

Putting the Bathroom Debate to Rest

Author : Ruthann Robson

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Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 **Ohio St. L. J.** (forthcoming, 2017), available at [SSRN](#).

The site of toilets as a social justice struggle is at least as old as plumbing. Biological necessity and the unacceptability (and often criminalization) of public urination or defecation led to “restrooms” being made widely available. Public toilets— meaning any facility outside the home and including commercial, work, and educational places—are a necessity if one wants to travel, engage in business, be employed, or pursue an education. But while bodily requirements are almost universal, public toilets have been less democratic. At one time, many restroom facilities bore racially restrictive signs. Economic class divisions explicitly and implicitly sorted people. Access to toilets for people with disabilities has been uneven. And restrooms continue to be designated by gendered symbols announcing sex-segregated usage.

Professor Ruth Colker, an established authority in gender, sexuality, and disability law, intervenes in the current debate surrounding sex-segregated restrooms and suggests an elegantly simple solution. This solution sidesteps the convoluted machinations that have recently suffused the problem.

Interpreting Title IX of the Education Amendments of 1972, the Obama Administration issued “guidance that required educational entities to allow students and faculty to use the communal, sex-designated restroom with which they self-identify and not limit transgender members of the community to restrooms with single stalls.” The United States Supreme Court was poised to hear the issue, granting certiorari to the Fourth Circuit’s decision in favor of the student in *Gloucester County School Board v. G.G.* But before oral argument, the new Administration [rescinded the guidance](#). The Court then issued a [one sentence order](#) vacating and remanding the Fourth Circuit opinion for further consideration in light of the new Administration’s action. Thus, the possibilities that the issue would be determined on administrative law grounds receded. Yet even before these developments, Colker sought to raise a different question than that raised by the *G.G.* litigation. Colker pivots to the question of whether it is constitutional for governments to *require* sex-segregated restrooms.

Interestingly, and often ignored in the scholarship, governments usually do require sex-segregated facilities. For example, as Colker notes, the New York State Plumbing Code provides: “Where plumbing fixtures are required, separate facilities shall be provided for each sex.” This imposition of sex-segregated restrooms then allows the challenge to this state action under traditional equal protection doctrine. For Colker, the challenge sounds in sex-role stereotyping that the state cannot solve by reference to formal equality. She rejects the possibility that “biological differences” have any purchase because at “home, men and women are able to use the same restroom design.”

Instead, sex-segregation justifications are based on the state interests of privacy and of safety. Analogizing to established constitutional equal protection cases such as *United States v. Virginia* (VMI) (1996), authored by Justice Ruth Bader Ginsburg, Colker argues that these justifications are pretextual (not genuine) and not sufficient, as well as not being served by the sex-segregation. Colker suggests that the privacy and protection arguments do not simply flow from a desire to protect the female sex from male violence—an assumption relying on gendered stereotypes and heterosexual norms—but also arise from desires to protect men. Men, on this view, need privacy and to be protected from a “continuing discomfort that men may feel in even thinking about women’s private bodily processes,” including menstruation.

More implicitly, when Colker articulates the harm to women from exclusion from all-male space including restrooms—exemplified by then-Presidential candidate John Kerry’s comment about the surprising “number of people”

who tried to introduce themselves to him in the men's room—she acknowledges men being protected from women's judgments and able to engage in "locker room" talk, as another Presidential candidate recently phrased sexist remarks.

Colker does address the lived experience of transgendered individuals who may be validated by sex-segregated facilities when they are able to use the facilities that conform to their own gender identity. Colker however does not delve deeply into the theoretical distinctions surrounding gender-identity, gender-expansion, and gender-abolition. Instead, Colker suggests that the norm of sex-segregation must end. She concludes that the sex-segregation norm that we sometimes subject to exceptions should be replaced by a non-segregation norm. This uni-sex norm for restrooms might likewise be subject to some exceptions on the basis of safety, assuming the need for the exception was grounded on the best available objective evidence and no modifications to the restroom design would mitigate the problems.

Colker admits norming sex-integration rather than sex-segregation might feel uncomfortable at first. But she concludes that while flipping the default rule might take some getting used to, we'd get used to it. And, she implies, we'd wonder why sex-segregated restrooms were ever the norm.

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