227</sup> So too the doctrine of respondeat superior was an aid to women who sought to charge employers and their employees. In 1896, a Texas court held that a railroad was responsible for a female traveler's injuries when its employee harassed and assaulted her while she waited for the next train.<sup>228</sup>

But these protections were woefully insufficient, especially in a world in which women were economically, socially, and politically restricted and stereotyped. That insufficiency and its effects were magnified when women entered the workplace in such large numbers during the Industrial Revolution.

## 2. Emergence of Labor Statutes Mandating Sex-Separation

There is very little available on the legislative history of the 1887 Massachusetts statute. However, we do know about other similar statutes passed in other jurisdictions around the same time. New York established its factory inspection system in 1886. The 1886 New York factory inspection report argued for sex-separation of bathrooms and even different entrances as a curb on sexual harassment in the workplace. It complained of owners and supervisors pressuring women to have sexual relations or lose their jobs. And it worried that existing factory inspection laws provided no power to address these concerns:

We have all seen specific and general charges in the newspapers at various times that in order to obtain or retain employment in

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servants and purporting to allow Overseers of Poor who placed them to make complaints to judiciary in event of mistreatment by master or mistress).

226. *Atkin v. Acton*, *supra* note 91 (clerk's behavior in assaulting employer's female servant constituted a breach of contract, and he was not entitled to back pay).

227. *A Scoundrel Arrested for Indecent Conduct*, CHI. DAILY TRIB. March 30, 1882, at 8.

228. *St. Louis S.W. Railway Co. v. Griffith*, 35 S.W. 741 (1907).

certain factories or workshops women were obliged to sacrifice their honor. Complaints of this nature have come to the Factory Inspectors *but there is nothing in the law we were appointed to enforce which gives us any authority in such cases even could the charges be verified.*<sup>229</sup>

"Sacrifice their honor" meant, in those days, to sacrifice one's chastity or, more bluntly, to have sex.<sup>230</sup> The report recommended that women be overseen by female overseers, that bathrooms be sex-separated, and that the water closets used by the different sexes should be at least ten feet apart or on different sides of the building and be screened."<sup>231</sup>

Aware that factory owners might use economic arguments to resist laws specifically intended to protect women from harassment, the report stated, "the matter of further protecting females who are obliged to earn their own living should be paramount to any economical notions."<sup>232</sup> It even went so far as to suggest that where males and females are employed in the same room, they should be separated.<sup>233</sup>

To further illustrate the concern, the report gave a specific example of a case in which women complained of sexual harassment, but the company did nothing. The women then went to the factory inspectors and sought the support of the relatively new Central Labor Union:

It was stated to us that in the worsted goods mills of Joseph T. Perkins, in Brooklyn, the young women and girls employed there were the victims of insult and debauchery at the hands of the foremen and others. *Previous to our notification the girls had complained to the superintendent and to the proprietor, both of whom refused to take any action in the matter. On being waited upon by the Factory Inspector, the superintendent denied the truth of the statement of the girls.* A written statement of the facts of the case was made by a number of the girls and given to the

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229. FIRST ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK FOR THE YEAR ENDING, Dec. 1, 1886, 20–21 (1887) (emphasis added) [hereinafter 1886 N.Y. FACTORY INSPECTORS REP.].

230. *See, e.g.*, WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 635 (1881), <https://archive.org/stream/websterscomplete00webs#page/n9n634n634> [<https://perma.cc/J2G8-AYUV>] (defining "honor" as "in women, purity, chastity").

231. 1886 N.Y. FACTORY INSPECTORS REP., *supra* note 229, at 20.

232. *Id.*

233. *Id.*



Factory Inspector. The Central Labor Union of Brooklyn becoming interested in the case by this time, this department turned it over to that body to prosecute. The parties were indicted, and one of them, a boy of fifteen years, was convicted and sentenced to the Elmira Reformatory. The trials of the others have not, as of yet taken place.<sup>234</sup>

To appreciate the above paragraph, one must understand the language of the nineteenth century. One definition of "insult" was to "leap upon." Thus, in this context, being "victims of insult and debauchery" likely meant being victims of sexual harassment, sexual assault, and rape.<sup>235</sup>

The following year, on May 25, 1887, a mere two months after Massachusetts passed its law requiring the separation of the sexes in bathrooms, New York amended its factory law to provide for a suitable wash-room for women separate from that afforded to the men.<sup>236</sup>

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234. *Id.* (emphasis in original). The Central Labor Union, referenced in the quote, was formed around 1881. It was a conglomerate of many different unions and also had many female members. *The Central Labor Union; Its Formation and Growth*, N.Y. TRIB., Oct. 26, 1890, at 22 (describing its history); see also, e.g., *Sewing Woman to the Central Labor Union*, N.Y. TIMES, Feb. 16, 1885, at 5 (describing a letter from a woman claiming she did not make enough in a sewing factory to support herself and was delighted by the formation of a woman's sewing factory workers union). It also had a significant contingent of socialist members. *Socialists Beat the George Men: Officers of the Central Labor Union Elected in the Interest of the Progressive Party*, N.Y. TIMES, Oct. 3, 1887, at 4 (Socialists win control in elections with union support).
235. The word "insult" meant not only to use words but also "to leap upon," "[t]he act of leaping upon," or to heap "gross abuse" upon another "by words or actions." See, e.g., WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 702 (1881), <https://archive.org/stream/websterscomplete00webs#page/702702> [<https://perma.cc/L98K-8UQN>].
236. The law provided in § 13 that "a suitable and proper wash room and water closets shall be provided for females where employed, and the water closets used by females shall be separate and apart from those used by males and shall be properly screened and ventilated . . . ." SECOND ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK, for the year ending December 1, 1887, at 11-12. Later, New York also provided that water-closets shall be kept free of obscene writing and marking and that a dressing-room shall be provided for women and girls, when changing was required by the factory inspector. See NINTH ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK, 21, 26, §9 (1895) [hereinafter 1895 N.Y. FACTORY INSPECTORS REP.].

Similarly, in 1871, advocate Joseph Cook spoke of women being pressured into “immoral” behavior in U.S. shoe factories. Again, to appreciate the concern here, one must read such language according to its historical context. “Immoral” could refer to coerced or to consensual behavior.<sup>237</sup> Cook argued that a father who wishes the welfare of his daughter would not place her in a factory. He spoke as well of the lack of “moral character” of the overseers. Translating his words, Cook was speaking of sexual harassment. Indeed, underscoring how bad the situation was, Cook called for a *complete* separation of the sexes in the shop rooms as a remedy.<sup>238</sup>

Noting the resentment men had over women making less money, an 1889 Ohio state report also urged bathroom sex-separation. It also argued that a system that paid women less for the exact same work demoralized them.<sup>239</sup> In that era, the term “demoralize” meant to corrupt or lessen the morals of a person. An example would be putting women in positions in which they had to participate in sexual engagement to have enough money to live.<sup>240</sup>

Bathroom sex-separation laws were not the only one type of anti-sexual harassment statutes passed to protect women’s safety. Several acts prevented employers from sending women to work at prostitution houses. The presence of these acts establish that such abuse was in fact occurring.<sup>241</sup> In 1897, Delaware passed a statute protecting women from

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237. See discussion at *supra* p. 247.

238. *E.g.*, JOSEPH COOK, OUTLINES OF MUSIC HALL LECTURES EMBRACING FIVE ADDRESSES ON FACTORY REFORM IN THE LARGEST TRADE OF THE UNITED STATES 20-24 (1871).

239. EXECUTIVE DOCUMENTS, ANNUAL REPORTS FOR 1889, MADE TO THE SIXTY NINTH GENERAL ASSEMBLY, OF THE STATE OF OHIO, REGULAR SESSION, COMMENCING JAN. 6, 1890, (Part II), at 1326-2728.

240. See, *e.g.*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 353 (1881), <https://archive.org/stream/websterscomplete00webs#page/n9> [<https://perma.cc/864S-2Q9N>] (defining demoralize as “to corrupt or to undermine the morals of”; “to destroy or lessen the effect of moral principles on”; “to render corrupt in morals”); ETYMOLOGICAL AND PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE, 140 (1881) (defining “demoralise” as “to corrupt the morals” or “to destroy or lessen moral qualities”). The notion of demoralizing as lessening one’s confidence seems to have come later. Compare MODERN DICTIONARY OF THE ENGLISH LANGUAGE 127 (1911) *Internet Archives Edition*, <https://archive.org/stream/moderndictionary00londuoft#page/126/search/demoralize> [<https://perma.cc/9FC2-K47T>] (defining “demoralize” as to corrupt and as to deprive of confidence).

241. Colorado Act of 1891, §1; Conn. Gen. Stat. 1902, c. 259, § 4608.

abusive, indecent, or profane language, and unnecessary exposure to hardships or maltreatment.<sup>242</sup> Statutes required that stairs where women worked have screening both on the bottom and the sides. Obviously, the reason was to stop men from looking up under women's dresses when they came down stairs.<sup>243</sup> Had the incidents not been occurring, there would have been no need for the law. An 1886 New York law provided that all water-closets shall be kept free of obscene markings.<sup>244</sup> Had the markings not been there, the law would not have been necessary.

Harassment continued despite rules attempting to remedy some discrimination. California provided that people could not be disqualified from jobs "on account of sex," but they still had laws requiring sex-separated bathrooms.<sup>245</sup>

These concerns were not limited to the United States. In 1848, a report of the Edinburgh Obstetric Society recommended that all places of manufacture, trade, or business, where more than twenty persons of both sexes are employed at the same time, must be provided with separate water-closets or privies for the use of each sex.<sup>246</sup> In 1908, the India

242. Delaware Act of 1897, c. 452, §4 *in* 14, J. OF POLITICAL ECONOMY, 117 (1906).

243. *See, e.g.*, ANNUAL REPORT OF THE FACTORY INSPECTORS OF THE STATE OF NEW YORK 375 (1894) (requiring factory to correct for unscreened stairs); BULLETIN OF THE BUREAU OF LABOR STATISTICS 538 (1897) (describing an Indiana law requiring screened stairs); 5 BULLETIN OF THE DEPARTMENT OF LABOR 646 (1900) (stating that stairs must be "properly screened" at bottom and sides); 1 BULLETIN OF THE BUREAU OF LABOR STATISTICS, LABOR LAWS OF THE UNITED STATES 1067 (1914) (discussing a 1909 Michigan Labor Laws that stated, "The stairs shall be properly screened at sides and bottom where females are employed...").

244. Ch. 409, Laws of 1886 (as amended); *see also* 1895 N.Y. FACTORY INSPECTOR REP., *supra* note 236 and accompanying text.

245. CAL. CONST. art. 20, §18; (1879), available at <https://www.cpp.edu/~jlkorey/calcon1879.pdf> [<https://perma.cc/GX38-7PCP>] ("No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession"); *In re Mary Maguire*, 57 Cal. 604, 499 (1881) (California Constitution protected woman's right to serve as a barmaid and applied equally to men and women); STARR & CURTIS ANNOT. STAT. c. 48, § 4; *see also* Third Biennial Report of the Bureau of Labor Statistics *in* 5 APPENDIX TO THE JOURNALS OF THE SENATE AND ASSEMBLY OF THE TWENTY-EIGHTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA 100 (1889) (speaking of sex-separated water-closets).

246. *Report of the Edinburgh Royal Maternity Hospital*, 9 MONTHLY J. MED. SCI., Nov. 1848, at 3. In an age of strict prohibitions on birth control and

Factory Commission reported that women working in the Rice Mills of Dragoon, complained that when they worked at night at the mill, "they were often molested by male laborers when they went to the latrines in the dark."<sup>247</sup> The report also addressed why women did not complain to mill authorities:

[A]ny one who knows the difficulties that a poor cooly woman has in proving her allegation before the authorities will recognize the probability of her more often failing to establish her case than of securing the punishment of the culprit. It is not an uncommon result in such cases for the women complainant to come out with her moral reputation damaged and for the cowardly male assailant to escape all censure or punishment. Under these circumstances the factory women in India employed at night has either to give up her work or like the generality of her sex excepting the suffragettes to suffer in silence.<sup>248</sup>

Opponents of women's right to work perpetuated the stereotype of "factory women" as immoral. Women and their supporters pushed back against this narrative, even as they pushed for more work opportunities.<sup>249</sup>

Massachusetts state documents show that some employers avoided separate bathroom laws. One did so by placing the women's bathrooms on the very top floor of building, thus making them inaccessible to workers, who were required to keep working on the shop floor.<sup>250</sup> A 1911 report spoke of a factory "where the closet was separated from the factory by a low muddy road. In rainy weather this road became impassable so that during such a period the women were absolutely deprived of closet accommodations."<sup>251</sup>

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widespread harrassment, increasing numbers of single, pregnant women were in the workplace.

247. 1 REPORT OF THE INDIAN FACTORY LABOUR COMM'N 107 (William T. Morrison ed. 1908).

248. *Id.*

249. *Woman's Kingdom . . . the Morals of Factory Women*, DAILY INTEROCEAN, June 4, 1892.

250. *Compare* PUBLIC DOCUMENTS OF MASSACHUSETTS No. 32, 77 (1894).

251. REPORT ON CONDITION OF WOMAN AND CHILD WAGE EARNERS IN THE UNITED STATES IN 19 VOLUMES, Volume III, Glass Industry, 61st Congress 2d Session, Senate I Document No 645, 353 (Charles P. Neill ed. 1911).

The legally-mandated economic dependence of women on men and limits on their economic advancement added two more wrinkles to the problem of protecting them from harassment. First, some women who had the social standing to change the law financially depended upon the very men who committed the offenses. These men were their husbands or fathers. Second, the desire to earn money as a means towards career progress, independence, or even survival, also made some women resist change and not speak up about harassment. In 1899, the *Los Angeles Times* reported that some factory women opposed protective changes out of fear that they would make women too expensive to hire and women would lose their jobs.<sup>252</sup>

It should be noted that factory owners generally treated most workers poorly. People were regularly required to work twelve or sixteen-hour days.<sup>253</sup> It was not uncommon to see girls and boys as young as seven years old working in factories.<sup>254</sup> And, in some cases, employers provided no bathrooms at all for anyone.<sup>255</sup> The fight for women's rights in those spaces, then, was as part of an overall labor battle. By leading the fight for rights, women, helped bring about the eight-hour day and better conditions for others.<sup>256</sup>

#### IV. HISTORICAL CORRECTION: THE LONG HISTORY OF SEX-SEPARATION

The alternative bathroom histories miss their mark in telling of the origins of sex-separation in bathrooms. Sex-separation dates back as far as

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252. Cf., *Women at Work; Quaking Employees Are Afraid They Will Lose Their Positions*, L.A. TIMES, June 21, 1899, at 3.

253. See e.g., TENTH ANNUAL REPORT OF THE BUREAU OF LABOR AND INDUSTRIAL STATISTICS (MICHIGAN), 1213, 1266-67 (1893) (reporting on men striking for work-day hour limits); *Tenth Annual Report of the Bureau of Labor and Industrial Statistics*, in 7 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 5-22, 740 (1893) (tables showing workday hour limits and the cause of strikes).

254. E.g., 2 BIENNIAL REPORT OF THE BUREAU OF LABOR STATISTICS, STATE OF MINNESOTA, 1889-1890, 205-206, 208 (table with ages of child workers); see also *id.* at 188 (speaking of conditions and ages of child labor in English mines).

255. *For Better Shops, Commissioner Ware Reports on the "Sweaters,"* CHI. DAILY TRIB., June 22, 1890 (noting filthy, poorly ventilated or insufficient toilets).

256. E.g., *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding state of Oregon's right to regulate hours for all workers (and not merely regulate the hours for women and children), on the ground of public welfare).

written history will take us. The bathroom has long been treated as unique public space, not as space just like any other. The key reason for the separation was safety and privacy. There were other reasons people supported the approach of course. Patriarchal norms, extreme sensibilities, and the desire to avoid prurience in bathroom spaces were among them. And the focus on women in the logic of establishing them, not only tells us that women were at greater risk for harassment but also suggests a belief that vulnerable men were less entitled to privacy and safety than vulnerable women.

History shows three instances in which sex-separation was not consistently the norm. One was where the safety of women and girls was, rightly or wrongly, assumed not to be at unique risk.<sup>257</sup> Examples are spaces shared by parties well-known to each other, with a shared interest that gave rise to a presumption of safety. These include bathrooms for families or those who could be expected to behave as families. A second exception existed in circumstances where the safety of women and children was simply disregarded or diminished as a public or private value. Examples include the treatment of bathrooms in some prisons and the denial of safe bathrooms to poor or powerless women working in some factories. And a third exception was where mixed-sex use was *intended*.

Some approaches to bathroom approaches fall into more than one category. For example, the case of female slaves forced to provide sexual services to their owners, might fall into categories two above (the safety of women was dismissed) and three above (amorous activities were presumed).

As I have discussed in this work, there has always been a minority tradition in which people indicated a preference for mixed-sex access and a loosening of binary sex guidelines.<sup>258</sup> Some sought out these spaces for opposite-sex sexual liaisons (or opposite-sex sexual predatory behavior). Others may have feared same-sex predators and felt that their safety and privacy was better protected in mixed spaces. Others may have felt that same-sex spaces excluded them because they did not fit into the binary options they offered. We also see evidence of gay men and gender nonconforming persons at the masquerades.

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257. Those who assert *imaginary predator* claims place mixed-sex spaces in the first category, e.g., where the safety of women and girls are not placed at unique risk. See discussion at *supra* p. 234.

258. See, e.g., discussion *supra* pp. 258, 263.

I would argue, then, that the evidence indicates that there are, in fact at least *two* stories of bathrooms. In one story, bathrooms were sex-separated to protect the female bodied from real harms and to counter powerful interests that disregarded women's safety. In this story, sex-separation helped to ensure women's safety and privacy. In the other story, as evidenced by approaches to the masquerades, bathroom rules were imposed to enforce a majority's view of morality and binary gender lines upon a minority.

The alternative bathroom histories do not fail merely because they incorrectly explain how bathrooms first became separated by sex. They do not err because they seek to tell the stories of LGBTQ peoples. They fail because they exclude the histories and experiences of other vulnerable groups, specifically women and the poor, even as they purport to reveal those histories. Indeed, I would argue, they *contort* these histories. Every scholar approaches history with biases that unavoidably affect the end product. But by framing protections afforded to women through sex-separation in bathrooms as entirely based on patriarchy or class consciousness, these alternative bathroom histories tell us that women did not need protection (which in turn risks suggesting they didn't suffer harassment). By suggesting that separate bathrooms were foisted on the poor, they risk suggesting to us that the poor had no special safety risks or did not want clean, safe spaces.

In the context of women's long battle for equality over so many centuries, such errors, whether intentional or not, are not small ones. For centuries, women (including poor women and lesbian and bisexual women), like transgender persons, have fought to have their perspectives and experiences (biologically based and otherwise) recognized and included in public policy. Theories that erase or ignore these perspectives threaten the very equality women have achieved thus far, and that which they still seek to achieve. Such approaches do not challenge patriarchy; they are, rather, consistent with a patriarchy that suggests women must always sacrifice so that the male-bodied can be comfortable. As Gerda Lerner commented, the exclusion of women's history "deprive[s women] of the empowerment, strength and knowledge women of the past could have offered them."<sup>259</sup> Speaking of prior efforts, she continued, "Since they could not ground their argument in the work of women before them, thinking women of each generation had to waste their time, energy and talent on constructing their argument anew."<sup>260</sup>

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259. GERDA LERNER, *THE CREATION OF FEMINIST CONSCIOUSNESS* 166 (1994).

260. *Id.*

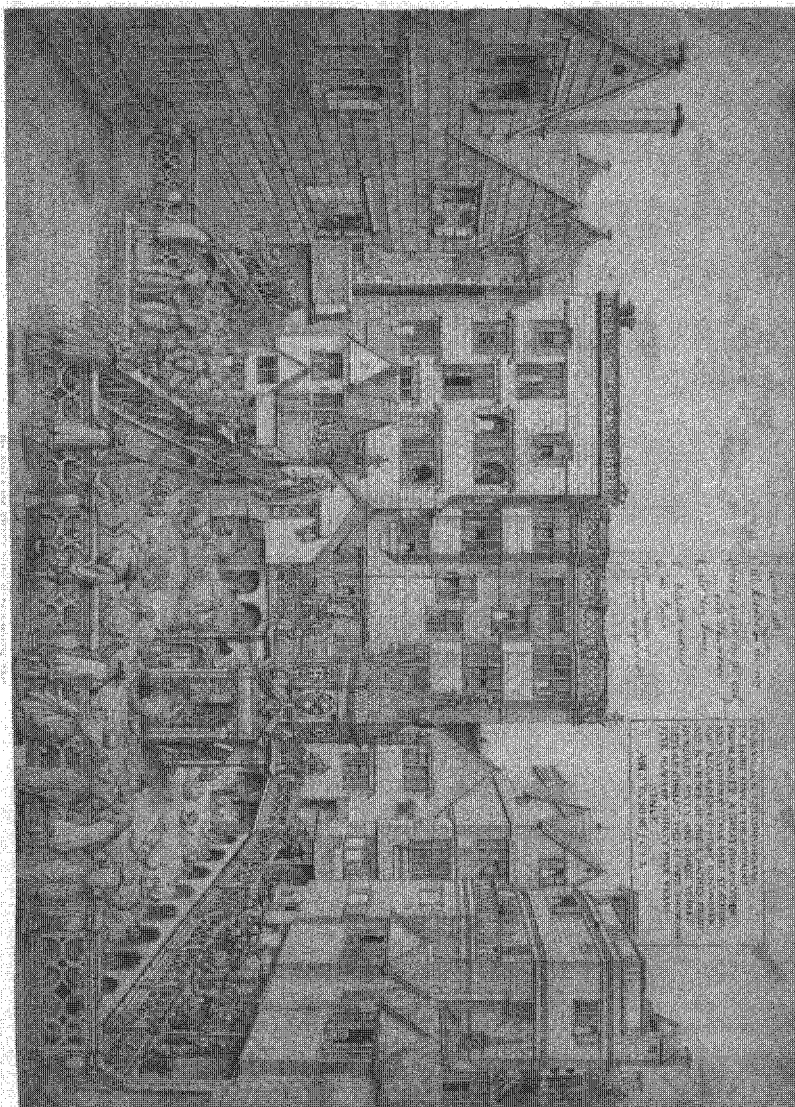
Those who push narratives that contort women's history, even when they do it in the interest of aiding transgender people, oppress women. While supporting the rights of everyone to be treated fairly, women and supporters of women have the right to push back against such these narratives. And push back they should.



*Figure 1: "A Beau Cacher" by Louis-Marin Bonnet, 1772, after the style of S. LeClerc*

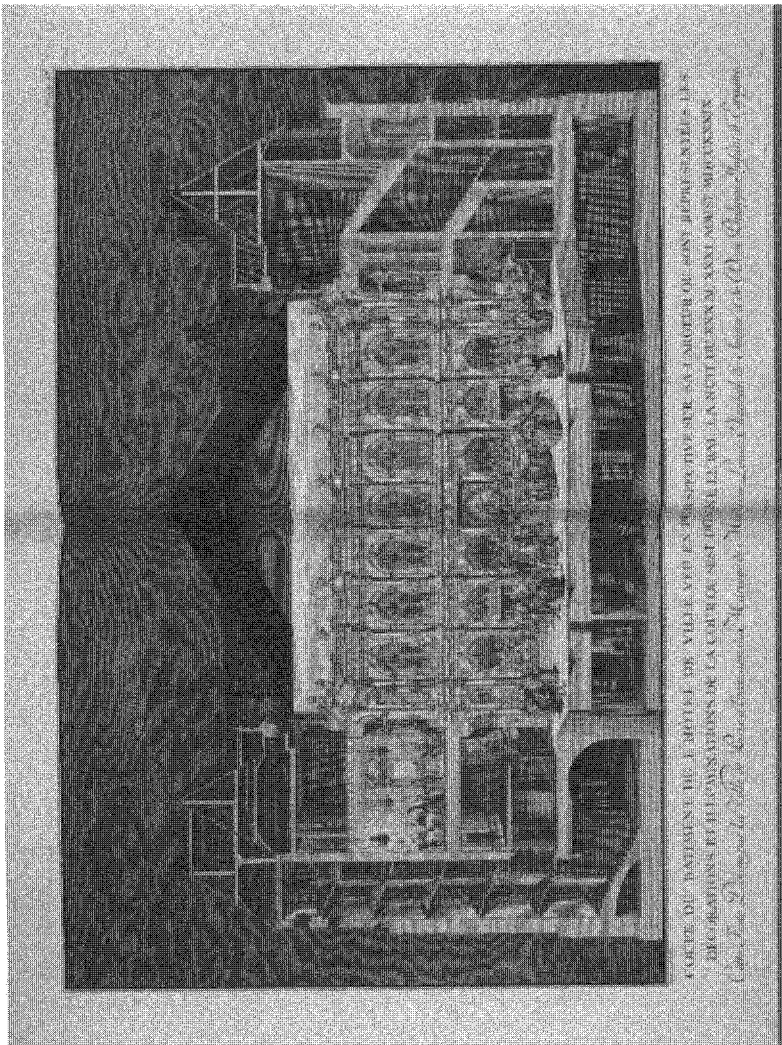
*Source: Gallica.bnf.fr/Bibliothèque Nationale de France.*





*Figure 2: The King and Queen's Baths in Bath, England; by Thomas Johnson, 1675*

*Source: Trustees of the British Museum.*



*Figure 3A: Plate XII; Cross-Section; Hôtel de Ville, Paris; 1739 Royal Marriage Ball, Showing Lower Level Garderobes Area*  
*Source: Institut National d'Histoire de l'Art, Bibliothèque.*

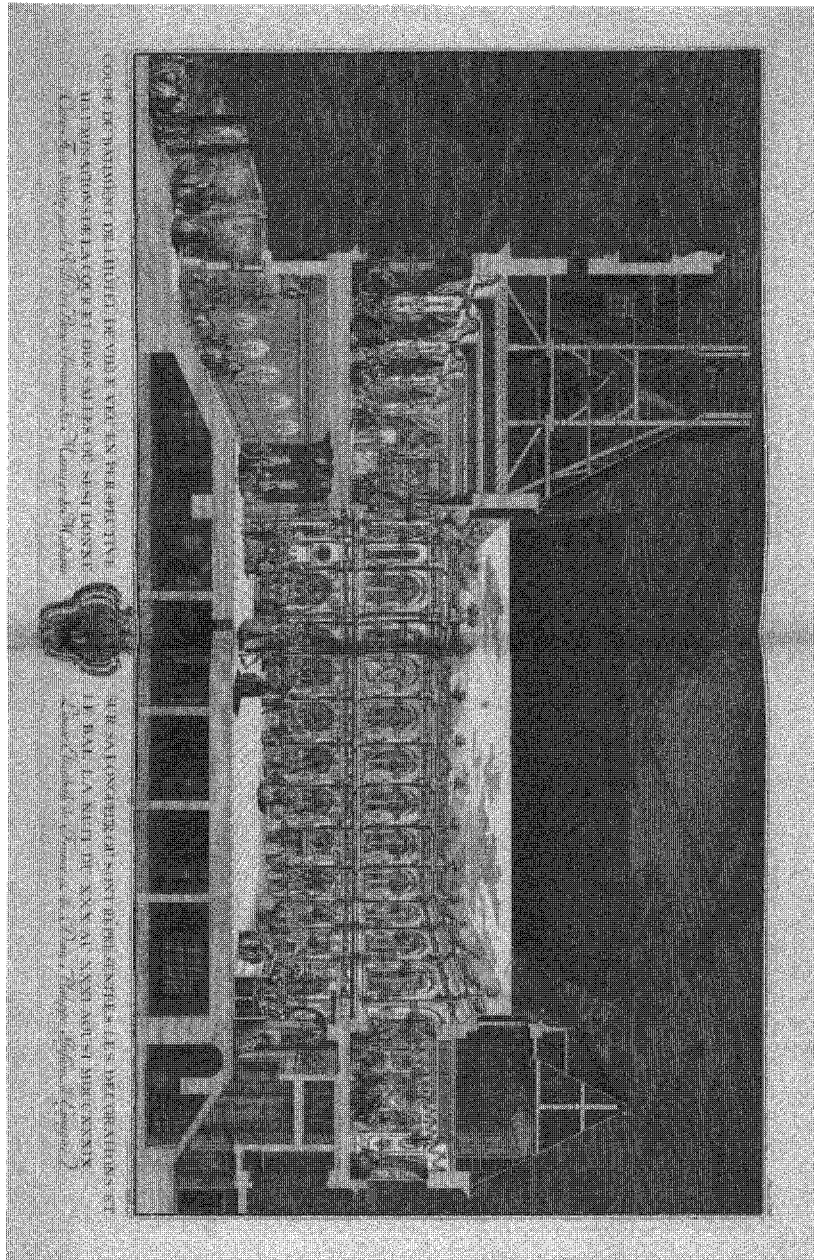
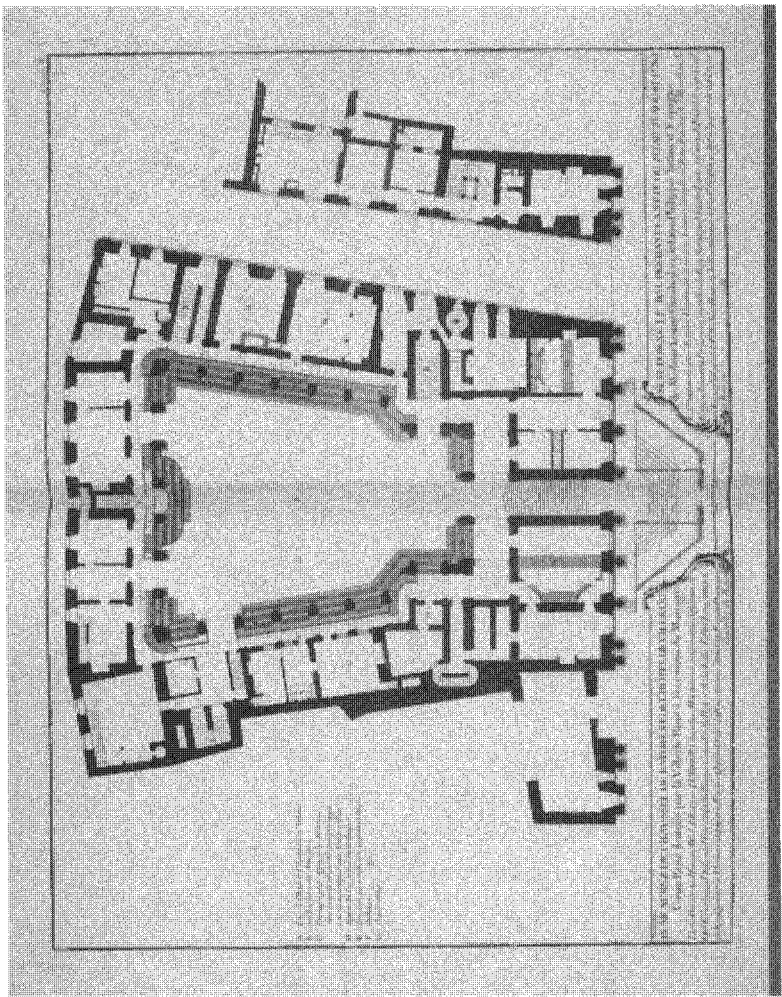
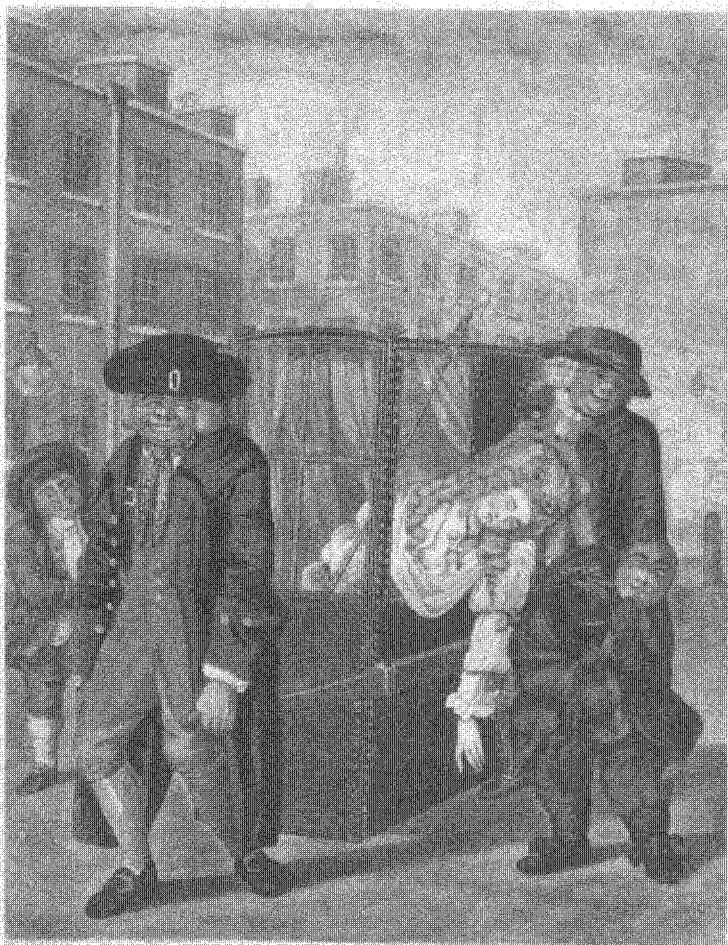


Figure 3B: Plate 13. Crosssection 2 Hôtel de Ville, Paris, 1739, Royal Marriage Ball; Showing Lower Level Garderobes Area and Left Stairwell. Source: Institut National d'Histoire de l'Art, Bibliothèque



*Figure 3C: Plate 10; Diagram, Lower Level, Hôtel de Ville, Paris, Site of 1739 Royal Marriage Ball; the Guardrobes (designated "G" on original) are, at the top of the picture, two rooms to the right of the first stairwell and, at the bottom, two rooms left of the circular stairwell.  
Source: Institut National d'Histoire de l'Art, Bibliothèque*



THE RETURN from a MASQUERADE: A MORNING SCENE

*Figure 4: Return from a Masquerade: A Morning Scene, Published by Carrington Bowles, 1784. Artist, Unknown  
Source: Trustees of the British Museum<sup>261</sup>*

261. Although the original is hand colored, the print has been converted to black and white for purposes of reproduction. See British Museum, Online Collection, [http://www.britishmuseum.org/research/collection\\_online/collection\\_object\\_details.aspx?objectId=1639400&partId=1](http://www.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=1639400&partId=1) [<https://perma.cc/R Y2Q-4DVT>].



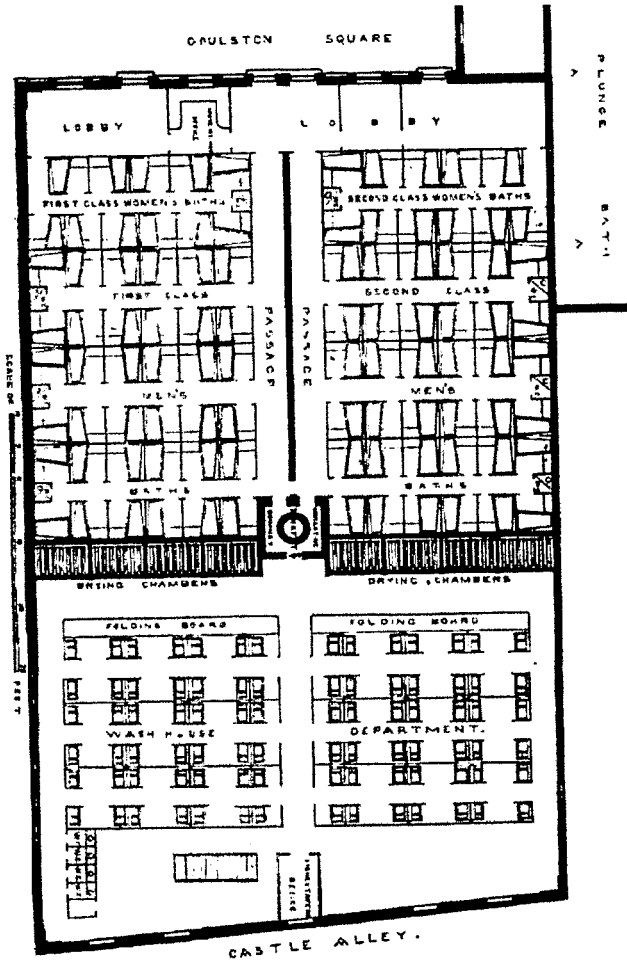
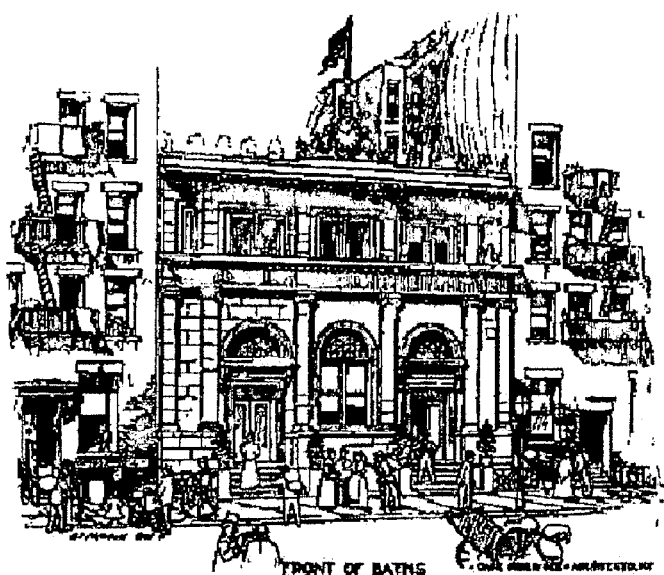


Figure 5: Diagram of the Washhouse at Goulston Square<sup>262</sup>

262. *Diagram of the Washhouse at Goulston Square*, 9 BUILDER 90 (1851) (diagram of baths and washhouses at Goulston Square, Whitechapel, showing baths divided first by class and then within class with women in front and men in back, but washhouse and folding boards apparently not separated by sex) (available in digital form at <http://www.bodley.ox.ac.uk/cgi-bin/ilej/image1.pl?item=page&seq=1&size=1&id=bu.1851.2.x.9.x.x.90> [<https://perma.cc/7TAN-VH62>]); see also ALLSOP, *supra* note 191, at 46 (featuring an illustration of plans for a washroom showing no sex-separation).



*Figure 6: An unidentified New York public bathhouse, architect's rendering<sup>263</sup>*

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263. Source: MAYOR'S COMM., *supra* note 206, at 29.

