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Privacy as Pretext

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PRIVACY AS PRETEXT

Susan Hazeldean†

The terms of the debate over LGBT rights have shifted in recent years, particularly since the Supreme Court made marriage equality the law of the land in Obergefell v. Hodges. Today, people against LGBT equality argue that curtailing LGBT rights is necessary to protect the rights of others. One potent rhetorical weapon used to oppose LGBT rights is the claim that antidiscrimination protections for LGBT people undermine privacy because they permit transgender people to use facilities that accord with their gender identity. This Article uses legal privacy theory to show that allowing transgender people into gendered facilities does not undermine privacy in any legally cognizable sense. In making this argument, I engage with the work of scholars who have developed various philosophical understandings of privacy thought to justify a legal right to its protection. Privacy has been conceptualized as: a “right to be let alone”; a means to limit access to the self; a safeguard of intimacy; a right to control information; a defense for personhood; and protection for social networks. But none of these conceptions of privacy support a right for cisgender¹ objectors to exclude transgender people from facilities that accord with their gender identity. Indeed, examining the issue through these privacy theories shows that excluded transgender people are the ones whose privacy is violated.

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¹ Throughout this Article, I use the term “cisgender” to describe people who are not transgender; a cisgender woman is one who was assigned female at birth, while a cisgender man is one assigned male at birth.

Opponents' privacy claims are just a pretext to justify rolling back antidiscrimination protections for LGBT people.

I also show that accepting a privacy right to exclude transgender people from gendered facilities would harm all women and girls. The privacy arguments being made to oppose LGBT rights echo a troubling history of using privacy concerns to justify unequal treatment of women. They also reify negative stereotypes about men and women, undermining sex equality and making all people more vulnerable to discrimination, mistreatment, and assault.

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INTRODUCTION

The terms of the debate over LGBT rights have shifted in recent years, particularly since the Supreme Court made marriage equality the law of the land in *Obergefell v. Hodges*.² Formerly, those opposed to LGBT rights made broad claims that homosexuality and gender variance were morally wrong and argued that states should limit LGBT people's rights in order to uphold traditional values.³ Post-*Obergefell*, traditionalists know that such arguments are unlikely to succeed in courts or even in political campaigns. But opposition to LGBT rights has not gone away; instead, opponents simply frame their claims differently.⁴ Today, those opposed to LGBT equal-

² 135 S. Ct. 2584 (2015).

³ See Shannon Price Minter, "Déjà Vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality, 95 N.C. L. REV. 1161, 1175 (2017).

⁴ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553 (2015) (not-

ity argue that curtailing LGBT rights is necessary to protect the freedom and dignity of others. Traditionalists claim that anti-discrimination protection for LGBT people invades the privacy of women and girls by permitting men to enter women's bathrooms. An asserted need to safeguard women's privacy has become a rallying cry for the opponents of laws forbidding discrimination based on gender identity or sexual orientation.

But the privacy concerns asserted in opposition to anti-discrimination protections for LGBT people are nothing more than a pretext to justify continued discrimination.⁵ This Article uses legal privacy theory to demonstrate that there is no genuine privacy interest in excluding transgender people from facilities that accord with their gender identity. In making this argument, I engage with the work of scholars who have identified philosophical conceptions of privacy that justify a legal right to its protection. Privacy has been described variously as: a "right to be let alone";⁶ a means to limit access to the self;⁷ a safeguard of intimacy;⁸ a right to control information;⁹ a defense for personhood;¹⁰ and protection for social networks.¹¹ A

ing that "[w]hen defenders of traditional marriage can no longer persuade by appeal to shared beliefs about the wrongs of same-sex relationships, they may instead appeal to beliefs about the importance of protecting religious pluralism, revising the secular rationale for the claim in a way that gives more direct and uninhibited expression to its religious logic. Accommodating complicity-based conscience claims in these circumstances may function to enable 'preservation through transformation': when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that preserve elements of the challenged regime.")

⁵ I do not dispute that some who seek to exclude transgender people from gendered facilities are sincerely anxious about their presence. But even when a cisgender objector genuinely feels threatened by a transgender woman using the women's bathroom, for example, the underlying motive for that unease is discriminatory: the person objecting believes the transgender woman is not a "real" woman or views her as disordered or dangerous because of her gender identity. Viewing a person in that light simply because she is transgender is discrimination based on sex, gender, and gender identity. So, while the objector purports to be concerned about privacy, the actual underlying motivation is anti-transgender discrimination, and privacy is therefore a pretext.

⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

⁷ Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 423 (1980).

⁸ Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 280 (1977).

⁹ ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

¹⁰ J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702.

¹¹ Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 970 (2005).

careful examination demonstrates that none of these varied conceptions of privacy support a right for cisgender objectors to exclude transgender people from facilities that accord with their gender identity.

My legal privacy theory analysis also shows that it is transgender people excluded from facilities matching their gender identity who truly face grave privacy violations. Exclusionary policies forcing transgender people to use sex-segregated facilities according to their assigned sex at birth cause significant privacy problems, including outing transgender people, undermining their ability to live according to their true gender identity, and encouraging anti-transgender bullying and harassment. A desire for privacy in the bathroom is legitimate, but policies that allow transgender people to use bathrooms that accord with their gender identity do not undermine privacy.

This analysis is urgent because in state legislatures across the country,¹² lawmakers are considering bills with the stated purpose of safeguarding women's and children's privacy¹³ by forbidding people from using a bathroom that does not accord with their "biological sex."¹⁴ These measures have names like

¹² S.B. 206, 2017–2018 Leg., Reg. Sess. (Kan. 2017). Other proposed bills include the Arkansas Physical Privacy and Safety Act, S.B. 774, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Child Privacy Act, H.B. 664, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); Kentucky Student Privacy Act, H.B. 141, 2017–2018 Gen. Assemb., Reg. Sess. (Ky. 2017); Student Physical Privacy Act, H.B. 41, 90th Leg., Reg. Sess. (Minn. 2017); Montana Locker Room Privacy Act, H.B. 609, 65th Leg., Reg. Sess. (Mont. 2017). Many of these bills are based on model legislation drafted by the Alliance Defending Freedom, an organization that claims to "promote[] religious liberty and marriage and the family" and frequently undertakes litigation and legislative campaigns to oppose LGBT rights. See *Regarding H.B. 15-1081 Concerning the Protection of Physical Privacy in Sex-Segregated Locker Rooms Before the H. Comm. On State, Veterans & Military Affairs*, 70th Leg., Reg. Sess. (Colo. 2015) (statement of M. Norton, Senior Counsel, Alliance Defending Freedom), [http://www.leg.state.co.us/CLICS/CLICS2015A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/4f3a48ec0a54330687257de2005e3f8c/\\$FILE/15HouseState0204AttachC.pdf#page=5](http://www.leg.state.co.us/CLICS/CLICS2015A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/4f3a48ec0a54330687257de2005e3f8c/$FILE/15HouseState0204AttachC.pdf#page=5) [<https://perma.cc/2WSP-WT4M>] [hereinafter "Norton Statement"].

¹³ In the 2017 legislative session, six states considered legislation that would preempt municipal and county-level antidiscrimination laws, another sixteen considered bills to restrict access to sex-segregated facilities on the basis of "biological sex" rather than gender identity, and fourteen considered legislation that would restrict transgender students' ability to use school facilities that accord with their gender identity. Joellen Kralik, *'Bathroom Bill' Legislative Tracking*, NAT'L CONF. ST. LEG. (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/MTT6-GR83>].

¹⁴ Some proposed bills also impose criminal penalties on people who use a public bathroom or other facility that does not match their sex assigned at birth or impose civil liability on entities that permit people to use gendered facilities that

the Student Privacy Protection Act and are supposed to protect young women's dignity and physical integrity.¹⁵ Proponents claim that these bills are a necessary, or even an emergency, response to a threat created by the LGBT community's demand for protection from discrimination in employment and public accommodations: the threat that such antidiscrimination protections will facilitate men entering women's bathrooms.¹⁶ They argue that these measures must be enacted to protect women and girls from grave privacy violations.¹⁷

Traditionalists have also challenged transgender-inclusive policies in court by claiming that schools or employers who allow transgender people to use facilities that match their gender identity have violated cisgender people's privacy.¹⁸ These arguments have taken a number of forms: substantive due process claims to bodily privacy;¹⁹ a claim that protecting privacy is an important state interest that justifies sex discrimination or provides a rational basis for it;²⁰ and arguments that the Civil Rights Act's Title VII and Title IX prohibitions on sex discrimination could not possibly include a right for trans-

do not conform to their birth-assigned sex. See, e.g., H.B. 244, 64th Leg., Reg. Sess. (Wyo. 2017), <https://www.wyoleg.gov/2017/Introduced/HB0244.pdf> [<https://perma.cc/UWT2-CVKC>] (redefining the crime of public indecency to include "knowingly us[ing] a public bathroom or changing facility designated to be used by a specific sex which does not correspond to the person's sex identified at birth by the person's anatomy"); H.B. 1612 § 2.2-3908, 2017 Leg., Reg. Sess. (Va. 2017), <https://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB1612> [<https://perma.cc/975Q-97HJ>] (proposing to impose civil liability on entities that permit people to use gendered facilities that do not conform to the sex they were assigned at birth).

¹⁵ Proponents of such efforts refuse to accept that transgender women are women too, women whose privacy interests will be directly harmed by such legislation. See *infra* Part III.

¹⁶ See *infra* Part II.

¹⁷ The Alliance Defending Freedom, for example, has argued that a state law forbidding discrimination on the basis of sexual orientation has "significantly increased public safety risk primarily to women and to children" and as a result "[p]arents are concerned about the safety and privacy of their children," and "husbands are justifiably concerned about the safety and privacy of their spouses." Norton Statement, *supra* note 12.

¹⁸ See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 330, 376 (E.D. Pa. 2017) (where plaintiffs alleged that their school district's practice of allowing transgender students to use bathrooms and locker rooms consistent with their gender identity violated their right to privacy under the Fourteenth Amendment and Pennsylvania common law).

¹⁹ See *id.* at 376.

²⁰ See, e.g., *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (where defendants claimed that under the Fourteenth Amendment's Equal Protection Clause, policies directed at transgender individuals need only be rationally based in concern for privacy to pass constitutional muster).

gender people to use sex-segregated facilities that accord with their gender identity.²¹ While some courts have rejected these arguments, others have been receptive to them.²²

By examining the privacy concerns asserted in opposition to antidiscrimination protections for LGBT people through the lens of legal privacy theory, this Article demonstrates that attempts to exclude transgender women from women's facilities do not protect women's privacy or safety. Indeed, these efforts are not only unhelpful to women's interests, they are harmful. Excluding transgender women from women's bathrooms on privacy grounds hurts all women, including cisgender women. It does so by reifying dangerous sex stereotypes that have been used to exclude women from public life and to justify sexual violence. Efforts to exclude transgender people from facilities that accord with their gender identity are better understood as struggles to oppose LGBT rights and maintain traditional sex and gender roles rather than as a defense of privacy. Far from protecting women and girls, the privacy arguments being made to oppose LGBT rights perpetuate negative stereotypes about women and men, undermining sex equality and making people more vulnerable to discrimination, mistreatment, and assault.

The Article proceeds as follows: Part I discusses how privacy concerns have historically been used to justify discrimination against women and their exclusion from public life and cautions that a stated concern for protecting privacy may be used to limit, rather than expand, women's rights. Part II explains how privacy claims have arisen in legal disputes about transgender people's access to facilities that accord with their gender identity. Part III describes the theoretical justifications for privacy rights advanced by scholars in the field and examines whether the asserted privacy interest in excluding transgender women from women's bathrooms fits the existing theoretical framework. I argue that the claimed privacy interest in excluding transgender people is a poor fit with privacy doctrine and cannot form a legally cognizable interest. In fact, it is transgender people facing such exclusions who have genu-

²¹ See, e.g., *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 865–66 (S.D. Ohio 2016).

²² Compare, e.g., *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 528 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (holding that a school district's policy of allowing transgender students access to bathrooms and locker rooms that reflected their gender identity served a compelling state interest in not discriminating against transgender students and was narrowly tailored to advance that interest), with *Johnston*, 97 F. Supp. 3d at 672 (rejecting a transgender student's equal protection claims).

ine privacy concerns worthy of legal protection. Part IV argues that, far from protecting women and girls, accepting a privacy rationale for excluding transgender women from women's facilities reifies pernicious stereotypes about women being seductive objects who tempt men into sexual violence.

I

THE HISTORICAL USE OF PRIVACY AS A PRETEXT FOR DISCRIMINATION AGAINST WOMEN

While the constitutional right to privacy has been used to win important advances in women's rights, the concept of privacy has a checkered history for women. In the nineteenth and early twentieth centuries, privacy was more frequently invoked by courts to deny women's rights than to uphold them. In the Victorian era, rapid industrialization moved the locus of production from the home to the factory.²³ The nineteenth century saw huge numbers of women joining the public workforce in mills, factories, and other industrial settings. For example, young white women were the majority of workers in textile mills from their founding in Lowell, Massachusetts in 1822.²⁴ Women also joined social reform and suffrage movements and began to participate in public social settings such as theaters. But this caused consternation. "[A]ny move by women outside the domestic sphere was viewed by many people with serious concern, for the growing number of women in public spaces evidenced a 'living contradiction of the cult of true womanhood.'"²⁵

The notion of "separate spheres" developed, in which women were seen to belong in the secluded, protected setting of the home, while men alone were suited for the challenges and opportunities of public life.²⁶ The Victorian "cult of true womanhood" held that (white) women were more pure and virtuous than men.²⁷ It thus cast (white) women as guardians of morality who had the duty to civilize men and nurture the next generation. Simultaneously, this ideology viewed (white) women as delicate, fragile creatures incapable of withstanding

²³ CATHERINE CLINTON, *THE OTHER CIVIL WAR* 18 (1984).

²⁴ *Id.* at 27; Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 21 n.78 (2007).

²⁵ Terry S. Kogan, *Sex Separation: The Cure for Victorian Social Anxiety*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 147 (Harvey Molotch & Laura Norén eds., 2010) (quoting CYNTHIA EAGLE RUSSETT, *SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD* 10 (1989)).

²⁶ CLINTON, *supra* note 23, at 18–19.

²⁷ Kogan, *supra* note 25, at 146–47.

hard physical or intellectual labor. Women were viewed as weak and childlike. They were to be cosseted at home, separate and apart from modern industrial life.²⁸ Domesticity thus became women's highest calling. Women were expected to be self-sacrificing, pious, gentle, and nurturing, tending to the needs of others in the home.

The private setting of the home was not necessarily a safe and protected place for women, however. A man had the right to control his wife and dictate her behavior. A husband could legally subject his wife to physical punishment if she failed to obey him.²⁹ The right of chastisement empowered men to strike their wives, although only a stick no wider than a thumb was supposed to be used.³⁰ But to preserve the home as a private repose, the law refused to intervene when husbands committed domestic violence against their wives.³¹ Until the late twentieth century, a husband could also legally force his wife to have sex with him against her will. The marital rape exemption was recognized at common law and every state also had a statute codifying it.³² Marriage was an absolute defense to any rape charge, no matter how brutal or horrific the violation.³³ As Reva Siegel pointed out, "privacy talk was deployed in the domestic violence context to enforce and preserve authority relations between man and wife."³⁴ Far from protecting

²⁸ "Women who move around outside the home, especially if it is out in the city versus, say, in a rural village, are 'out of control,' a phrase significantly also used of the prostitute and for both the urologically and morally 'incontinent' (a word with many meanings)." Clara Greed, *Creating a Nonsexist Restroom*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 25, at 121.

²⁹ Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2123 (1996) ("As master of the household, a husband could command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority.").

³⁰ Beirne Stedman, *Right of Husband to Chastise Wife*, 3 *VA. L. REG.* 241, 243 (1917).

³¹ See, e.g., *State v. Black*, 60 *N.C. (Win.)* 262, 267 (1864) ("[U]nless some permanent injury be inflicted, or there be some excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain [to criminally prosecute a husband for assaulting his wife]. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.").

³² Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 *AM. CRIM. L. REV.* 1819, 1819 (2011).

³³ Cf. *Commonwealth v. Fogerty*, 74 *Mass. (8 Gray)* 489, 490 (1857) (noting that a defendant could always defend himself against a charge of rape by showing that "the woman on whom it was charged to have been committed was his wife").

³⁴ Siegel, *supra* note 29, at 2158.

women, the “ideology of the private sphere” created “a right of men ‘to be let alone’ to oppress women one at a time.”³⁵

At the same time, women’s efforts to attain a place in public life were “fought every step of the way, often with the complicity of the courts[.]”³⁶ The Supreme Court infamously held in *Bradwell v. Illinois* that a woman could be denied a license to practice law solely on the basis of sex.³⁷ Justice Bradley wrote that this holding was justified because “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”³⁸ In an era when the Court regularly struck down economic regulations designed to protect workers claiming they impinged upon a natural right to contract, it made an exception for legislation targeting women. The hours that women worked could be limited because “her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. . . . The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor[.]”³⁹ So laws forbidding women from working certain hours were permissible, even though such a statute to protect male workers would not pass constitutional muster. Women were delicate, and their most important responsibility was to bear healthy children. The state was therefore justified in excluding them from certain occupations to protect their physical, spiritual, and moral well-being. For example, in a challenge to a statute that forbade women from obtaining liquor licenses, the Supreme Court held: “The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line

³⁵ Catherine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 49, 53 (Jay L. Garfield & Patricia Hennessey eds., 1984).

³⁶ Teresa Godwin Phelps, *Gendered Space and the Reasonableness Standard in Sexual Harassment Cases*, 12 *NOTRE DAME J.L. ETHICS & PUB. POLY* 265, 279 (1998).

³⁷ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 136 (1872).

³⁸ *Id.* at 141 (Bradley, J., concurring).

³⁹ *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908).

between the sexes, certainly, in such matters as the regulation of the liquor traffic.”⁴⁰

It was against this backdrop that the practice of segregating bathrooms by gender developed. The first law mandating sex-segregated water closets was enacted by the Massachusetts legislature in 1887.⁴¹ It required that “suitable and proper wash-rooms 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.”⁴² As Terry S. Kogan points out, “policymakers were motivated to enact toilet separation laws aimed at factories as a result of deep social anxieties over women leaving their homes—their appropriate ‘separate sphere’—to enter the work force.”⁴³ It was not just bathrooms or locker rooms that were segregated by gender: separate “ladies lounges” were created in public spaces to give women a home-like setting where they could retreat.⁴⁴ Some public institutions also had designated access points just for women, such as a “ladies’ window” in the San Francisco post office.⁴⁵ Many workplaces failed to provide restrooms for women, however, sending a powerful signal that they were not welcome. The only bathroom on the floor of the U.S. Senate, for example, was labelled “Senators Only,” but was also men only.⁴⁶ Women serving in the Senate were forced to use a bathroom in the visitors’ gallery until 1993.⁴⁷

While it is comfortable to see such practices as anachronistic vestiges of a prior era, the refusal to provide bathrooms has continued to be used to exclude women from employment opportunities. “The basic nature of the need to eliminate waste, and the humiliation entailed in having to overcome obstacles to meet this need, make toilets the ideal choice, conscious or subconscious, for those bent on excluding outsiders from white

⁴⁰ *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), *abrogated by* *Craig v. Boren*, 429 U.S. 190 (1976).

⁴¹ Kogan, *supra* note 25, at 145.

⁴² Act of Mar. 24, 1887, ch. 103, §2, 1887 Mass. Acts 668 (quoted in Kogan, *supra* note 25, at 145).

⁴³ Kogan, *supra* note 25, at 145. *But see* W. Burlette Carter, *Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex*, 37 *YALE L. & POL’Y REV.* 227, 279 (2018) (arguing that sex-segregation in bathrooms was in effect much earlier; “even in Massachusetts, sex-separation in bathrooms was well established long before 1887, not only informally, but by regulations”).

⁴⁴ Kogan, *supra* note 25, at 152.

⁴⁵ *Id.*

⁴⁶ Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 *J. PLAN. LITERATURE* 267, 271 (2007).

⁴⁷ *Id.*

male preserves.”⁴⁸ Women going to work in male-dominated fields like firefighting or mining have been confronted with workplaces in which bathrooms are not provided at all or are restricted to men only. Courts do not always recognize such deprivations as actionable sex discrimination.⁴⁹ In *Hulbert v. Memphis Fire Department*, the Sixth Circuit Court of Appeals ruled that an employer’s failure to provide shower facilities for women supported Ms. Hulbert’s prima facie discrimination claim but she was not entitled to relief because there was no real evidence of damages.⁵⁰ Similarly, the Eighth Circuit Court of Appeals found that deficient restrooms for women did not support a hostile work environment claim.⁵¹ Failing to provide a woman worker with a portable toilet when she worked one-fifth of a mile from the nearest restroom was also ruled not severe enough to establish harassment claim.⁵² While the practice of segregating bathrooms by gender may seem benign, it “has negatively impacted women . . . by serving as a tool for keeping them out of male-dominated professions.”⁵³

In the 1970s, the campaign to ratify the Equal Rights Amendment (ERA) and write an explicit prohibition of sex discrimination into the Constitution foundered in part because of concerns about bathrooms.⁵⁴ ERA opponent Phyllis Schlafly claimed the amendment would be disastrous for women because it would, among other indignities, mandate unisex toilets.⁵⁵ Proponents insisted that the ERA would not infringe on

⁴⁸ Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263, 285 (1990).

⁴⁹ See Mary Anne Case, *All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655, 1655 (2007) (describing the Seventh Circuit’s rejection in *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000), of the claim that a failure to provide adequate female restroom facilities constituted sexual harassment).

⁵⁰ No. 99-5358, 2000 WL 924318, at *5 (6th Cir. June 28, 2000).

⁵¹ *Kline v. City of Kan. City Fire Dep’t*, 175 F.3d 660, 669 (8th Cir. 1999).

⁵² *Austin v. Minn. Mining & Mfg. Co.*, 193 F.3d 992, 994 (8th Cir. 1999).

⁵³ C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey’s Gender Identity Protection*, 61 RUTGERS L. REV. 409, 425 (2009).

⁵⁴ Petula Dvorak, *The Equal Rights Amendment Has Languished for Decades. Virginia Must Put It Over the Top*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/local/the-equal-rights-amendment-has-languished-for-decades-virginia-must-put-it-over-the-top/2018/11/29/c454c8f4-f3f0-11e8-80d0-f7e1948d55f4_story.html?utm_term=.8738620dffb9 [<https://perma.cc/QY5M-P7XC>].

⁵⁵ Schlafly also argued that ratification of the ERA would lead to women serving in combat and marriage being opened to same-sex couples. Both ideas caused great anxiety at the time but have since come to pass without tremendous social upheaval (and without ratification of the ERA). See Emily Crockett, *The Bizarre History of Bathrooms Getting in the Way of Equal Rights*, VOX (Dec. 30, 2015), <https://www.vox.com/2015/12/30/10690802/bathrooms-equal-rights-lgbtq> [<https://perma.cc/T64E-BX44>].

anyone's privacy;⁵⁶ ERA supporter Judy Carter called Schlafly's bathroom claim a "malicious rumor" that preyed upon the "deep, unspoken fear people have about bathrooms."⁵⁷ Despite these efforts to reassure the public, however, concerns about possible negative consequences of the ERA ultimately prevented its ratification. Anxiety about bathrooms was thus effectively deployed to prevent the enactment of explicit constitutional protections against sex discrimination.

This troubling history suggests some reason to be leery of calls to protect women by imposing even stricter gender segregation policies in bathrooms and other facilities supposedly to safeguard their privacy. As noted above, supposed concerns about privacy could be a pretext for discrimination rather than a genuine demand for women's rights. Opponents of LGBT equality are increasingly seeking to roll back antidiscrimination protections forbidding sexual orientation and gender identity-based discrimination in public accommodations on the basis that they foster privacy violations. Part II describes the use of privacy concerns as a basis for opposition to antidiscrimination laws.

II

THE DEPLOYMENT OF PRIVACY ARGUMENTS TO OPPOSE LGBT EQUALITY

The argument that laws protecting LGBT people from sexual orientation or gender identity discrimination violate women's privacy by allowing men to enter women's bathrooms has become increasingly common in the last few years. Opponents now regularly attack proposals to ban sexual orientation and gender identity discrimination in employment, housing, or public accommodations by labelling them "bathroom bills," even when they do not explicitly address access to sex-segregated facilities.⁵⁸ The trope that antidiscrimination bans will

⁵⁶ Timothy D. Schellhardt, *Interpreting ERA: Legal Experts Say Plan to Outlaw Sex Bias Is Widely Misunderstood*, WALL ST. J. (May 16, 1979).

⁵⁷ *Unisex Bathroom Rumors*, KINGMAN DAILY MINER, March 20, 1979, at 3, <https://news.google.com/newspapers?nid=YGhAHpnlhDoC&dat=19790320&printsec=frontpage&hl=en> [<https://perma.cc/LL95-M47T>].

⁵⁸ See Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1375, 1387 (2017) (describing how opponents defeated Houston's Equal Rights Ordinance by "tagging it a 'bathroom bill'" and how people against a Pennsylvania antidiscrimination bill similarly dubbed it a "Bathroom Bill"); see also Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 504-05 (2018) ("[R]eligious conservatives discovered they could convince

permit men to enter women's bathrooms and cause harm has become "the principle rhetorical weapon against protecting LGBT people from discrimination in public accommodations."⁵⁹ Traditionalists urge both legislators and members of the public to reject antidiscrimination legislation on the grounds that doing so is the only way to protect women and children who will otherwise fall victim to sexual predators.

When opponents describe the privacy harm that women may suffer if transgender women are allowed into the women's bathroom, they frequently raise the specter of sexual predation. But while many communities have had laws forbidding discrimination based on sexual orientation or gender identity for years, there have not been reports of sexual assaults in bathrooms as a result.⁶⁰ Twenty-one states,⁶¹ the District of Columbia,⁶² and more than 200 cities and counties have adopted nondiscrimination laws allowing transgender people to access sex-segregated facilities that accord with their gender identity.⁶³ Police, prosecutors, and human rights commissions in those communities have "consistently denied that there is any correlation between such policies and a spike in assaults."⁶⁴ The National Task Force to End Sexual Assault and

legislators and voters to repeal sexual orientation anti-discrimination laws by highlighting that the statutes' gender identity provisions created ambiguity about who could access sex-segregated facilities.").

⁵⁹ Wilson, *supra* note 58, at 1386.

⁶⁰ German Lopez, *Anti-Transgender Bathroom Hysteria, Explained*, VOX (Feb. 22, 2017), <https://www.vox.com/2016/5/5/11592908/transgender-bathroom-laws-rights> [<https://perma.cc/3QNU-WDJQ>] ("[E]xperts and officials in 12 states and 17 school districts with protections for trans people [reported] that they had no increases in sex crimes after they enacted their policies."); *What Experts Say*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/what-experts-say> [<https://perma.cc/F39G-QSND>] (noting that while many states cities have adopted laws protecting LGBT people from discrimination in public accommodations there has been "no increase in public safety incidents in restrooms in any of these cities or states") (last visited Sept. 4, 2019).

⁶¹ See Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2016) (amended by the Civil Rights Act of 2005, Assemb. B. 1400); COLO. REV. STAT. ANN. § 24-34-601 (2014); CONN. GEN. STAT. ANN. § 46a-64 (2017); Delaware Equal Accommodations Law, DEL. CODE ANN. tit. 6, § 4501 (amended by Gender Identity Nondiscrimination Act of 2013, S.B. 97, 147th Gen. Assemb., (2013)); HAW. REV. STAT. ANN. § 368-1; 775 ILL. COMP. STAT. ANN. 5/5-102 (2019); IOWA CODE ANN. § 216.7 (2007); ME. REV. STAT. tit. 5, § 4591; Fairness for All Marylanders Act of 2014, S.B. 212, Reg. Sess. (Md. 2014).

⁶² D.C. CODE § 2-1402.31.

⁶³ *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [<https://perma.cc/U4WZ-YCAG>] (last visited Sept. 4, 2019).

⁶⁴ Emanuella Grinberg & Dani Stewart, *3 Myths That Shape the Transgender Bathroom Debate*, CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/07/>

Domestic Violence noted that “[n]one of these jurisdictions have seen a rise in sexual violence or other public safety issues.”⁶⁵ A recent empirical study assessed whether reports of safety or privacy violations in public restrooms were more frequent in localities with gender identity nondiscrimination ordinances for public accommodations and found no evidence that privacy and safety in public restrooms changed as a result of the passage of such laws.⁶⁶ Rather, the evidence suggests that “the passage of such nondiscrimination laws is not related to the number or frequency of criminal incidents in such public spaces,” which are “exceedingly rare.”⁶⁷

Despite the lack of empirical proof that permitting transgender people to use the bathroom in accordance with their gender identity will result in any increase in sexual assault or violence, opponents of LGBT rights continue to argue that grave privacy and safety violations will result if schools, businesses, and government are forbidden to discriminate based on gender identity.⁶⁸ On February 22, 2016, the City Council in Charlotte, North Carolina, voted to amend a city ordinance forbidding public accommodation discrimination based on race, color, religion, national origin, or sex, to add “sexual orientation, gender identity, [and] gender expression.”⁶⁹ The mea-

health/transgender-bathroom-law-facts-myths/index.html [https://perma.cc/M82R-EDHG].

⁶⁵ *National Consensus Statement on Behalf of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NAT'L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN (Apr. 29, 2016), <http://www.endsexualviolence.org/wp-content/uploads/2017/09/STATEMENT-OF-ANTI-SEXUAL-ASSAULT-AND-DOMESTIC-VIOLENCE-ORGANIZATIONS-IN-SUPPORT-OF-EQUAL-ACCESS-FOR-THE-TRANSGENDER-COMMUNITY.pdf> [https://perma.cc/CS2N-DW6Q].

⁶⁶ Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *SEXUALITY RES. & SOC. POLY* 70, 80 (2019).

⁶⁷ *Id.*

⁶⁸ As Tobias Wolff points out, opponents have repeatedly used this tactic to reduce support for antidiscrimination legislation. “With striking consistency, opponents have invoked anxiety over the bathroom—who uses bathrooms, what happens in bathrooms, and what traumas one might experience while occupying a bathroom—as the reason to permit discrimination in the workplace, housing, and places of public accommodation. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 *HARV. L. & POLY REV.* 201, 201 (2012).

⁶⁹ Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016); Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7-4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016), <http://www.charlotteobserver.com/news/politics-government/article61786967.html> [https://perma.cc/DWP7-WFSG]; Greg Lacour, *HB2: How North Carolina Got Here (Updated)*, CHARLOTTE MAG. (Mar. 30, 2017), <http://www.charlottemagazine.com/Charlotte-Magazine/April-2016/HB2-How-North-Carolina-Got-Here/> [https://perma.cc/Q9FR-DJH8].

sure met with fierce opposition, which focused on its protections for transgender people. In particular, opponents claimed that the ordinance would lead to privacy and safety violations in bathrooms because the law permitted transgender people to use bathroom facilities that accorded with their gender identity rather than their sex assigned at birth.⁷⁰ Although the ordinance outlawed discrimination in public accommodations generally, including in taxis, bars, restaurants, and transportation,⁷¹ opponents labeled the bill a “bathroom ordinance,” and were remarkably successful in reframing debate about the law to focus solely on bathroom privacy.⁷² Indeed, the bill came to be commonly referred to as “the bathroom ordinance.”⁷³ After lengthy public debate, the measure was adopted, but the controversy continued. State lawmakers in the North Carolina legislature expressed outrage about the law immediately upon its enactment. North Carolina Senate President *pro tempore* Phil Berger claimed that the ordinance would “allow men to share public bathrooms with little girls and women,” and asked, “[h]ow many fathers are now going to be forced to go to the ladies’ room to make sure their little girls aren’t molested?”⁷⁴ North Carolina House Speaker Tim Moore similarly stated that the law needed to be changed “to protect children, who from the time they’ve been potty trained, know to go into the bathroom of their [G]od-given appropriate gender.”⁷⁵

The day after the Charlotte City Council adopted the anti-discrimination ordinance, North Carolina lawmakers called for a special legislative session to convene so that they could undertake legislative intervention to “correct [Charlotte’s] radical course.”⁷⁶ The North Carolina state legislature held a special

⁷⁰ Harrison, *supra* note 69 (noting that the “bathroom provision sparked the most opposition, with opponents mostly worried about the safety of women and girls in a public bathroom with people who were born male”).

⁷¹ Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016).

⁷² See *Charlotte Council Repeals ‘Bathroom’ Ordinance that Led to HB2; Sets Ultimatum for Legislature*, FOX 8 (Dec. 19, 2016), <http://myfox8.com/2016/12/19/charlotte-council-to-repeal-bathroom-ordinance-that-led-to-hb2-sets-ultimatum-for-legislature/> [<https://perma.cc/C38H-PRUN>].

⁷³ *Id.*

⁷⁴ Jim Morrill, *Republican Lawmakers Blast Charlotte’s LGBT Protections*, CHARLOTTE OBSERVER (Mar. 3, 2016), <http://www.charlotteobserver.com/news/politics-government/article63864677.html> [<https://perma.cc/4XXE-DK95>].

⁷⁵ Amy Elliott, *Group Rallies Against Proposed Special Session on Non-Discrimination Ordinance*, SPECTRUM NEWS, <https://spectrumlocalnews.com/nc/triangle-sandhills/news/2016/03/17/group-rallies-against-proposed-special-session-on-charlotte-s-non-discrimination-ordinance> [<https://perma.cc/P4FW-HWAT>] (last visited Jan. 8, 2019).

⁷⁶ Andrea Fox, *The Latest: House Speaker Supports Charlotte Vote Override*, EFFICIENTGOV (Feb. 23, 2016), <https://efficientgov.com/blog/2016/02/23/the->

session on March 23, 2016 to debate House Bill 2, the Public Facilities Privacy & Security Act (H.B. 2).⁷⁷ State representatives opined that the bill “sends a message to these municipalities who have been taken over by the liberal, homosexual, prohomosexual ideology that we are going to stick up for traditional values”⁷⁸ and was necessary to prevent a “pervert [from] walk[ing] into a bathroom [when] my little girls are in there.”⁷⁹ The special session lasted only one day, and the bill was passed fewer than twelve hours after it was introduced with almost no opportunity for public comment and little debate.⁸⁰ H.B. 2 amended North Carolina’s General Statutes to mandate that all public agencies and executive branch agencies, including local school boards and the University of North Carolina, designate all multiple occupancy bathrooms and changing facilities for use by persons “based on their biological sex.”⁸¹ The bill defined biological sex as “the physical condition of being male or female, which is stated on a person’s birth certificate.”⁸² H.B. 2 also barred municipalities from enacting antidiscrimination protections under local law and reserved the right to pass non-discrimination legislation solely to the state government. This stripped LGBT people of protection from public accommodations discrimination because North Carolina state law forbade discrimination only on the basis of disability, race, religion, color, national origin or “biological sex” and offered no protection from bias based on sexual orientation, gender identity, or gender expression.⁸³ Despite H.B. 2’s broad sweep, President *pro tempore* of the North Carolina Senate Phil Berger defended

latest-house-speaker-supports-charlotte-vote-override/ [https://perma.cc/LN4B-QATF].

⁷⁷ First Amended Complaint for Declaratory & Injunctive Relief at 32, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. Apr. 21, 2016).

⁷⁸ *Id.* at 35–36.

⁷⁹ *Id.* at 35.

⁸⁰ *Id.* at 32–33.

⁸¹ Public Facilities Privacy & Security Act of 2016, N.C. GEN. STAT. § 115C-521.2 (2016) [hereinafter H.B. 2].

⁸² *Id.*

⁸³ See N.C. GEN. STAT. ANN. § 143-422.11 (effective March 23, 2016 to March 29, 2017). Before the passage of H.B. 2, North Carolina state law only forbade public accommodation discrimination based on disability under N.C. Gen. Stat. § 168A-6 (2015). H.B. 2 enacted the Equal Access to Public Accommodations Act, which expanded the protected classifications to include race, religion, color, national origin and “biological sex,” but did not include sexual orientation or gender identity. H.B. 2 § 143-422.11, *supra* note 81. The Equal Access to Public Accommodations Act was repealed with the passage of House Bill 142, An Act to Reset S.L. 2016-3, § S.L. 2017-4, § 1 (effective March 30, 2017). Currently, North Carolina law forbids discrimination in public accommodations only on the basis of disability. N.C. GEN. STAT. § 168A-6 (2015).

the law as a “bathroom safety bill” that has “nothing to do with discrimination and everything to do with protecting women’s privacy and keeping men out of girls’ bathrooms.”⁸⁴ Similarly, North Carolina House Speaker Tim Moore claimed the bill was “about privacy” because the Charlotte ordinance “would have allowed a man to go into a bathroom, locker or any changing facility, where women are—even if he was a man. . . . Obviously there is the security risk of a sexual predator, but there is the issue of privacy.”⁸⁵

House Bill 2 generated enormous controversy following its enactment. Rallies in response to the law attracted hundreds of protesters.⁸⁶ Businesses, religious organizations, and community groups condemned the provision. Companies and performers opposed to the law cancelled business expansions and entertainment events in the state.⁸⁷ Sporting events were also affected; the National Basketball Association moved its All-Star Game from Charlotte in 2017, while the NCAA removed seven championships that were to be held in North Carolina during the 2016–17 academic year.⁸⁸ The cost to the state in lost

⁸⁴ Jeff Reeves, *NC Weighs Impact on HB2 After US Court Overturns Virginia Transgender Bathroom Rule*, CBS17 NEWS (Apr. 19, 2016), <http://www.cbs17.com/news/court-overturms-virginia-schools-transgender-bathroom-rule/1080696678> [<https://perma.cc/94X2-7VDM>].

⁸⁵ Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html> [perma.cc/EDC5-KLDQ].

⁸⁶ Mark Barrett, *Thousands Rally in Raleigh Over HB2*, CITIZEN TIMES (Apr. 26, 2016), <https://www.citizen-times.com/story/news/local/2016/04/25/thousands-hb2-demonstrators-descend-raleigh/83471994/> [<https://perma.cc/WU2Z-P2DP>].

⁸⁷ See Jana Kasperkevic, *PayPal Cancels North Carolina Center in Protest of Law That ‘Denies Equal Rights,’* GUARDIAN (Apr. 5, 2016), <https://www.theguardian.com/technology/2016/apr/05/paypal-cancels-north-carolina-center-charlotte-law-lgbt-discrimination> [<https://perma.cc/UU5U-M4GU>] (stating that PayPal cancelled plans for a new operation center in Charlotte, North Carolina, following the passage of HB2); Roger Yu, *Deutsche Bank to Freeze New Jobs in NC Due to New Transgender Law*, USA TODAY (Apr. 12, 2016), <https://www.usatoday.com/story/money/2016/04/12/deutsche-bank-freeze-new-jobs-nc-due-new-transgender-law/82932994/> [<https://perma.cc/JYZ7-UWSL>] (reporting that Deutsche Bank announced it would “freeze plans to create 250 new jobs at its software center in Cary, N.C.” because of HB2); *Decision on Whether to Boycott N.C. Over HB2 is Tough Call for Some Musicians*, MCCLATCHY REGIONAL NEWS (Apr. 24, 2016), https://www.journalnow.com/news/state/decision-on-whether-to-boycott-n-c-over-hb-is/article_1eb5610d-3890-50e5-9534-9dc0dc115129.html [<https://perma.cc/W35U-WNRL>] (describing how Bruce Springsteen, Ringo Starr, Boston, Ani DiFranco, Pearl Jam, and Cirque du Soleil cancelled performances in the state in protest over the law).

⁸⁸ Michael Gordon et. al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 30,

revenue from canceled conventions, concerts, and sporting events was estimated to be \$196 million, and the *Associated Press* estimated that the state would lose \$3.76 billion in revenue by the end of 2028 as a result of the law.⁸⁹ In November 2016, Republican Governor Pat McCrory lost his bid for reelection to Democrat Roy Cooper; his support of H.B. 2 was widely believed to be one of the reasons for his defeat.⁹⁰ Facing intense pressure to change the law in order to end boycotts against the state, particularly by the NCAA, the North Carolina legislature replaced H.B. 2 with H.B. 142 in March 2017.⁹¹

The new law was pitched as a repeal of H.B. 2, but it did not undo all the damage the original bill had done to LGBT people in North Carolina. The replacement statute forbids state agencies, offices, boards, and branches of government, including universities and local school boards, from regulating “access to multiple occupancy restrooms, showers, or changing facilities,” leaving such power solely in the hands of the North Carolina state legislature.⁹² No public institution in North Carolina can adopt a policy allowing transgender people to use sex-segregated facilities in accordance with their gender identity.⁹³ But in July 2017, the North Carolina governor and other executive branch officials entered into a consent decree holding that

2017), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [https://perma.cc/6ELR-G53W].

⁸⁹ *'Bathroom Bill' to Cost North Carolina \$3.76B, AP Analysis Finds*, NBC (Mar. 27, 2017), <https://www.nbcnews.com/feature/nbc-out/bathroom-bill-cost-north-carolina-3-76b-ap-analysis-finds-n738866> [https://perma.cc/GWQ4-BKEN]; see also Jack B. Harrison, *To Sit or Stand: Transgender Persons, Gendered Restrooms, and the Law*, 40 U. HAW. L. REV. 49, 99 (2017) (noting that “[i]n the months following the passage of H.B. [2], North Carolina faced a significant financial backlash”).

⁹⁰ See, e.g., Associated Press & Ariel Zilber, *North Carolina Lawmakers Set to Repeal Controversial 'Bathroom Bill' Which Requires Transgender People to Use Restrooms of Sex on Birth Certificate* (Dec. 20, 2016), <https://www.dailymail.co.uk/news/article-4048630/Incoming-governor-says-North-Carolina-repeal-LGBT-law.html> [https://perma.cc/C55F-56YU] (noting that McCrory's election defeat was “blamed partly on the controversial [HB2] law”); Chris Fitzsimon, *McCrory, the Mayor Who Never Figured Out How to Be Governor*, WINSTON-SALEM J. (N.C.) A16, Dec. 10, 2016, at A16 (opining that McCrory “actually lost the race [for reelection] on March 23 when he signed the sweeping anti-LGBT law HB2”).

⁹¹ Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals 'Bathroom Bill'*, CNN (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [https://perma.cc/GFS6-XP5].

⁹² Steve Harrison, *Does the HB2 Compromise Fix the State's Bathroom Dilemma? Maybe Not*, CHARLOTTE OBSERVER (Mar. 30, 2017), <https://www.charlotteobserver.com/news/politics-government/article141686774.html#storylink=cpy> [https://perma.cc/JT44-6Q7E].

⁹³ *Id.*

the new statute cannot be construed “to prevent transgender people from lawfully using public facilities in accordance with their gender identity.”⁹⁴ As such, transgender people in North Carolina are no longer barred from using bathrooms that accord with their gender identity, even though North Carolina schools, public universities, and other state institutions cannot by law adopt transgender-inclusive policies regarding access to sex-segregated facilities.⁹⁵

But while H.B. 2’s ban on bathroom usage has been lifted, its restriction on local antidiscrimination ordinances remains. The replacement law H.B. 142 prevents any city from “regulating private employment practices or regulating public accommodations” until December 2020, meaning that no city can enact antidiscrimination protections for LGBT people.⁹⁶ So LGBT people in North Carolina have no legal protection against discrimination at work or in public accommodations, and local communities cannot create such protection until December 2020. Those opposed to the original Charlotte antidiscrimination ordinance clearly achieved their objective despite the massive mobilization against H.B. 2 and its purported repeal.

A similar story played out in Texas. In 2014, the City Council in Houston, Texas, passed the Houston Equal Rights Ordinance (HERO), which prohibited discrimination in employment, housing, and public accommodation on the basis of a variety of traits, including sexual orientation and gender identity.⁹⁷ Opponents of the law collected signatures to put HERO to a public referendum.⁹⁸ The ordinance was voted down on November 3, 2015, after an intense campaign in which opponents of the ordinance “flooded radio and TV with ads saying the law [gave] men dressed in women’s clothing, including sexual predators, the ability to enter a woman’s restroom.”⁹⁹ Ad-

⁹⁴ Consent Judgment and Decree at 5, *Carcaño v. Cooper*, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. July 23, 2019).

⁹⁵ The decree is binding on the current governor and executive branch officials as well as their “successors, officers, and employees.” *Id.*

⁹⁶ Mark Joseph Stern, *The HB2 ‘Repeal’ Bill Is an Unmitigated Disaster for LGBTQ Rights and North Carolina*, SLATE (Mar. 30, 2017), http://www.slate.com/blogs/outward/2017/03/30/hb2_repeal_bill_is_a_disaster_for_north_carolina_and_lgbtq_rights.html [https://perma.cc/W3KE-776D].

⁹⁷ Katherine Driessen, *Claims About Restroom Access Dominate HERO Debate*, HOUS. CHRON. (Oct. 15, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Claims-about-bathroom-access-dominate-HERO-debate-6572325.php> [https://perma.cc/4LMB-NRJ4].

⁹⁸ Alexa Ura, *Houston Ordinance Vote a Test for LGBT Advocates*, TEXAS TRIBUNE (Oct. 28, 2015), <https://www.texastribune.org/2015/10/28/houston-ordinance-vote-next-big-test-lgbt-advocate/> [https://perma.cc/7ZFB-HUP7].

⁹⁹ Driessen, *supra* note 97.

vertisements by the group Texas Values Action showed a transgender woman using a woman's locker room and posing a threat to other women in the facility.¹⁰⁰ Another TV ad showed a man bursting into a bathroom stall occupied by a young girl.¹⁰¹

After successfully repealing the Houston ordinance, Texas conservatives came close to prohibiting municipal antidiscrimination laws across the state. In 2017, the Texas Senate passed Senate Bill 6, a proposed law similar to North Carolina's H.B. 2 that would have preempted any local nondiscrimination ordinance that allowed transgender people to use bathrooms in accordance with their gender identity.¹⁰² The bill also mandated that people use bathrooms in public schools, universities, and government buildings that match their "biological sex."¹⁰³ The stated purpose of the law was to ensure that "residents have a reasonable expectation of privacy when using intimate facilities."¹⁰⁴ Sponsor Senator Kolkhorst said the bill would "provide privacy and safety that Texans expect," and would protect women and girls from being victims of voyeurs and sexual predators in women's bathrooms.¹⁰⁵ The proposal drew strong opposition from the business community, civil rights groups, and law enforcement.¹⁰⁶ Police chiefs from around the state testified that enforcing the bill would draw law enforcement resources away from more important priorities.¹⁰⁷ Business leaders, including Fortune 500 companies based in Texas, spoke out against the bill and claimed it would cost the

¹⁰⁰ German Lopez, *The Ugly Myth About Transgender People Opponents of a Houston Civil Rights Law Used to Win*, VOX (Nov. 3, 2015), <https://www.vox.com/2015/10/20/9576343/hero-houston-bathroom-myth> [<https://perma.cc/M2XG-AZ7U>].

¹⁰¹ Driessen, *supra* note 97.

¹⁰² Chris Johnson, *Texas Senate Approves Anti-Trans Bathroom Bill*, WASH. BLADE (Mar. 15, 2017), <https://www.washingtonblade.com/2017/03/15/texas-senate-approves-anti-trans-bathroom-bill/> [<https://perma.cc/BE7B-KXGT>].

¹⁰³ "Biological sex" is defined as "the physical condition of being male or female, which is stated on a person's birth certificate." S.B. 6 § 5, 85th Leg., Reg. Sess. (Tex. 2017), <https://apps.texastribune.org/texas-bathroom-bill-annotated/> [<https://perma.cc/8WNE-6RPV>].

¹⁰⁴ *Id.* § 1(4).

¹⁰⁵ Jeremy Wallace, *Bathroom Bill Wins Key Vote in Texas Senate*, HOUS. CHRON. (July 26, 2017), <https://www.chron.com/news/politics/texas/article/Bathroom-bill-wins-key-vote-in-Texas-Senate-11402981.php> [<https://perma.cc/A9ZZ-G3G7>].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

state \$5.6 billion through 2026.¹⁰⁸ The bill died in the Texas House of Representatives after the House speaker refused to refer it to a committee for consideration.¹⁰⁹ While the measure did not pass in 2017, prominent lawmakers appeared committed to considering it again in future legislative sessions. Lieutenant Governor Dan Patrick told reporters that the bill would be back next session “[b]ecause the people will demand it,” adding: “The issue is not going to go away.”¹¹⁰

Similar provisions have been debated across the country. In the 2017 legislative session sixteen states considered legislation to restrict access to multiple occupancy bathrooms and other sex-segregated facilities on the basis of sex assigned at birth or “biological sex.”¹¹¹ Proposed legislation in another fourteen states would have limited transgender students’ access to sex-segregated facilities that accord with their gender identity at school.¹¹² Six more states considered legislation to preempt local antidiscrimination laws,¹¹³ although only North Carolina passed such a law.¹¹⁴ In November 2018, Massachusetts held a state-wide referendum on whether to retain a law outlawing discrimination on the basis of gender identity in public accommodations.¹¹⁵ Opponents of the antidiscrimination measure argued that it should be repealed because it

¹⁰⁸ Jonathan Berr, *In Texas, It's Business Vs. the Bathroom Bill*, CBS NEWS (July 27, 2015), <https://www.cbsnews.com/news/texas-bathroom-bill-opposed-by-businesses/> [<https://perma.cc/3KXQ-Q2YY>].

¹⁰⁹ Alexa Ura, *After Months of Controversy, Texas Bathroom Bill Dies Quietly*, LONGVIEW NEWS-JOURNAL (Aug. 16, 2017), https://www.news-journal.com/news/state/after-months-of-controversy-texas-bathroom-bill-dies-quietly/article_e0569592-1894-59fb-b827-c6b7db58800c.html [<https://perma.cc/L3SF-HYTR>].

¹¹⁰ David Montgomery & Manny Fernandez, *Texas Bathroom Bill Dies Again, Raising Republican Acrimony*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/us/politics/texas-bathroom-bill-dies-again-raising-republican-acrimony.html> [<https://perma.cc/QS73-SFPN>].

¹¹¹ These states are Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. “*Bathroom Bill*” *Legislative Tracking*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/3Y6T-5V45>].

¹¹² These states are Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New Jersey, New York, Oklahoma, South Dakota, Tennessee, Texas and Virginia. *Id.*

¹¹³ These states are Missouri, Montana, North Carolina, South Carolina, Texas and Virginia. *Id.*

¹¹⁴ House Bill 2 and then House Bill 142 discussed in detail *infra*.

¹¹⁵ Julie Moreau, *Massachusetts Backs Transgender Rights in Historic State-wide Referendum*, NBC NEWS (Nov. 7, 2018), <https://www.nbcnews.com/feature/nbc-out/massachusetts-backs-transgender-rights-historic-statewide-referendum-n933516> [<https://perma.cc/PNN8-AY4D>].

“eliminate[d] the right to privacy and safety in public restrooms, locker-rooms, showers and changing facilities.”¹¹⁶ Massachusetts voters opted to retain the antidiscrimination law, an encouraging result for transgender advocates in the first state-wide referendum on transgender rights.¹¹⁷ LGBT-rights activists feared that a vote to repeal the antidiscrimination protections would likely have prompted “a wave of similar efforts to roll back protections in other states.”¹¹⁸

While obtaining access to gender-appropriate bathrooms may not be the number one goal for transgender advocates,¹¹⁹ restrooms certainly are not a trivial issue for the transgender community. Using the bathroom in public places presents serious challenges for transgender people, who may face verbal harassment, physical attacks, sexual assault, or being denied access to the toilet altogether. This has serious life consequences. “Transgender people are forced out of employment and school because they are denied access to bathrooms.”¹²⁰ In a recent survey of transgender Americans, 12% reported being verbally harassed in public restrooms within the previous year, while 1% were physically attacked, and 1% were sexually assaulted.¹²¹ Another 9% said someone had denied them access to a bathroom.¹²² Perhaps not surprisingly, transgender people were afraid to use the bathroom; almost 60% had avoided using public restrooms for fear of confrontation.¹²³ Just under a third of transgender people said they limited the amount they ate or drank at least once in the previous year so they did not need to use a public restroom.¹²⁴ This reluctance

¹¹⁶ KEEP MASSACHUSETTS SAFE, <https://www.keepmasafe.org/> [<https://perma.cc/YJA3-CCZD>] (last visited Mar. 15, 2019).

¹¹⁷ Moreau, *supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ See Shannon Price Minter, “*Déjà Vu All Over Again*”: *The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1191 (2017) (arguing that “if transgender advocates were able to choose their own priorities, equal treatment in restrooms, in and of itself, would likely fall lower on the scale than ensuring that transgender people are able to work, attend school, be free from hate violence, have access to homeless shelters and medically necessary care, secure accurate state-issued identification, raise children, obtain asylum, and be protected from violence and abuse in prisons, jails, and detention facilities”).

¹²⁰ Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 137 (2010).

¹²¹ SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 226–27 (2016). The 2015 survey of 27,715 respondents reached an estimated 2% of the adult transgender population.

¹²² *Id.* at 225.

¹²³ *Id.* at 228.

¹²⁴ *Id.* at 229.

to use the bathroom often had health consequences: 8% of transgender people surveyed reported that avoiding going to the restroom had caused them to suffer a medical problem such as a kidney or urinary tract infection, or another kidney-related medical issue.¹²⁵ Unfortunately, transgender people may view risking such health problems as the lesser of two evils; as one commentator put it, for a transgender person, “the public restroom is the closest thing to hell.”¹²⁶

When transgender people seek permission to use facilities that accord with their gender identity at their school or work, privacy concerns are often used to justify denying access.¹²⁷ Employers and school districts argue that permitting transgender people to utilize the facility that matches their gender identity, as opposed to their sex assigned at birth, will invade the privacy of other, cisgender people.¹²⁸ One transgender woman resigned her position and filed suit after her employer refused to allow her to use the women’s bathroom at work.¹²⁹ The company claimed it was “attempting to accommodate the conflicting concerns of [the transgender employee] and the female employees who expressed uneasiness about sharing their restroom with a male.”¹³⁰ Despite a state law banning discrimination on the basis of sexual orientation and gender identity, the employer’s action was deemed nondiscriminatory; the Minnesota Supreme Court noted that “the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender” and therefore ruled that the employer had not violated federal or state law forbidding discrimination on the basis of sex or sexual orientation.¹³¹ An-

125 *Id.*

126 MATT KAILEY, JUST ADD HORMONES: AN INSIDER’S GUIDE TO THE TRANSSEXUAL EXPERIENCE 143–44 (2005) (also noting that “[r]estroom use is probably the biggest single issue for a person transitioning on the job, and it’s a major discussion point in any trans support group”).

127 Of course, people with a nonbinary gender identity who are neither male nor female may not have access to any bathroom facility that accords with their gender identity. See Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 981 (2019) (noting that “the presence of a nonbinary person in either the men’s or women’s restroom may result in harassment or even violence”).

128 See, e.g., *Goins v. W. Grp.*, 635 N.W.2d 717, 721 (Minn. 2001) (employer refused to permit a transgender woman to use the women’s bathroom because cisgender women employees objected); *Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (school denied transgender schoolgirl permission to use the girl’s bathroom, citing concerns about the privacy of cisgender girls).

129 *Goins*, 635 N.W.2d at 721.

130 *Id.*

131 *Id.* at 723.

other court found an employer who fired a transgender woman who refused to use the men's bathroom at work had not violated Title VII because the company "only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms."¹³² Landlords have also refused to lease space to tenants on similar grounds. In *Hispanic Aids Forum v. Estate of Bruno*, a New York landlord refused to rent office space to a nonprofit that served transgender clients.¹³³ The company said it declined to renew the organization's lease because "other tenants in the building were complaining" about the transgender clients' bathroom usage.¹³⁴ Again, despite a local law forbidding discrimination based on gender identity, the court found the landlord's actions were not contrary to law. It held the organization's transgender clients were merely "prohibited from using the restrooms not in conformance with their biological sex, as were all tenants."¹³⁵

Employers who do permit transgender workers to use the bathroom that accords with their gender identity may face protests or even litigation from cisgender employees. School teacher Carla Cruzan sued the school district where she worked after a transgender woman coworker was permitted to use the women's bathroom there.¹³⁶ Cruzan argued that because of the school district's actions, she had been "forced to share the restroom with a biological male."¹³⁷ She believed her coworker's use of the women's bathroom was "an invasion of her 'personal privacy as a female,'" "humiliating to her as a female," and a deprivation of her "sexual modesty."¹³⁸ She sued, alleging violations of Title VII.¹³⁹ The court granted the defendant school district's motion for summary judgment, however, holding that Cruzan had failed to establish that the school had created a hostile work environment or subjected her to religious discrimination.¹⁴⁰

¹³² *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (stating that the employer's conduct was not illegal because the employer "did not require Plaintiff to conform her *appearance* to a particular gender stereotype" so as to engage in illegal sex stereotyping).

¹³³ *Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S. 2d 43, 44 (N.Y. App. Div. 2005).

¹³⁴ *Id.* at 46.

¹³⁵ *Id.* at 47.

¹³⁶ Brief for Plaintiff-Appellant at 3, *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001) (No. 01-3417), 2001 WL 34091359, at *3.

¹³⁷ *Id.* at *6.

¹³⁸ *Id.*

¹³⁹ *Id.* at *6.

¹⁴⁰ *Cruzan*, 165 F. Supp. 2d at 966.

Bathroom access issues have also arisen in public schools with respect to transgender students.¹⁴¹ High school student Gavin Grimm told school officials that he was transgender when he began his sophomore year of high school.¹⁴² They were supportive and ensured he was treated as a boy by teachers and staff. Gavin was also allowed to use the boy's restroom, but some members of the community contacted the school board looking to bar him from doing so.¹⁴³ A school board member subsequently introduced a proposed resolution limiting male and female restroom and locker room facilities to "the corresponding biological genders."¹⁴⁴ Community members who spoke in support of the proposed resolution during the school board meeting claimed that "permitting [Gavin] to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms."¹⁴⁵ Speakers pointedly referred to Gavin using female pronouns and called him "young lady."¹⁴⁶ One man compared Gavin to a person who was convinced he was a dog and wanted to urinate on fire hydrants.¹⁴⁷

The school board ultimately adopted the proposed resolution and barred Gavin from the boys' bathroom.¹⁴⁸ Gavin avoided using the bathroom at school and repeatedly developed painful urinary tract infections after holding his urine too long.¹⁴⁹ Gavin filed suit, alleging that the school district had discriminated against him based on sex in violation of Title IX of the Civil Rights Act and denied his right to equal protection under the Fourteenth Amendment.¹⁵⁰ He sought a preliminary injunction to permit him to use the boy's bathroom during his senior year of high school.¹⁵¹ The district court denied his request, and while an appeals court reversed that decision and an injunction was issued, the Supreme Court took certiorari and overturned the appellate decision.¹⁵² The case was re-

¹⁴¹ See, e.g., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd. (Grimm I)*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

¹⁴² *Id.*

¹⁴³ *Id.* at 716.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 716.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 727.

¹⁵⁰ *Id.* at 731.

¹⁵¹ *Id.* at 732.

¹⁵² *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017).

manded back to the district court. On August 9, 2019, the district court ruled that the school board had discriminated against Gavin in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment.¹⁵³

In a similar case, Jane Doe's mother informed the principal of her elementary school that Jane was transgender the summer before she began first grade.¹⁵⁴ Jane's mother requested that Jane be allowed to use the girls' bathroom at school and be referred to using a female name. The school declined both requests and required Jane to use the office restroom during first grade, and a unisex restroom in the teachers' lounge during her second-grade year.¹⁵⁵ Jane faced harassment from school staff and was bullied by other students.¹⁵⁶ She suffered from "extreme anxiety and depression" because of her treatment at school and was hospitalized for suicidal ideation.¹⁵⁷ The summer before fourth grade, Jane "became anxious about returning to school" and attempted suicide.¹⁵⁸

The U.S. Department of Education notified the school district that its actions violated Title IX,¹⁵⁹ and the district filed suit, seeking an injunction forbidding the federal government from compelling it to change its policies.¹⁶⁰ Jane moved to intervene and sought an injunction permitting her to use the girls' bathroom. Jane's school district asserted that excluding her from the girls' bathroom was necessary because of "the

¹⁵³ Order Granting Summary Judgment, *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054-AWA-RJK (E.D. Va. Aug. 9, 2019). The Court issued a declaratory judgment, awarding Gavin nominal damages of one dollar plus reasonable attorneys' fees and costs. *Id.*

¹⁵⁴ *Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 855 (S.D. Ohio 2016).

¹⁵⁵ *Id.* at 856–57.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 856.

¹⁵⁸ *Id.*

¹⁵⁹ The Obama administration took the position that excluding a transgender child from the bathroom that accords with her gender identity constituted sex discrimination that violated Title IX. In May 2016, the Department of Education issued a "Dear Colleague" to school districts notifying them that to comply with Title IX, "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity." U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 3 (May 13, 2016), <https://www.justice.gov/opa/file/850986/download> [<https://perma.cc/6XWQ-8PJ3>]. The Trump administration rescinded the guidance on February 22, 2017, saying there "must be due regard for the primary role of the States and local school districts in establishing educational policy." U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/U3BV-7TV4>].

¹⁶⁰ *Bd. of Educ. of the Highland Sch. Dist.*, 208 F. Supp. 3d at 859.

dignity and privacy rights of other students” as well as “safety issues and lewdness concerns.”¹⁶¹ Three parents of other Highland students submitted affidavits in support of the School District’s policies, including one whose foster children had suffered sexual abuse.¹⁶² She stated that, for her daughters, “the male anatomy is a weapon by which they were assaulted,” and so “[t]he very presence of a male, regardless of whether he identifies as a female, in my daughters’ restroom or locker room . . . will almost certainly cause severe trauma that will set back their emotional and psychological healing process.”¹⁶³

A federal district court found that the school had likely violated Title IX, and it entered a preliminary injunction permitting Jane to use the girls’ bathroom.¹⁶⁴ The district appealed, but the parties agreed to dismiss the appeal following the change in political administration and the Trump administration’s revocation of prior guidance requiring schools to allow transgender students to use facilities consistent with their gender identity.¹⁶⁵ Jane Doe and the school district subsequently settled the lawsuit.¹⁶⁶

The asserted privacy concerns of cisgender people who object to sharing bathrooms and other sex-segregated facilities with transgender people have become the central basis for numerous political and judicial decisions about LGBT equality and restroom access.¹⁶⁷ Part III examines the privacy interests that traditionalists claim are at stake when a transgender woman uses a women’s bathroom. To determine whether a transgender person using the bathroom in accordance with her gender identity actually threatens the privacy of other users, I examine the claim using philosophical conceptions of privacy advanced by legal scholars to justify a right to privacy protection under the law.

¹⁶¹ *Id.* at 874.

¹⁶² *Id.* at 858.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 854.

¹⁶⁵ *Doe ex rel. Doe v. Bd. of Educ. of the Highland Local Sch. Dist.*, No. 2:16-CV-524, 2017 WL 3588727, at *1 (S.D. Ohio Aug. 21, 2017).

¹⁶⁶ *Order Granting 139 Sealed Motion for Approval of a Collaborative Resolution Agreement, Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524 (S.D. Ohio June 21, 2018).

¹⁶⁷ *See, e.g., Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (affirming grant of preliminary injunction allowing transgender student to use the boys’ restroom while at school).

III

IS THERE A LEGALLY COGNIZABLE PRIVACY INTEREST
IN TRANSGENDER EXCLUSION?

The task of evaluating the competing privacy claims of transgender people who seek to use the bathroom in accordance with their gender identity and cisgender objectors who want to keep them out is made more difficult by the fact that there is no scholarly unanimity on what privacy is or how far the right to it extends. Much has been written about the contradictory justifications for protecting privacy and the difficulty of even agreeing upon a definition of privacy itself.¹⁶⁸ The reality is that scholars disagree passionately about how to conceptualize our legal right to privacy. As philosopher Judith Jarvis Thomson put it, “[p]erhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is.”¹⁶⁹ Daniel Solove argues that privacy cannot be distilled to a single unitary conception.¹⁷⁰ Rather, “[p]rivacy is too complicated a concept to be boiled down to a single essence. Attempts to find such an essence often end up being too broad and vague, with little usefulness in addressing concrete issues.”¹⁷¹ There are, however, several fairly distinct schools of thought regarding how the law should understand privacy. I evaluate the issue of transgender bathroom access using six prominent conceptions of privacy: the Right to Be Let Alone, Limited Access, Intimacy, Control of Information, Personhood, and Social Networks.

¹⁶⁸ See DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1 (2008) (describing privacy as “a concept in disarray” and noting that “[p]hilosophers, legal theorists, and jurists have frequently lamented the great difficulty in reaching a satisfying conception of privacy”).

¹⁶⁹ Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975).

¹⁷⁰ SOLOVE, *supra* note 168 at 103.

¹⁷¹ *Id.* Solove instead advocates a taxonomic approach, identifying potentially problematic activities that are frequently recognized as violating privacy. His taxonomy of privacy problems identifies four basic groups of harmful activities: (1) information collection, in which data is gathered about a person through surveillance or interrogation; (2) information processing, when data concerning an individual is used, stored or manipulated via aggregation, identification, insecurity, secondary use, and exclusion; (3) information dissemination, when information about a person is spread or disseminated through breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation, and distortion; and (4) invasion, which unlike the others does not necessarily involve information, but occurs when a person’s seclusion is disrupted through intrusion or decisional interference. *Id.* at 103–05.

A. The Right to Be Let Alone

Samuel Warren and then-activist Louis Brandeis described the right to privacy as a “right to be let alone,”¹⁷² in a groundbreaking 1890 article often described as the foundation of American privacy law.¹⁷³ They argued that privacy was under threat from technological advances such as instant photography and lurid press interest in publishing salacious stories about people’s intimate lives. Such developments, they claimed, “have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”¹⁷⁴ With privacy under threat because “[g]ossip is no longer the resource of the idle and of the vicious, but has become a trade,” they argued that there was a common law right to protection from the publication of personal information.¹⁷⁵ In the past, the phrase “right to be let alone” had been used to justify a tort remedy for attempted physical touching, but Warren and Brandeis argued that the common law also “secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”¹⁷⁶

Warren and Brandeis’ article led to the recognition of various privacy torts in almost every state.¹⁷⁷ But the authors argued for more than a tort remedy for people whose private information had been published by a newspaper. They also spoke of privacy as protecting an individual’s “inviolable personality” and argued that each person had a “general right to the immunity of the person[—]the right to one’s personality.”¹⁷⁸ Since then, the Supreme Court has frequently invoked this conception of privacy in constitutional cases, including in seminal rulings protecting citizens from wiretapping,¹⁷⁹ overturning prohibitions on contraception,¹⁸⁰ and prohibiting making

¹⁷² Warren & Brandeis, *supra* note 6, at 193.

¹⁷³ See, e.g., James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Demystifying a Landmark Citation* 13 SUFFOLK U. L. REV. 875, 877 (1979) (claiming there is “near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy”).

¹⁷⁴ Warren & Brandeis, *supra* note 6 at 195.

¹⁷⁵ *Id.* at 196.

¹⁷⁶ *Id.* at 198.

¹⁷⁷ DANIEL J. SOLOVE ET AL., INFORMATION PRIVACY LAW 30–31 (2d. ed. 2006); SOLOVE, *supra* note 168, at 16.

¹⁷⁸ Warren & Brandeis, *supra* note 6, at 205, 207.

¹⁷⁹ *Katz v. United States*, 389 U.S. 347, 350 (1967).

¹⁸⁰ *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972).

the mere possession of obscene material in the home a crime.¹⁸¹ Justice Abe Fortas wrote that this “right to be let alone” allowed a person “to live one’s life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law.”¹⁸²

In *Doe v. Boyertown Area School District*, four cisgender high school students sued their school district after it permitted two transgender students to use bathrooms and locker rooms that accorded with their gender identity.¹⁸³ One of their causes of action was a Pennsylvania state law privacy tort. The plaintiffs claimed that they had been subjected to “intrusion upon seclusion,” which occurs when someone “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns,” in a manner that would be “highly offensive to a reasonable person.”¹⁸⁴ Plaintiffs Joel Doe and Jack Jones claimed they had experienced such tortious conduct because they were “viewed in their underwear by a member of the opposite sex,” and Joel Doe also “[saw] a member of the opposite sex in a state of undress,” after a transgender boy entered the locker room when they were preparing for gym class and changed his shirt.¹⁸⁵

Do cisgender people like these students who object to using a bathroom or locker room at the same time as a transgender person have a viable claim that being required to do so violates their right “to be let alone”? At first blush, it might appear so. What the cisgender objector desires is seclusion from the transgender person, and the essence of a “right to be let alone” would seem to be protection for those who want isolation or separation from others. But on closer inspection, the cisgender students’ claim is not really about protecting their isolation, or the ability to separate themselves from other people. After all, Joel Doe and Jack Jones did not object to sharing the locker room with one another, or with other boys who are not transgender.¹⁸⁶

¹⁸¹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

¹⁸² *Time, Inc. v. Hill*, 385 U.S. 374, 413 (1967) (Fortas, J., dissenting).

¹⁸³ *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018).

¹⁸⁴ *Id.* at 537 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1965)).

¹⁸⁵ Brief of Appellants at 51, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (No. 17-3113), 2017 WL 5515323, at *51.

¹⁸⁶ *Id.*

The Third Circuit Court of Appeals ruled that the cisgender students' claims were not viable and affirmed their dismissal by the district court.¹⁸⁷ The court found that "the mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person."¹⁸⁸ This was partly because students in a locker room are not seeking isolation or seclusion. Rather, they "expect to see other students in varying stages of undress, and they expect that other students will see them in varying stages of undress."¹⁸⁹ Further, the school did not permit any and all students to use any locker room, regardless of gender identity or sex assignment at birth. Transgender students were allowed to use facilities in accordance with their gender identity only after meeting with a counsellor as part of a case-by-case assessment to determine whether to permit the student to use facilities that accorded with their gender identity, instead of the sex they were assigned at birth.¹⁹⁰ Joel Doe and Jack Jones's claim that the boys' locker room was open to "member[s] of the opposite sex" was thus misleading—only a transgender boy was allowed to use the facility in addition to the cisgender boys, and even he had to satisfy a counsellor that permitting him to do so was appropriate.

All students at the Boyertown Area High School were also given the option to change or use the toilet in completely private, single-user facilities if they did not feel comfortable in the locker room or multi-stall bathroom.¹⁹¹ But the cisgender students who sued the district argued that this was unsatisfactory.¹⁹² They argued that transgender students should be limited to the facilities of their sex assigned at birth or the single-user facilities.¹⁹³ In their view, this was the appropriate solution because only "preserving the sex-specific communal facilities to single-sex use would resolve all [plaintiffs'] privacy concerns."¹⁹⁴ The cisgender plaintiffs in *Boyertown* were not seeking to be left alone. They conceded that the single-user facilities offered by the district would allow them to change or toilet in solitude, but they nevertheless claimed that option was

¹⁸⁷ *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d at 521.

¹⁸⁸ *Id.* at 537.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 524.

¹⁹¹ *Id.* at 524–25.

¹⁹² *Id.* at 530.

¹⁹³ *Id.*

¹⁹⁴ Brief of Appellants at 32, *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (No. 17-3113), 2017 WL 5515323, at *32.

not sufficient. Clearly, their privacy claim against the school district was not grounded in a “right to be let alone.”

B. Limited Access

Another conception of privacy is that it is a “concern for limited accessibility.”¹⁹⁵ Under this rubric, privacy exists to limit access to the self. Ruth Gavison argues that we want privacy to limit our “accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others’ attention.”¹⁹⁶ In this conception, a person would have total privacy only if no one knew anything about her, no one paid any attention to her, and no one had physical access to her. Of course, as Gavison points out, such “perfect privacy” could never exist in any society.¹⁹⁷ But if we start from that (albeit imaginary) vantage point we can see that a person loses privacy “as others obtain information about [that] individual, pay attention to him, or gain access to him.”¹⁹⁸ Thus privacy lessens as secrecy, anonymity, or solitude are diminished.

This conception of privacy also does not support a claim by the cisgender woman who objects to sharing a bathroom with a transgender woman (as opposed to other women). Carla Cruzan sued her employer after a transgender woman colleague was permitted to use the women’s bathroom at her workplace, claiming that this policy violated her privacy.¹⁹⁹ But the fact that Cruzan had to use a bathroom that was also open to transgender women did not mean anyone would obtain information about her or pay attention to her. Certainly, Cruzan’s use of the bathroom facility might communicate some information to her coworkers. People who saw her walking into the bathroom might assume that she needed to urinate, although that assumption may or may not have been accurate.²⁰⁰ They would also see that Cruzan identified as a woman by her choice of bathroom, but they likely would have been aware of her gender identity already, so it is questionable whether that really qualifies as learning new information. But the most important thing is that neither of these things that people might learn about Cruzan based on her visit to the

¹⁹⁵ Gavison, *supra* note 7, at 423.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 428.

¹⁹⁸ *Id.*

¹⁹⁹ *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001).

²⁰⁰ She could instead be planning to re-apply her makeup, defecate, or blow her nose, among other reasons that people use bathroom facilities.

bathroom was affected by whether a transgender woman was also using that bathroom. The fact that a transgender woman was also permitted to use the same shared women's bathroom as Cruzan did not result in anyone knowing anything more about Cruzan than they would had she used a women's bathroom from which transgender women were excluded. She enjoys the same level of secrecy about herself whether or not transgender women are permitted to use the bathroom facility.

Nor does a transgender woman having access to the bathroom facility mean that anyone will pay more attention to Cruzan.²⁰¹ People will not be more likely to notice Cruzan going to the bathroom facility just because a transgender woman is also permitted to use it. The bathroom being accessible to transgender women does not increase the attention paid to Cruzan. She will not be looked at, scrutinized, or observed more closely than were she only sharing the bathroom with other cisgender women. Or, to put it another way, Cruzan's level of anonymity in her workplace is simply not affected by the decision to allow transgender women to utilize the women's bathroom. Some people may notice her walking to the bathroom, others may see her washing her hands in the sink, or spot her leaving the facility after she is done using it. But this is no more likely because transgender women also have access to the same facility as Cruzan. Her level of scrutiny or anonymity is the same.

Cruzan's level of solitude is also not affected by the decision to admit transgender women to the women's bathroom facility.²⁰² In a shared bathroom facility, Cruzan is always subject to having to share the areas outside the bathroom stalls with other people. While she will be alone in the bathroom stall itself, the sinks, mirrors, and hand driers may be used by other women while Cruzan is adjacent to them. Again, this is true whether or not transgender women are among those permitted to enter the women's bathroom facility. Cruzan has the same amount of solitude that she had before. With regard to all the three aspects of privacy identified by the "limited access" conception, then, a cisgender objector's privacy is not diminished by transgender women being allowed to use the bathroom facilities. On the other hand, a transgender girl like Jane Doe does face a loss of privacy if she is forced to

²⁰¹ *Cruzan*, 165 F. Supp. 2d at 966.

²⁰² *Id.*

use the boys' bathroom at her school.²⁰³ Being compelled to use the male restroom will "out" Jane as transgender. When she goes to the toilet marked "boys," that will communicate to her fellow students that Jane was designated male at birth. It will also likely provoke questions from the other children about why Jane is going to the boys' bathroom and not the girls' facility. A girl in the boys' restroom is likely to face stares and hostility from boys who question whether she belongs in that space. So Jane's classmates will both obtain information about her and pay attention to her as a result of her exclusion from the girls' bathroom. Under a limited access conception of privacy, we can clearly see that barring Jane from the girls' restroom will threaten her privacy.

C. Intimacy

Some scholars conceptualize the right to privacy as one that safeguards intimacy. Tom Gerety argues that the right of privacy exists to give adults "autonomy sufficient to bar state intrusion, observation, or regulation of the harmless intimacies of personal identity[,] . . . [which] begin with the body and its sexuality."²⁰⁴ The paradigmatic example of this, Gerety says, is the sexual relationship enjoyed by a married couple at issue in *Griswold v. Connecticut*.²⁰⁵ In that case the Supreme Court struck down a state statute that criminalized the use of contraception by married couples.²⁰⁶ Justice William Douglas noted that the law allowed the police "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives[.]"²⁰⁷ But as Gerety points out, there is no dispute that police could enter the bedroom if they had a warrant to look for illegal drugs, or evidence related to a murder.²⁰⁸ So the problem is not the physical location of the "sacred . . . marital bedroom" but rather regulation of the intimate sexual relationship between the couple.²⁰⁹ The state of Connecticut had empowered police officers to search people's bedrooms to ascertain whether they were having sex forbidden by the statute. This was what Justice Douglas called "repulsive," because intimate conduct at home should not be subject to such scru-

²⁰³ Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016).

²⁰⁴ Gerety, *supra* note 8, at 280.

²⁰⁵ *Id.* at 279; *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

²⁰⁶ *Griswold*, 381 U.S. at 486.

²⁰⁷ *Id.* at 485.

²⁰⁸ *Id.* at 486.

²⁰⁹ *Id.* at 485.

tiny.²¹⁰ In this view, the right of privacy protects the autonomy of each person to engage in “bodily and mental intimacies over which no one wishes to grant the state the right of regulation.”²¹¹

Obviously, if a cisgender objector like Carla Cruzan is obligated to use a shared women’s bathroom facility that is also used by a transgender woman, that does not implicate a sexual relationship with another person.²¹² So the intimacy conception of privacy would initially not appear to give her any grounds to object. But Gerety’s conception of privacy does not only cover sexual relationships, but also the intimacy of one’s own body. “Intimacy itself is always the consciousness of the mind in its access to its own and other bodies and minds, insofar, at least, as these are generally or specifically secluded from the access of the uninvited.”²¹³ As such, the intimacy conception of privacy also protects against intentional intrusions upon seclusion, either by physically violating a person’s solitude or by publicizing details of a person’s intimate life. These are, in Gerety’s words, acts of “outrageous peering and prying into private lives and things,”²¹⁴ such as by watching a mother give birth without her consent,²¹⁵ or tricking a woman into being photographed nude and distributing the images to others.²¹⁶

The seminal *De May v. Roberts* case was decided in 1891, a few years before Warren and Brandeis published their groundbreaking call for recognition of privacy rights.²¹⁷ Roberts brought suit after a man named Scattergood had entered her home and watched the birth of her child.²¹⁸ When Scattergood arrived with her doctor, Roberts and her husband assumed that he was a part of the medical team coming to help with the birth. They therefore allowed him to enter their home. But later they discovered that Scattergood had no medical training or expertise at all. The court found that the Roberts had not consented to Scattergood’s presence because they were misled as to his role, believing him to be a physician-in-training or

²¹⁰ *Id.* at 486.

²¹¹ Gerety, *supra* note 8, at 272.

²¹² *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001).

²¹³ Gerety, *supra* note 8, at 268.

²¹⁴ *Id.* at 263.

²¹⁵ *De May v. Roberts*, 9 N.W. 146, 147 (1881).

²¹⁶ *York v. Story*, 324 F.2d 450, 454 n.6 (9th Cir. 1963).

²¹⁷ Warren & Brandeis, *supra* note 6.

²¹⁸ *De May*, 9 N.W. at 148–49.

other medical professional, when in fact he was not.²¹⁹ As such, his presence at the “sacred” occasion of the birth of their child was an actionable violation of their privacy, and they were entitled to damages.²²⁰

In *York v. Story*, a police officer photographed Ms. York naked after she reported a physical assault against her.²²¹ The officer ordered Ms. York into a room, locked her in, and then told her to undress before photographing her in “indecent positions” despite her objections that the photographs would not show her injuries.²²² Officer Story later claimed he had destroyed the images, but in fact he had shared them with other officers, who also made additional copies. The Ninth Circuit found that Ms. York had stated a claim for violation of her Fourteenth Amendment right to privacy, declaring: “The desire to shield one’s unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. . . . We do not see how it can be argued that the searching of one’s home deprives him of privacy, but the photographing of one’s nude body, and the distribution of such photographs to strangers does not.”²²³

Privacy-as-intimacy protects against such acts of physical invasion and publicity because it grants us “control over who, if anyone, will share in the intimacies of our bodies.”²²⁴ But can a cisgender objector like Cruzan argue that allowing a transgender woman to use the women’s bathroom is a violation of her bodily privacy akin to those suffered by Roberts and York? A school district made such an argument in *Board of Education of the Highland Local School District v. United States Department of Education*.²²⁵ The district had refused to allow transgender girl Jane Doe to use the girls’ bathroom at her elementary school. Examining the school district’s justifications for its policy, the court noted that intervenors defending it had pointed to “several Sixth Circuit cases concerning the right to bodily privacy against invasive strip searches or videotaping,” but held that those were inapposite.²²⁶ After all, another girl using the same bathroom facility as Jane Doe would not be

²¹⁹ *Id.* at 149.

²²⁰ *Id.*

²²¹ *York*, 324 F.2d at 451.

²²² *Id.* at 452.

²²³ *Id.* at 455.

²²⁴ Gerety, *supra* note 8, at 266.

²²⁵ *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 859 (S.D. Ohio 2016).

²²⁶ *Id.* at 875.

photographed or videotaped. Nor would she have to expose her naked body to a school official or anyone else; like most shared bathrooms, the girl's facility at Jane's school had private stalls that shielded their occupants from view while they used the toilet. In contrast, Ms. York was forced to show her naked body to an official who photographed it and distributed the images.²²⁷ A cisgender objector like Cruzan cannot claim that her body will be publicized, as in the York case.

But perhaps *Roberts* provides a more fitting analogy?²²⁸ In seeking to enter the girls' bathroom, is Jane Doe misrepresenting herself just like Scattergood did in order to witness Roberts giving birth? Like giving birth, courts generally regard urination and defecation as private acts. As one court put it, "there are few activities that appear to be more at the heart of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment than the right to eliminate harmful wastes from one's body away from the observation of others."²²⁹ But again, no girl using the Highland school facilities would be exposed while using the toilet because private stalls were available. So, neither Jane Doe nor anyone else would have witnessed the intimate act at issue, as in the *Roberts* case. Scattergood misled Roberts as to his purpose in being present; she thought he was a medical professional present to assist in her labor and delivery, when in fact he was not.²³⁰ Jane Doe, in contrast, sought to enter the girl's bathroom for the appropriate reason: she needs to use the toilet while attending school.²³¹ As such,

²²⁷ Similarly, in *Brannum v. Overton County School Board*, 516 F.3d 489, 495 (6th Cir. 2008), school officials videotaped middle school students changing in their locker rooms, recording the images and leaving them on an unsecure server, from which they were downloaded several times. See also *Doe v. Luzerne Cty.*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that a deputy sheriff stated a claim for a Fourteenth Amendment violation when a superior officer instructed her to undress and shower while filming her); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (holding that defendants who strip searched high school students at school violated their constitutional rights); *Lee v. Downs*, 641 F.2d 1117, 1118–19 (4th Cir. 1981) (upholding verdict for a female prisoner who was forcibly restrained by male guards while a female nurse removed her clothing).

²²⁸ *De May v. Roberts*, 9 N.W. 146, 148–49 (1881).

²²⁹ *West v. Dallas Police Dep't*, No. Civ. A. 3-95CV-1347P, 1997 WL 452727, at *6 (N.D. Tex. July 31, 1997); see also *Glaspy v. Malicoat*, 134 F. Supp. 2d 890, 895 (W.D. Mich. 2001) (holding that a prison visitor who was forced to urinate in his pants because guards would not allow him to use the bathroom or leave the facility had suffered a Fourteenth Amendment violation).

²³⁰ *De May*, 9 N.W. at 148.

²³¹ The school district claimed that forbidding Jane from using the bathroom was also necessary to guard against "lewdness" but there is no discussion in the case of any evidence that Jane was behaving inappropriately. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D.

the intimacy conception of privacy does not seem to provide any support for Carla Cruzan's claim that allowing a transgender woman to use the women's facility she also used violated her right to privacy.

A transgender person like Jane Doe, on the other hand, would seem to have a privacy interest in being able to use the bathroom that accords with her gender identity that is cognizable under the intimacy conception of privacy. As noted above, many transgender people report suffering physical and sexual assault when using the bathroom.²³² These incidents often involve exposure or abuse of the victim's genitals. One transgender man reported: "I went into the men's bathroom[.] . . . I was just washing my hands when he first punched me in the back and then went for my vagina. I nearly passed out due to the blow."²³³ While a transgender woman who was recognized as she left the woman's bathroom was surrounded by a group of men who pushed her and "ripp[ed] [her] pants down."²³⁴ According to a national survey of transgender people, such incidents were more commonly suffered by respondents who were identifiable as transgender based on how they look as opposed to those who had greater passing privilege because their physical appearance matched their gender identity.²³⁵ If a transgender girl like Jane Doe is forced to use the boy's bathroom, her feminine appearance will out her as transgender. That increased visibility of her transgender status will put her at greater risk of assault and having her body exposed or attacked, violating her right to privacy in the intimacy of her body.

Laws and policies forcing people to use the bathroom that matches their "biological gender" also expose transgender people to questioning about the appearance of their genitals. In *Kastl v. Maricopa County Community College*, a transgender woman who sued after being fired for using the women's restroom at work was forced to answer questions concerning the appearance of her genitals, and to disclose medical records

Ohio 2016). The "lewdness" concern was therefore likely a matter of stereotypes. See *infra* Part IV.

²³² JAMES ET AL., *supra* note 121, at 226–27.

²³³ *Id.* at 228.

²³⁴ *Id.*

²³⁵ See *id.* at 227. Forty-five percent of respondents who said that others could always or usually tell they were transgender and 38% of those who said that others could sometimes tell they were transgender reported one or more of these experiences, in contrast to only 16% of those who said that others could rarely or never tell that they were transgender.

regarding the same.²³⁶ In determining that she had not suffered illegal discrimination, the Court discussed Ms. Kastl's genitals in detail, noting that she had testified that she had "a penis and testicles" and that her doctor's notes from her last physical stated that her "testicles were bilaterally descended and there was no abnormality."²³⁷ While Ms. Kastl was not forced to be photographed naked, she was compelled to answer invasive questions about her genitals and discuss their appearance.²³⁸ She also had to reveal medical documents concerning the appearance of her genitals. Such compelled disclosures are also extremely invasive and humiliating. Indeed, a transgender woman might have a particular interest in keeping the appearance of her genitals private, because they do not conform with societal expectations of what a woman's body should look like. A law or policy that conditions bathroom access on "biological sex" or genitalia subjects transgender people to being questioned about the appearance of their genitals, which also infringes on their right to intimate bodily privacy.

D. Control of Information

Another powerful conception of privacy is that it is the right to control information about oneself. As Alan Westin explains, "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."²³⁹ In this conception, a person's privacy is violated when they have no autonomy to decide who will have access to their personal information. Obviously, this is a pressing concern at a time when technological advances create ever more sophisticated means to obtain, gather, and share information about individuals. This conception of privacy is concerned with safeguarding individuals' right to choose what information is shared about them and when: "[p]rivacy [is] considered as the condition under which there is control over acquaintance with one's personal affairs by the one enjoying it."²⁴⁰ To demonstrate that her privacy had been violated under this conception, a cisgender ob-

²³⁶ Kastl v. Maricopa Cty. Cmty. Coll. Dist., No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *1 (D. Ariz. Aug. 22, 2006).

²³⁷ *Id.* at *5-6.

²³⁸ As Tobias Wolff points out, "antagonists treat the physical reality of the transgender person—his or her genital configuration or other physical characteristics—as requiring obsessive attention." Wolff, *supra* note 68, at 211.

²³⁹ WESTIN, *supra* note 9, at 7.

²⁴⁰ Hyman Gross, *Privacy and Autonomy*, in XIII NOMOS 169 (J. Roland Pennock & John W. Chapman eds., 1971).

jector like Carla Cruzan would have to show that permitting a transgender woman access to the shared bathroom she used would cause her to lose control over her personal information.²⁴¹ But that is simply not the case. If a transgender woman is allowed to use the same shared facility as Cruzan, she might be able to see Cruzan applying makeup or washing her hands at the sink, but these activities were already subject to observation by other women in the facility. So Cruzan's control over her personal information is not reduced.

The animating concern behind many efforts to exclude transgender women from the women's bathroom appears to be that transgender women will use the bathroom to "peep" at or even assault other women. Of course, such violations are illegal whether committed by a transgender or cisgender person.²⁴² There is also no evidence that protecting LGBT people from discrimination in public accommodations leads to sexual misconduct in bathrooms. Eighteen states, the District of Columbia, and more than 200 municipalities have laws permitting transgender people to use facilities that accord with their gender identity.²⁴³ These protections have not led to voyeurism or physical attacks in bathrooms. Rather, "prosecutors, law enforcement agencies[,] and state human rights commissions have consistently denied that there is any correlation between such policies and a spike in assaults."²⁴⁴ Given the lack of evidence that transgender women permitted to use women's bathrooms will violate the law by engaging in voyeurism, there is no basis to believe that Cruzan will lose control of personal information about the appearance of her naked body or any-

²⁴¹ *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001).

²⁴² *E.g.*, 18 U.S.C. § 1801 (2004); IOWA CODE ANN. § 709.21 (West 2017) ("A person who knowingly views, . . . another person, for the purpose of arousing or gratifying the sexual desire of any person, commits invasion of privacy [an aggravated misdemeanor,] if . . . [t]he other person does not . . . consent to being viewed, . . . [t]he other person is in a state of full or partial nudity. . . [and t]he other person has a reasonable expectation of privacy."); Bill Chappell, *'Playboy' Model Sentenced Over Body Shaming Woman at Gym*, NPR (May 25, 2017), <http://www.npr.org/sections/thetwo-way/2017/05/25/529999618/playboy-model-sentenced-over-body-shaming-woman-at-gym> [<https://perma.cc/43J3-BRM3>]. Sadly, people do commit crimes in bathrooms and locker rooms. A recent high-profile example is that of Dani Mathers, a cisgender Playboy model who took a picture of a 70-year-old woman naked in a women's locker room at an LA Fitness gym and posted it on social media. Mathers was convicted of invasion of privacy and sentenced to community service. *Id.*

²⁴³ *Transgender Bathroom Access Laws in the United States*, BALLOTPEdia, https://ballotpedia.org/Transgender_bathroom_access_laws_in_the_United_States#cite_note-aclu-1 [<https://perma.cc/3ENH-DTTM>] (last visited Jan. 11, 2019).

²⁴⁴ Grinberg & Stewart, *supra* note 64.

thing else.²⁴⁵ Cruzan simply does not have less privacy under this conception if her transgender coworker has access to the women's bathroom. Her control over her personal information remains the same.

In contrast, when a transgender girl like Jane Doe is denied access to the bathroom that accords with her gender identity and forced to use the boy's bathroom instead, she does lose control over her personal information.²⁴⁶ Both the fact that Jane was assigned male at birth and that she is transgender are revealed when she is forced to use the boy's bathroom. She no longer gets to decide whether to share these personal facts about herself with other children or teachers at her school. Instead, her assigned sex and transgender status are revealed without her consent.

E. Personhood

One influential theory of privacy views it as protecting personhood. The term "personhood" originated with Paul Freund,²⁴⁷ who used it to refer to "those attributes of an individual which are irreducible in his selfhood."²⁴⁸ In Warren and Brandeis' seminal article, they wrote that the right to privacy was based on the principle that each person had a right to his "inviolable personality."²⁴⁹ Brandeis expounded on the idea forty years later as a Supreme Court Justice, writing in dissent in *Olmstead v. United States*, a case that found no legal violation after the government wiretapped a person's phone.²⁵⁰ Brandeis argued that:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings[,] and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions[,] and their sensations. They conferred, as against the Government, the right to be let alone.²⁵¹

²⁴⁵ *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 966 (D. Minn. 2001).

²⁴⁶ *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 859 (S.D. Ohio 2016).

²⁴⁷ Craven, *supra* note 10, at 702.

²⁴⁸ Professor Paul A. Freund, Address at the Annual Dinner of the American Law Institute (May 23, 1975), 52 A.L.I. Proc. 563, at 574 (1975).

²⁴⁹ Warren & Brandeis, *supra* note 6, at 205.

²⁵⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

²⁵¹ *Id.*

Privacy as personhood protects people's right to make autonomous decisions about how they want to live their lives, without interference from the government or other people. It conceives privacy as the freedom to choose what kind of person one wants to be and to live in accordance with that vision without undue meddling. As Ed Bloustein writes, "[a]n intrusion on our privacy threatens our liberty as individuals to do as we will."²⁵² Thus privacy protects against acts that are "demeaning to individuality," "an affront to personal dignity," or an "assault on human personality."²⁵³ The Supreme Court embraced a personhood theory of privacy in its decisions on the right to privacy such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*, which involved decisions about reproduction, family formation, marriage, and raising children.²⁵⁴ The Court explained that such matters were protected by a constitutional right to privacy because they

involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁵⁵

So does a cisgender objector like Carla Cruzan have a claim under this conception of privacy? Is her ability to define for herself what kind of person she will be undercut by a transgender woman being allowed to use the same shared bathroom facility that she frequents? Certainly, people have very strong feelings about the issue of who is allowed to use the same bathroom as them. A cisgender objector might say that permitting transgender women to use the women's bathroom damages her personal identity because she defines herself as a traditionalist who rejects a "radical homosexual agenda" and believes in a God-given distinction between men and women. Thus, living in a community with transgender women is profoundly at odds with her religious beliefs, or sense of morality. It impinges on her autonomy to define her identity according to her traditional, transphobic values.

²⁵² Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1002 (1964).

²⁵³ *Id.* at 973-74.

²⁵⁴ *Roe v. Wade*, 410 U.S. 113, 116 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

²⁵⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

Jed Rubinfeld criticized the personhood conception of privacy for just this reason, pointing out that some people may define their personhood through intolerance.²⁵⁶ Such individuals deeply value living in a community that excludes others of whom they disapprove. He noted that recognizing the right of LGBT people to engage in same-sex relationships without being criminalized might be said to undermine the rights of an “intolerant heterosexual” who “can claim, on personhood’s own logic, that critical to *his* identity is not only his heterosexuality but also his decision to live in a homogenously heterosexual community.”²⁵⁷

Of course, laws or policies excluding transgender people from bathrooms are arguably different from sodomy laws, which effectively rendered being gay a criminal offense.²⁵⁸ School officials who refuse to allow a transgender girl to use the bathroom that accords with her gender identity do not claim that doing so will stop her from being transgender;²⁵⁹ they accept that she may continue to be a transgender girl but nevertheless insist that she use the boys’ bathroom or, in some cases, an individual gender-neutral bathroom. Such laws or policies arguably do not remove transgender people from the community²⁶⁰ and produce the homogeneously cisgender community the intolerant objector is seeking. Even if the school does exclude transgender girls from the bathroom, the cisgender objector will still attend school or work with transgender women. The only difference will be that now she does not have to spend the small percentage of her day that she is in the bathroom in the immediate vicinity of transgender women. Viewed in that way, it is clear that the impact of bathroom

²⁵⁶ Jed Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 768 (1989).

²⁵⁷ *Id.* at 765.

²⁵⁸ See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000) (discussing how “the very existence of sodomy laws creates a criminal class of gay men and lesbians, who are consequently targeted for violence, harassment, and discrimination because of their criminal status”).

²⁵⁹ See, e.g., Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 856 (S.D. Ohio 2016) (describing how school officials refused to allow Jane Doe, a transgender girl, to use the girls’ restroom but nevertheless agreed to “address [her] as a female”).

²⁶⁰ Many would argue, however, that these laws are, at bottom, an effort to eradicate transgender people. Transgender advocates frequently characterize efforts to protect bathroom access as a fight to ensure transgender people have the right to exist in public spaces. E.g., Shayna Medley, *Trans and Non-Binary People Continue to Fight for Their Right to Exist in Public Spaces*, ACLU (May 22, 2018), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/trans-and-non-binary-people-continue-fight-their-right-exist> [<https://perma.cc/7QTU-U7SH>].

inclusion (or exclusion) on the objector's personhood rights—her ability to “define herself”—is negligible, even if she constructs her whole identity around opposition to transgender women.

Indeed, the reality is that the group of people using any given women's bathroom are likely to be diverse in a number of ways—in terms of age, race, weight, height, reproductive capacity, etc. So why would the characteristic in question—that of being assigned male at birth as opposed to assigned female—loom so large as to impact the very identity of another woman using that bathroom at the same time? If the cisgender objector is compelled to use a women's bathroom that is also accessible to transgender woman, that would not seem to undermine her conception of who she is as a woman any more than a tall woman using the facility would make a petite person tall. Her identity formulation remains intact.²⁶¹

Again we can contrast that with the impact upon a transgender girl like Jane Doe who is excluded from the girl's bathroom at school.²⁶² Jane identifies as a girl. But when she is excluded from the girls' bathroom and forced to use the one for boys, Jane is categorized as a boy by the school and even forced to identify herself as a boy by walking into the boys' restroom. Even if the school allows her to express her female gender identity in other ways, for example by wearing female clothing or using a girl's name, by categorizing her as a boy they reduce her to a boy in a dress rather than the girl that she is. This concern applies with equal force to people who have a nonbinary gender identity and do not identify exclusively as either male or female. Requiring a nonbinary person to use either a men's or women's restroom fails to respect their identity.²⁶³ Gender is one of the most visible and socially significant categories we have for organizing people in our society.²⁶⁴ So forc-

²⁶¹ *But see* JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 104 (1979) (arguing that the existence of transgender women is an assault on the identity of cisgender women: “[a]ll transsexuals rape women's bodies by reducing the real female form to an artifact, appropriating this body for themselves”).

²⁶² *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 857.

²⁶³ As Jessica Clarke points out, the ideal solution for accommodating people of all gender identities is to phase out gendered spaces altogether, providing instead “larger, open, public spaces and fully enclosed private stalls that would better ensure safety, accommodate families, and operate fairly and efficiently.” Clarke, *supra* note 127 at 982; *see also* Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 *YALE J.L. & FEMINISM* 465, 496 (2018).

²⁶⁴ *See* KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* 12–13 (2018).

ing a person to adopt a gender identity that is not their own is a significant burden upon their personal identity.²⁶⁵ This is why gender dysphoria can produce clinically significant distress, including suicidal ideation, from which Jane herself suffered.²⁶⁶ So again, under a personhood conception of privacy, we can clearly see that Jane's privacy is threatened by excluding her from the bathroom, while the cisgender objector does not actually lose privacy if Jane is admitted.

This is all the more clear when we examine the refinement on the personhood conception of privacy advanced by Jed Rubenfeld. Rubenfeld argued that the constitutional right to privacy exists to protect against "a particular kind of creeping totalitarianism, an unarmed *occupation* of individuals' lives."²⁶⁷ In this conception, the government violates privacy when it directs a person's life course, forcing her to conform to a standardized conception of normal behavior. Privacy is thus to be invoked "only where the government threatens to take over or occupy our lives—to exert its power in some way over the totality of our lives."²⁶⁸ The Supreme Court's privacy decisions can therefore be understood as protecting individuals from being forced into socially enforced behaviors that take over their lives, such as by being compelled to bear a child, attend public school, or marry someone of the same race.²⁶⁹ Such activities enlist, direct, and take over people's lives, and so people have a constitutional privacy right to refuse to participate in them.

A cisgender student who objected to sharing the girl's bathroom with Jane Doe, however, could not claim that having to do so would direct her life course or take over her identity.²⁷⁰ Unlike being forced to bear a child, being compelled to use a

²⁶⁵ See *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 523 (3d Cir. 2018) ("Forcing transgender students to use bathrooms or locker rooms that do not match their gender identity is particularly harmful. It causes 'severe psychological distress often leading to attempted suicide.'" (citations omitted)).

²⁶⁶ *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 856 (S.D. Ohio 2016). In order to qualify for a diagnosis of Gender Dysphoria under the DSM-V, a patient must be suffering from "clinically significant distress." Transgender people are at much higher risk of suicidal ideation and completed suicide than cisgender persons. See William Byne et al., *Gender Dysphoria in Adults: An Overview and Primer for Psychiatrists*, 3 *TRANSGENDER HEALTH* 57, 63 (2018) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5944396/> [<https://perma.cc/CQ35-AMR5>] (noting that "[u]p to 47% of transgender adults have considered or attempted suicide").

²⁶⁷ Rubenfeld, *supra* note 256, at 784.

²⁶⁸ *Id.* at 787.

²⁶⁹ *Id.* at 793.

²⁷⁰ *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 856.

bathroom that is also open to transgender women only affects the small percentage of the objector's day that she spends in the restroom. It does not fill up her life. As such, it does not violate her right to privacy from creeping totalitarianism.

The situation is different for Jane Doe, however. A requirement that she use the boy's bathroom imposes a far greater burden on her freedom to direct her own life course. Since Jane identifies as a girl, when she is compelled to use the boy's restroom she is forced to deny her true identity. "[W]alking into a toilet segregated by sex requires that each of us in effect self-segregate by hanging a gendered sign on ourselves[.]"²⁷¹ Jane is thus required to state that she is a boy, rather than a girl, and forced to reveal that she is transgender, rather than keeping her transgender status hidden. Such actions reverberate throughout Jane's life, affecting far more than just the few minutes she spends in the bathroom each day. Not only is the very act of denying her identity likely to cause Jane humiliation, shame, and distress, being exposed as transgender to her community will expose her to verbal harassment and physical abuse as well. Both will have a profound impact on her physical and mental health. When the real eleven-year-old Jane Doe was not permitted to use the girl's bathroom at her elementary school, the stress of being excluded and the bullying she endured from teachers and children who disapproved of her transgender status caused her to attempt suicide.²⁷² She had to be hospitalized on two separate occasions for suicidal ideation and a suicide attempt.²⁷³ A government action that limits a person's autonomy so profoundly that she tries to kill herself to escape its strictures clearly has taken over her life. Under Rubinfeld's refinement of the personhood theory, we again see that laws forcing transgender people to use bathrooms that conflict with their gender identity violate their right to privacy but are not necessary to defend the privacy of cisgender objectors.

F. Social Network Privacy

In *Doe v. Boyertown Area School District*, four cisgender students sued to overturn a school policy permitting transgender high school students to use bathrooms and locker

²⁷¹ Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 25, at 218.

²⁷² *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 856.

²⁷³ *Id.*

rooms in accordance with their gender identity.²⁷⁴ The plaintiffs claimed that the school district's practice violated their right to privacy under the Fourteenth Amendment, their right of access to educational programs under Title IX, and their Pennsylvania common law right of privacy preventing inclusion upon their seclusion while using bathrooms and locker rooms.²⁷⁵ They sought a preliminary injunction requiring the school district to ensure students used facilities corresponding to their "biological sex."²⁷⁶

In addition to claiming that the policy violated their privacy because it meant a transgender student might see them partially undressed, the plaintiffs also claimed that it undermined their privacy because a transgender girl might hear a cisgender girl "opening products to deal with menstruation issues or using the restrooms" and thus the transgender girl could discern that the cisgender girl was menstruating.²⁷⁷ One plaintiff in the case, Mary Smith, claimed that the stalls in the multi-user bathrooms did not provide her with privacy because people could hear her opening pads or tampons while she was inside.²⁷⁸ Similarly, Plaintiff Macy Roe stated that bathroom stalls were insufficiently private because she could "still be heard going to the bathroom or attending [her] period, and there are large gaps in the stalls that [she has] made eye contact through before."²⁷⁹ The court noted, however, that Macy Roe testified she had never seen anyone purposefully looking through the gaps in the bathroom stall.²⁸⁰ The court also quoted a medical doctor who testified as an expert on the treatment of transgender youth and indicated that transgender youth with gender dysphoria are "far more likely to want to conceal their physical anatomy and are typically extremely hypervigilant within sex-segregated" facilities.²⁸¹ He further testified that "transgender patients are . . . particularly modest about exposing themselves while using privacy facilities."²⁸² The district court held that the fundamental right to privacy did not extend to protection from "being heard . . . in an area such as a locker room or multi-user bathroom where there is a

²⁷⁴ 276 F. Supp. 3d. 324, 329–30 (E.D. Pa. 2017).

²⁷⁵ *Id.* at 330.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 383.

²⁷⁸ *Id.* at 360.

²⁷⁹ *Id.* at 362–63.

²⁸⁰ *Id.* at 363.

²⁸¹ *Id.* at 370.

²⁸² *Id.*

limited amount of auditory privacy from anyone.”²⁸³ While the plaintiffs claimed that the presence of a “member of the opposite sex” in a bathroom or locker room was objectively offensive because people “require a buffer from members of the opposite sex that we do not require from members of the same sex,”²⁸⁴ the court rejected that contention, noting that multi-user bathrooms and locker rooms are “shared common areas with other students,”²⁸⁵ and so the plaintiffs could not claim that they attempted to seclude themselves by entering them.

But arguably, the plaintiffs in *Doe v. Boyertown Area School District* were making an associational privacy claim about the social network of girls in the bathroom. Mary Smith and Marcy Doe asserted that when students who they called “members of the same sex” heard them urinate or open tampon wrappers, the information gleaned from that auditory exposure was still private.²⁸⁶ But when a transgender student heard the same thing, it was an unauthorized disclosure that violated their privacy.²⁸⁷ Similarly, the practice of “outing” LGBT celebrities, or revealing a famous person’s sexual orientation without their consent, was frequently criticized as an invasion of privacy.²⁸⁸ This objection arose even when the information was widely known within the LGBT community. Publicizing the facts to the wider heterosexual world infringed on the celebrity’s privacy because it violated a “long standing agreement among gay people that they kept each others’ secrets.”²⁸⁹

We might also analogize the Doe plaintiffs’ claim to that of a member of Alcoholics Anonymous who wants to be able to tell fellow A.A. members that she is an alcoholic but does not want that information shared with others. Some privacy scholars find the A.A. member’s claim compelling. Lior Jacob Strahilevitz argues, for example, that groups like A.A. “can be designed to trigger reciprocal nondisclosure, and people making germane disclosures within these settings generally ought to expect that the information disclosed will not circulate

²⁸³ *Id.* at 388.

²⁸⁴ *Id.* at 406.

²⁸⁵ *Id.* at 407.

²⁸⁶ *Id.* at 406.

²⁸⁷ *Id.*

²⁸⁸ See generally Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531 (1995) (noting that while proponents claimed outing was necessary to counter homophobic stereotypes with real-life examples of successful LGBT people, it was an ineffective advocacy tool and potentially subjected people to anti-gay discrimination and violence).

²⁸⁹ LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 4 (1993).

outside the group.”²⁹⁰ In his view, a famous actress who discloses that she is an alcoholic at an A.A. meeting “ought to have a reasonable expectation of privacy in the disclosed information.”²⁹¹

As a matter of law, “AA and other self-help groups do not enjoy the veil of legal confidentiality—evidentiary privilege.”²⁹² Courts have repeatedly rejected claims that confessions to fellow A.A. members are protected by privileges afforded to communications with a psychotherapist or a spiritual advisor. In *State v. Boobar*, for example, Ronald Boobar appealed his murder conviction on the basis that two members of A.A. who testified regarding statements Boobar had made to them should have been barred from doing so on the basis of privilege.²⁹³ But the court held it was “not reasonable to conclude . . . that by the language of [the Maine counseling and therapist statute], the legislature intended to sweep information disclosed to peer counselor or self-help groups like AA within the privilege set forth.”²⁹⁴

While information shared in A.A. or other self-help groups may not be legally privileged, however, participants might still be justified in thinking that it will not be disseminated beyond the group. “When an individual speaks with relative strangers in a support group like Alcoholics Anonymous, she trusts that they will not divulge her secrets.”²⁹⁵ The norms of the social network and the identities of the group’s members give her reassurance that they will keep information shared there confidential. Ethnographer Gene Shelley found that people with HIV frequently kept their HIV status secret from friends and family because they were afraid of being ostracized.²⁹⁶ But those same people felt comfortable telling other members of a support group for people with HIV about their status, even if

²⁹⁰ Strahilevitz, *supra* note 11, at 970.

²⁹¹ *Id.*

²⁹² Bree Schonbrun, “In the Light of Reason and Experience”: *The Scope of Evidentiary Privilege in the Self-Help Setting: Alcoholics Anonymous Examined*, 25 CARDOZO L. REV. 1203, 1206 (2004).

²⁹³ 637 A.2d 1162, 1169 (Me. 1994).

²⁹⁴ *Id.*; see also *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002) (holding that defendant’s communications to members of an A.A. group are not privileged under New York state law); *United States v. Schwensow*, 942 F. Supp. 402, 403–04 (E.D. Wis. 1996) (holding that confessions to A.A. counselors are not privileged under the psychotherapist privilege).

²⁹⁵ Ari Ezra Waldman, *Trust: A Model for Disclosure in Patent Law*, 92 IND. L. J. 557, 583 (2017).

²⁹⁶ Gene A. Shelley, H. Russell Bernard, Peter Killworth, Eugene Johnsen & Christopher McCarty, *Who Knows Your HIV Status? What HIV+ Patients and Their Network Members Know About Each Other*, 17 SOC. NETWORKS 189, 204 (1995).

they hardly knew them.²⁹⁷ They trusted fellow HIV positive individuals to keep the information private: “with respect to preventing the further spread of [information about] a person’s HIV status, individuals living with HIV can better predict the future behavior of others also living with HIV (even if they know very little else about them) than others with whom they may be close for different reasons.”²⁹⁸ Certainly, for people battling addictions or coping with health conditions like HIV, support groups provide an important outlet where people who may be isolated or marginalized can find community and understanding. The fact that such groups have a powerful norm barring the disclosure of information about members outside the group setting means they provide a safe space where individuals can share potentially stigmatizing information without fear of it being further disseminated.²⁹⁹

Obviously, multi-user bathrooms do not have the same shared norm of nondisclosure as an A.A. meeting. No one makes announcements in the bathroom that “what is said in the room remains in the room,” as they do at the beginning of A.A. meetings.³⁰⁰ But Macy Roe and Mary Smith’s argument hinges on what they perceive as the shared characteristics of girls using the bathroom. Like the HIV positive people in the Shelley study, they view the girls in the bathroom as fellow travelers—people with a common trait who will keep information related to that stigmatized characteristic private. So, from Doe and Smith’s point of view, it doesn’t matter if other girls know they have their period because they would not tell anyone else that information. Since the other girls also experience stigma regarding menstruation, they have the same incentive Doe and Smith do to keep it a secret.³⁰¹

On the other hand, Doe and Smith claim a transgender girl is a “biological male.”³⁰² As such, they view her as no more likely to keep information about their periods secret than any other boy. But a transgender girl does not identify as a boy—she lives and sees herself as a girl. While she might not experi-

²⁹⁷ *Id.*

²⁹⁸ Waldman, *supra* note 295, at 584.

²⁹⁹ Strahilevitz, *supra* note 11, at 969–70.

³⁰⁰ See Jessica G. Weiner, “*And the Wisdom to Know the Difference*”: Confidentiality vs. Privilege in the Self-Help Setting, 144 U. PA. L. REV. 243, 307 n.118 (1995).

³⁰¹ Cf. SIMONE DE BEAUVOIR, *THE SECOND SEX* 339 (1998) (describing a girl’s embarrassment as male relatives make jokes about her menstruation).

³⁰² Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 391 (E.D. Pa. 2017).

ence menstruation, she is certainly not exempt from misogynistic harassment; indeed, she is probably more likely to experience sexist bullying than a cisgender girl.³⁰³ As such, she has the same incentive to avoid publicizing what goes on in the girls' bathroom as Macy Doe does. She is not a boy who might be expected to harass Doe by gossiping or teasing her about the fact that she has her period. Such behavior would only open her up to uncomfortable questions about her own anatomy.

Similarly, self-help groups like A.A. and other similar twelve-step programs are open to anyone who self-identifies as needing the intervention offered. There is no requirement that would-be A.A. members produce medical documentation or other evidence to prove that they are alcoholics, or that they have experienced particular difficulties related to their addiction. Rather, any person who believes they are dependent on alcohol and wants help to overcome that dependence can participate.³⁰⁴ As such, an A.A. member who decides to share information about, for example, losing a job due to being drunk at work runs the risk that someone else in the group may not have had that exact same experience. But still he trusts that the other A.A. member will keep his confidence because their stories are sufficiently analogous to generate sympathy and understanding. Similarly, a girl in the bathroom at school might hope that other girls present will safeguard information about her period, even if they themselves do not menstruate.

So the desire for social network privacy does not justify excluding transgender people from the bathroom most aligned with their gender identity.³⁰⁵ A transgender girl is just as likely to form a reliable member of the social network in the women's bathroom as any other woman.

A careful examination of the asserted privacy interest in excluding transgender women from the women's bathroom

³⁰³ See, e.g., *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 856 (S.D. Ohio 2016) (describing how Jane Doe, a transgender girl, was bullied to the point that she became suicidal).

³⁰⁴ "AA has, since its formal inception in 1938, represented itself as a non-denominational 'fellowship of men and women' whose only requirement for membership is the desire to stop drinking." Schonbrun, *supra* note 292, at 1225.

³⁰⁵ Respecting the gender identity of nonbinary people who do not identify exclusively as male or female requires offering gender neutral facilities that do not require people to select a male or female facility. Until such facilities can be made available, a "temporary solution is to permit nonbinary people to use whichever facility they feel the safest in, or which they believe best matches their sex or gender, just as transgender men and women should be able to." Clarke, *supra* note 127, at 983.

shows that it does not accord with any of the philosophical conceptions of privacy that undergird the legal right to privacy protection. While all people have a legitimate interest in privacy when they use the bathroom, allowing transgender people to use the facility that accords with their gender identity does not undermine bathroom privacy for cisgender people. Rather, it is policies that make transgender people use facilities according to their assigned sex at birth rather than their gender identity that raise genuine privacy concerns. The privacy interests asserted to oppose antidiscrimination protections for LGBT people are clearly nothing more than a pretext used to justify continuing discrimination against sexual minorities. Efforts to enact so-called “privacy protection acts” that repeal antidiscrimination laws and exclude transgender women from women’s bathrooms therefore do not enhance the privacy rights of women and children. They impose direct harms upon transgender women, who are excluded from facilities that reflect their gender identity and subjected to grave privacy violations, described above. But such efforts also harm cisgender women because they reify damaging stereotypes that undermine women’s equality and safety. Part IV discusses the negative effects that efforts to justify transgender bathroom exclusion on privacy grounds have on all women.

IV

WHY THE PRIVACY PRETEXT FOR DISCRIMINATION AGAINST LGBT PEOPLE HARMS ALL WOMEN

The argument that permitting transgender women to use the women’s bathroom violates the privacy of other women and girls is grounded in pernicious gendered stereotypes that undermine sex equality. As such, the privacy pretext for discrimination against LGBT people is a threat to all women. As noted above, opponents of LGBT equality frequently argue that antidiscrimination protections for LGBT people will lead to women’s privacy being violated by permitting (predatory) transgender women to use women’s bathrooms.³⁰⁶ The specter of sexual predation looms large, but while many communities have had laws forbidding discrimination based on sexual orientation or gender identity on the books for years, there have not

³⁰⁶ E.g., Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 37 (1997) (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

been reports of sexual assaults in bathrooms as a result.³⁰⁷ So why do opponents continue to invoke concerns about sexual predation in arguing that antidiscrimination protections must be rolled back to protect women's privacy? The reason is that they are appealing to, and re-inscribing, powerful gender stereotypes. Traditional conceptions of sex and gender hold that all people can be cleanly categorized into two sexes—male and female. People who are designated male at birth are expected to have a male gender identity, to be masculine in presentation, and to sexually desire (and dominate) women. While people designated female at birth should identify as women, be feminine in presentation, and sexually submit to men. Traditional understandings of sexuality do not just mandate heterosexuality for everyone. They also prescribe relationship roles for men and women. A man is expected to be sexually aggressive and demanding, while a woman should be virginal and pure, reluctant to engage in sex except as part of a committed relationship to a special man she wants to please. As Erving Goffman put it, “men are defined as desiring access to women and women as holding them in check.”³⁰⁸

LGBT people by nature do not conform to these expectations. Their identities thus threaten patriarchal heteronormative understandings of human sexuality. Lesbian, gay, and bisexual people undermine compulsory heterosexuality, while transgender and gender variant people problematize the notion that a particular gender identity and presentation automatically flows from the sex one is assigned at birth. Efforts to eliminate antidiscrimination protections for LGBT people can therefore be viewed as an attempt to shore up traditional sex roles by granting a right to exclude people who do not conform to them.

More specifically, patriarchal heteronormative ideas about sexuality are the reason why the presence of transgender women in women's bathrooms is so threatening to traditionalists. They believe that a person designated male at birth should be a man, and that men have a natural urge to sexually dominate or even assault women. That is why permitting a transgender woman to use a women's bathroom is a threat to “sexual mod-

³⁰⁷ E.g., Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1386 (2017).

³⁰⁸ Erving Goffman, *The Arrangement Between the Sexes*, 4 THEORY & SOC'Y 301, 330 n.8 (1977).

esty” for cisgender objectors like Carla Cruzan.³⁰⁹ A person who espouses traditional sex roles believes a person designated male at birth must be a man, and that a man must naturally want to behave in a sexually aggressive way towards women. So allowing a person assigned male at birth to use a women’s bathroom is inviting a sexually predatory individual into the space, even if that person is an eleven-year-old schoolgirl like Jane Doe.

The flip side to the troubling stereotype that all men are potential rapists is the even more pernicious idea that women are seductive objects who lure men into sexual violence. Traditional understandings of gender also suggest that women are responsible for preventing sexual assault by hiding themselves from men. If women do not dress or behave in a sufficiently modest way, they will deservedly be sexually assaulted because men have irresistible urges to rape them.

This thinking was on display in *Dothard v. Rawlinson*, where the Supreme Court upheld a ban on women working as corrections officers in Alabama maximum security prisons.³¹⁰ The state argued that the ban was necessary because women simply could not effectively control prisoners, and their presence would provoke violence.³¹¹ The Court agreed, finding it plausible that “sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison.”³¹² In dissent, Justice Marshall called this “one of the most insidious of the old myths about women[;] that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults.”³¹³

The notion that men have uncontrollable urges to rape which women are responsible for controlling is extremely damaging to women’s autonomy and safety. It also harms men by stereotyping them as predators, a burden that falls heaviest on African American men who are commonly perceived to be “less able to control their desire or sexual urges than white men”³¹⁴ and thus suffer the “stigmatic harm of repeatedly being raced

³⁰⁹ Plaintiff-Appellant’s Brief at 14, *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001) (No. 01-3417), 2001 WL 34091359, at *6.

³¹⁰ *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

³¹¹ *Id.* at 343.

³¹² *Id.* at 335.

³¹³ *Id.* at 345 (Marshall, J., dissenting).

³¹⁴ I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1364 (2010).

and sexed as a rapist.”³¹⁵ This trope further suggests that women who suffer sexual assaults are somehow to blame for their victimization. Over the past few decades, legal reformers have worked diligently to change this perception and ensure that rape victims can access justice without being castigated for “bringing it on themselves.”³¹⁶ Most recently, the #MeToo movement has drawn attention to the sexual violence that women (and some men) have suffered in a variety of settings, including at work, to suggest that victims deserve to be heard and believed, and to hold abusers accountable and obtain justice.³¹⁷

Excluding transgender women from women’s facilities does not address any actual threat to women’s privacy or safety. As the outpouring of accounts of sexual violence in connection with the #MeToo movement suggests, the greatest threat to women’s sexual autonomy and safety does not come from transgender women in bathrooms but men (and some women) who prey upon people at work, in the community, and at home.³¹⁸ Not only do efforts to roll back antidiscrimination protection for LGBT people and exclude transgender women from women’s facilities do nothing to address these actual threats of sexual violence, they shore up pernicious stereotypes that make all women more vulnerable to sexual assault. By suggesting that all women are seductive sexual objects who must hide themselves from men to escape sexual violence, the discourse about transgender bathroom access reifies the damaging myth that women are to blame when men rape them. This insidious idea hurts all women, including cisgender women, undermining their right to be free from sexual violence.

Efforts to legalize discrimination against LGBT people and ban transgender women from women’s bathrooms do not protect women’s privacy or safety. They are instead a calculated

³¹⁵ *Id.* at 1391.

³¹⁶ See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and A New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54 (2002) (noting that the law traditionally would regard nonconsensual sex as rape only if the victim was a chaste woman, and that prior to the enactment of rape shield laws, defendants were free “to suggest that the complainant was routinely unchaste and ‘asking for it’ on the night in question”).

³¹⁷ Jessica L. Crutcher, *#Metoo: The Survivors*, HOUS. LAW. (March/April 2018), at 44 (describing how the #MeToo social media movement has given survivors of sexual assault a platform to at last be heard: “I, too,’ they say, was raped, sexually assaulted, stalked, sexually harassed, groped by strangers on the street, made to fear for our safety, our lives, in so many different ways that we have all lost count”).

³¹⁸ *Id.*

effort to deploy fear in the service of rolling back LGBT equality. But in addition to doing nothing to enhance women's privacy, such efforts actually harm all women because they also reify damaging myths that justify and excuse sexual violence.

CONCLUSION

Laws and policies that repeal antidiscrimination protection for LGBT people and compel everyone to use only the bathroom that accords with their "biological sex" are frequently justified on the basis that they are necessary to protect women's privacy. But a closer examination of the privacy interests at stake show that allowing transgender people to use the bathroom that matches their gender identity does not diminish the privacy of cisgender women. As such, efforts to roll back antidiscrimination protection for LGBT people and exclude transgender women from women's facilities do not enhance women's privacy. Instead, they not only impose grave privacy violations on transgender people, they harm all women by perpetuating pernicious stereotypes that make women more vulnerable to sexual assault.