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Loo Law: The Public Washroom as a Hyper-Regulated Place

Irus Braverman*

I. INTRODUCTION

“For its subjects to participate in the body of the empire, their waste need not be subjected to microscopic scrutiny. . . . It is enough to enforce a code of shitting — the master’s code.”

— Dominique Laporte, *History of Shit*¹



Figure 1: Male figurine (left) inspecting female figurine (right).²

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1. DOMINIQUE LAPORTE, *HISTORY OF SHIT* 63 (Nadia Benabid & Rodolpe el-Khoury trans., MIT Press 2000) (1978).

2. Posting of Baierman to YesbutNobutYes, http://www.yesbutnobutyes.com/archives/2008/07/toilet_iconogra.html (July 11, 2008) [hereinafter *Toilet Iconography*].

What do you do when you enter a public washroom? Do you choose a urinal or a stall? Which is your favorite stall: the furthest or the closest one to the entrance? Do you sit or stand? Hover or squat? Flush with your bare hand, with toilet paper, or with your foot? And how do you wash your hands? In the study, "Please Wash Your Hands," 548 people were asked how they use the washroom, especially the public washroom.³ Responses varied significantly.⁴ There is much discretion, the study indirectly illustrates, in the way that people use this space. So many choices, such diversity.

But there is an alternative way of seeing things. Washroom conduct can also be described as limited, constrained, and even highly uncreative. This is the direction that the Article takes. The Article suggests that the washroom space, and that of the public washroom in particular, is intensely regulated. Furthermore, the Article argues that the public restroom is probably the most regulated of all common spaces in the United States.⁵ Utilizing the State of New York as a window from which to observe the various issues raised by what I call "loo law," the Article makes more general claims about the relationship between law and spatial design. It argues that the law not only reflects certain social practices and beliefs, but also makes them less changeable, less flexible, and more rigid. This is mainly the result of the embodiment of certain social and cultural practices in the physical space, an embodiment that is then fixed and codified by law.

We are made strikingly aware of just how disciplined we are with regard to our washroom practices when visiting public washrooms in other geographies or when considering washroom conduct in different temporalities. From minute dressing codes, such as zippers, to the potty training of toddlers, recognizing the importance of washroom design in governing our everyday conduct is not unlike realizing the importance of salt to King Lear — namely that small things govern our everyday lives and make all the difference in the world. We visit washrooms several times a day. Based on an average of eight minutes a day, we will all spend roughly 3,650 hours or 150 days in the washroom in the course of our lives.⁶ Nonetheless, at least with respect to the public washroom, we usually go into this space with the sole intention of getting out as quickly as possible. This Article provides a second glimpse into the space of the public washroom, illustrating the role that the law plays in making this place — along with its myriad fixtures — into what it is.

3. Jo-Anne Bichard, Julianne Hanson & Clara Greed, *Please Wash Your Hands*, 3 SENSES & SOC'Y 79, 79 (2008).

4. *Id.* at 80-81.

5. This is not an empirical claim. I have not measured the exact degree of regulation nor have I counted the number of norms and the number of fixtures regulated.

6. These estimates are twice as high for the Japanese. INGRID WENZ-GAHLER, FLUSH!: MODERN TOILET DESIGN 11 (2005).

My most memorable experience from the year I spent in southern India is having to use my bare hands instead of toilet paper. I remember how ecstatic I was when, after a seven-month-no-toilet-paper regime, I stepped into a washroom in Bangalore's Kentucky Fried Chicken to discover that they supply toilet paper. Back to civilization, I thought. But this sort of toilet-shock does not only happen to Westerners in non-Western bathrooms. The lack of sex segregation and privacy causes many Americans and British anguish when traveling abroad. A woman entering a public facility in Italy, France, or Japan will usually find that she has no privacy from urinating males. A book titled, *Johns in Europe – Toilet Training for Tourists*,⁷ warns the American traveler of some of the "horrors" that await her abroad, while Thai tour books warn Thai travelers against climbing and squatting over those abominable and noisy Western-style toilets.⁸ The Germans, according to Erica Jong's heroine, allow and even obligate people to inspect their own feces, a practice that is made possible by a porcelain platform for the feces to fall on before it whirls down into the watery abyss.⁹

This study shows that as a result of the complex interrelations between law and spatiality, the American public washroom — and public washrooms worldwide — has become a uniform, cookie-cutter space that does not allow for much innovation, creativity, or even liberty on the part of its everyday users.¹⁰ First, the Article provides a range of definitions of the public washroom and a brief account of its history. The Article then proceeds to consider the regulation of public washrooms. On its face, this regulation could seem technical and valueless, but a further exploration reveals the moral values that such regulation assumes and promotes. In this respect, legal regulations reflect and reinforce society's most prominent ideology, while at the same time presenting such ideology as merely neutral or technical.

Several specific discussions illustrate the extent of this ideological production. First, I discuss how the technical regulation of washrooms embodies a certain cultural and political understanding of gender relations. I then discuss how washrooms promote certain understandings of physical abilities and disabilities. At this point, the Article reveals the vast eclectic and

7. ALEXANDER KIRA, *THE BATHROOM 204*, 264 (Viking Press 1976) (1966) (citing M. KULLEY, *JOHNS IN EUROPE – TOILET TRAINING FOR TOURISTS* (1970)). See also JONATHAN ROUTH & BRIGID SEGRAVE, *THE GOOD LOO GUIDE: WHERE TO GO IN LONDON* (1965).

8. KIRA, *supra* note 7, at 204.

9. Francesca Bray, *American Modern: The Foundation of Modern Civilization*, <http://www.anth.ucsb.edu/faculty/bray/toilet/amodern3.html> (last visited Sept. 26, 2008) (citing ERICA JONG, *FEAR OF FLYING: A NOVEL* (Signet 1995) (1973)).

10. But see *TheBathroomDiaries.com*, *The Golden Plungers: The World's Best Bathroom*, <http://www.thebathroomdiaries.com/GoldenPlungers.html> (last visited Sept. 29, 2008).

chaotic mass of legal regulations of the public washrooms. From this point on, however, the Article explores the regulation of human conduct through the standards that pertain to toilet fixtures and accessories. Rather than regulating human behavior through a direct form of ordering, such as signs commanding that "employees must wash hands," things regulate human behavior through physical design, which indirectly enforces certain behavior while rendering other behavior impossible. As a result, it is almost impossible for a person to conduct herself in any way other than that which is prescribed by the law, thus reinforcing and stagnating existing social norms.

Throughout, the Article explores the reasons for the hyper-juridical attention toward public washrooms. First and foremost, I claim that this zealous attention toward washrooms has to do with the sanitary significance of this space. By focusing on the history of sanitary regulation, Section I provides some insight into the detailed regulation of moral conduct in the public washroom. It illustrates that more than any other space, the washroom signifies the connection between purity and danger.¹¹ What happens in the space of the washroom cannot happen elsewhere; farting, defecating, urinating, are all matters "out of place" — in essence dirt or pollution — when occurring outside the washroom.¹²

This hyper-intensive washroom regulation may also be explained through the washroom's ambiguous public/private properties. Section II further explores this dimension of washroom space, illustrating how "publicness" has been interpreted by scholars and by the relevant legal norms. In particular, several scholars have shown that drains express the literal connection between public and private. Just like water and electricity, they connect every home-dweller to the state without a sense of direct intervention.¹³ Some have even classified sewers draining into oceans as a "public secret," Michael Taussig's term for what is generally known but cannot be spoken — a strategic absence.¹⁴ According to Dominique Laporte, it was commerce and shit that helped construct the modern state in sixteenth century France, making the case for the state as a purifying force that establishes its power through its capacity to force shit into the private realm.¹⁵ The washroom emerges, then, as a liminal space. It is precisely this liminality, I claim, that renders the washroom a model of disciplinary regula-

11. MARY DOUGLAS, PURITY AND DANGER 2, 41 (1966). See also Ruth Barcan, *Dirty Spaces: Communication and Contamination in Men's Public Toilets*, 6 J. INT'L WOMEN'S STUD. 7 (2005); Gay Hawkins, *Down the Drain: Shit and the Politics of Disturbance*, 7 UTS REV. 32 (2001); DAVID INGLIS, A SOCIOLOGICAL HISTORY OF EXCRETORY EXPERIENCE (2001).

12. DOUGLAS, *supra* note 11, at 40.

13. Hawkins, *supra* note 11, at 34-35. See also JAMIE BENIDICKSON, THE CULTURE OF FLUSHING: A SOCIAL AND LEGAL HISTORY OF SEWAGE (2007).

14. Hawkins, *supra* note 11, at 35 (citing MICHAEL TAUSSIG, DEFACEMENT 3 (1999)).

15. LAPORTE, *supra* note 1, at 42.

tion.¹⁶ The washroom thus embodies and represents an unintentional cultural strategy for preserving existing social categories and for maintaining our most cherished classifications.¹⁷ Section II further explores the private/public divide through the lens of the washroom.

Finally, the intense regulation of the public washroom is also a consequence of the specific physical functions that are performed in this space. Washroom regulations are not only physical but are also legal expressions of the "normal" anatomic range of human movement. In a sense, spatial design at large is regulatory and confining. Upon entering a building, to pick an obvious example, we usually use the door assigned for entry rather than breaking through the wall.¹⁸ The architectural design of the building thus regulates our every move in and out of these spaces.

The space of the washroom, I suggest, is even more physically constraining, both because of its smaller size and for the multiple, complex, and contested functions that are performed in it. The toilet seat, for example, is designed and standardized so that it can seat the average Western person, the flush handle is placed where it is supposed to be easy to access for frequent flushing, and the toilet bowl is designed to contain the amount of toilet paper that is normally used by a single, "normal" user. These physical limitations of the "normal" washroom user are expressed in their finest detail through existing loo law in its broadest sense, which includes regulations and standards. The physical and anatomical aspects of washroom space are further explored in Section III, which discusses washroom regulation, as well as in Section IV, which studies the network of standards that apply in this space.

16. In the Foucaultian sense. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Second Vintage Books ed. 1995) (1977). Foucault examines the evolution of power from its more familiar manifestations, as practiced by the sovereign, to the less obvious controls practiced through the indoctrination of individuals. According to Foucault:

[I]f it is true that the leper gave rise to rituals of exclusion, which to a certain extent provided the model for and general form of the great Confinement, then the plague gave rise to disciplinary projects. Rather than the massive, binary division between one set of people and another, it called for multiple separations, individualizing distributions, an organization in depth of surveillance and control, an intensification and a ramification of power.

Id. at 198. Foucault explores the meaning of discipline through a depiction of the plague: "Against the plague, which is a mixture, discipline brings into play its power, which is one of analysis." *Id.* at 197. Finally, "behind the disciplinary mechanisms can be read the haunting memory of 'contagions,' of the plague, of rebellions, crimes, vagabondage, desertions, people who appear and disappear, live and die in disorder." *Id.* at 198.

17. Patricia Cooper & Ruth Oldenziel, *Cherished Classifications: Bathrooms and the Construction of Gender/Race on the Pennsylvania Railroad During World War II*, 25 FEMINIST STUD. 8 (1999).

18. Bruno Latour, *Where Are the Missing Masses? The Sociology of a Few Mundane Artifacts*, in *SHAPING TECHNOLOGY/BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE* 225 (Wiebe E. Bijker & John Law eds., 1992).

II. A BRIEF HISTORY OF PUBLIC WASHROOMS¹⁹

The rising importance of the twenty-first century's fascination with dirt and cleanliness is evident in the United Nations' declaration of the year 2008 as the "International Year of Sanitation."²⁰ There is now also a "World Toilet Organization."²¹ With headquarters in Singapore, this organization spans seventeen member states and promotes the design of public toilets internationally, taking into account not only cultural peculiarities but also the technological, ecological, and legal aspects of toilet construction.²² In our sanitary, well-plumbed lives, the toilet — an engineering marvel — removes waste out of sight and out of mind.²³ Indeed, the washroom, and the water closet ("WC") in particular, is an ingenious invention on the immediate physical level. At the same time, the WC does not only flush water; it also flushes the human fear of its own organic nature and, consequently, of mortality.²⁴

According to a *New York Times* article, good disposal of human excreta can reduce diarrhea by forty percent, and washing hands reduces it further.²⁵ This article also cites health economists who indicate that every dollar invested in sanitation can save seven dollars on health costs and lost productivity.²⁶ Readers of the *British Medical Journal* voted sanitation as the greatest medical milestone ever, over penicillin and anesthesia.²⁷ Through emphasizing its functions in eliminating public health hazards,²⁸ the minute regulation of washrooms, and of public washrooms in particular, is not only legitimized, but also made necessary. This regulation becomes an issue of public safety and, thus, the responsibility of the state.

When reading existing regulations that pertain to public washrooms, it is difficult to keep in mind that not so long ago, public washrooms had a

19. This section primarily relies on CLARA GREED, INCLUSIVE URBAN DESIGN: PUBLIC TOILETS 31-35 (2003) and KIRA, *supra* note 7, at 193-99.

20. United Nations, *International Year of Sanitation*, <http://esa.un.org/iys/index.shtml> (last visited Sept. 24, 2008).

21. World Toilet Organization Home Page, <http://www.worldtoilet.org> (last visited Sept. 24, 2008); WENZ-GAHLER, *supra* note 6, at 13.

22. WENZ-GAHLER, *supra* note 6, at 13.

23. Rose George, *Send in the Latrines*, N.Y. TIMES, May 19, 2008, at A21. See also STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE (2007).

24. See ALAIN CORBIN, THE FOUL AND THE FRAGRANT: ODOR AND THE FRENCH SOCIAL IMAGINATION 58 (Aubier Montaigne trans., Berg 1986).

25. George, *supra* note 23.

26. *Id.*

27. *Medical Milestones*, BMJ, Jan. 14, 2007, http://www.bmj.com/cgi/content/full/334/suppl_1/DC3 (last visited Nov. 7, 2008).

28. See ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER (1971); Charles P. Gerba, Craig Wallis & Joseph L. Melnick, *Microbiological Hazards of Household Toilets: Droplet Production and the Fate of Residual Organisms*, 30 APPLIED MICROBIOLOGY 229 (1975); JESSICA SNYDER SACHS, GOOD GERMS, BAD GERMS: HEALTH AND SURVIVAL IN A BACTERIAL WORLD (Hill and Wang eds., 1st ed. 2007).

very different moral role as well as function and design. Indeed, until the nineteenth century, public washrooms were the norm, and private dwelling toilets were only built for the rich. The first evidence of actual physical facilities for public use was found in Knossos, dating back to approximately 1700 B.C.E.²⁹ In fact, most of the great cities of the ancient world provided startlingly sophisticated public facilities. The epitome of this approach was Rome, which provided public facilities on a wide scale in lieu of private facilities. Roman cities were famous for their advanced sewer systems and provided the first real example of a public urinal.³⁰ The urine was collected in great cisterns and sold to cloth dyers. There was even a goddess of sewage called Cloacina. Spanish ceremonies honoring “Our Lady of the Sewage” christianized such ancient deities.³¹

For the next thousand years or so, public facilities declined and the sewage system disappeared. The facilities ranged from none, to designated heaps, to privies, to carriage pots for the wealthy. Within private dwellings, it was customary to empty chamber pots out of upstairs windows by throwing their contents into the street, calling out: “gardez l’eau” (“guard the water,” hence the word “loo”). Public toilets were located over rivers. Under medieval statutes, anyone, including women, had the right to squat in the gutter, for example, within the boundary of the ancient City of London.³²

Industrialization was accompanied by the expansion of towns and cities, and population growth increased pressure for better sewer systems. It was not until the 1840s that the public street urinal made its reappearance, this time in Paris.³³ By the 1860s Paris also boasted enclosed kiosks, and by the 1880s the washroom had become unisex and incorporated WCs as well.³⁴ Still, most houses piled the sewage in the garden or waited for the nightsoil man to collect it. Nightsoil men were the central means for collection in Japan before World War II and in Australia around the same time. Cesspools were common as well.

In Britain, the nineteenth century spread of cholera made necessary central intervention in the public’s excretory conduct. The 1835 Municipal Corporations Act laid the foundation for this, aided by the material development of the modern WC.³⁵ The first British public toilets using a water system were at the Great Exhibition of 1851 and initially were not provided

29. KIRA, *supra* note 7, at 194.

30. *Id.*

31. GREED, *supra* note 19, at 33.

32. *Id.* at 34.

33. KIRA, *supra* note 7, at 195.

34. *Id.*

35. GREED, *supra* note 19, at 40. In 1596 Sir John Harrington invented the first modern lavatory using water. In the nineteenth century, Sir Thomas Crapper perfected and marketed modern WCs with siphonic cisterns.

for women.³⁶ The 1872 Act adopted the water-based sewer system, turning it into a government standard.³⁷ This shift from cesspools to flush toilets led to the overloading of the existing sewers. Consequently, an 1875 Act was introduced to enable the creation of a set of bylaws that would control the layout of new streets and housing schemes.³⁸

The history of excrement regulation in France is not very different from that of Britain, although it starts somewhat earlier. Dominique Laporte begins his remarkable *History of Shit* with a quotation from a 1539 decree issued by Francois, King of France. Article 4 of the decree stated:

We forbid all emptying or tossing out into the streets and squares . . . of refuse . . . as well as all waters whatever their nature, and we command you to delay and retain any and all stagnant and sullied waters and urines inside the confines of your homes. We enjoin you to then carry these and promptly empty them into the stream and give them chase with a bucketful of clean water to hasten their course.³⁹

Moreover, Article 23 of this decree ordered every lord and owner of a house to build cesspools and earthclosets "or risk the penalty of the confiscation of their abodes."⁴⁰ Maintaining that every individual family is responsible for their personal waste, the decree established what Laporte calls a "privatization of waste," which made it possible for "the smell of shit to be bearable [only] within the family setting, home to the closest social ties."⁴¹ This privatization enabled the state to "clean its hands" of such earthly matters, thereby becoming "the supreme guarantor of absolute power and virginal purity," an alchemist that transforms shit into gold.⁴² Shit, Laporte further contends, has become "a political object through its constitution as the dialectical other of the 'public.'"⁴³ While the state wants nothing to do with the *prive*, it reigns as the law of cleanliness above its sewers. "Cleanliness, order, and beauty, defined by Freud as the cornerstones of civilization, are elevated to new extremes when embodied by the state."⁴⁴

36. OLGA GERSHENSON & BARBARA PENNER, Introduction to LADIES AND GENTS: PUBLIC TOILETS AND GENDER (forthcoming 2009) (manuscript at 4, on file with *Hastings Women's Law Journal*) (cited with permission); KIRA, *supra* note 7, at 195.

37. GREED, *supra* note 19, at 40.

38. *Id.*

39. LAPORTE, *supra* note 1, at 4.

40. *Id.* at 5.

41. *Id.* at 29.

42. *Id.* at 40-43.

43. *Id.* at 46.

44. *Id.* at 56. See also KATHERINE ASHENBURG, THE DIRT ON CLEAN: AN UNSANITIZED HISTORY (2007); INGLIS, *supra* note 11.

III. WHAT IS A PUBLIC WASHROOM?

Generally, when we think about washrooms we think about privacy; we think about being able to do our business how and when we want. We believe that behind that closed door — even of a public washroom — there can be no video cameras, no policemen. We can choose to sit or to hover, to fold the toilet paper or to crinkle it up, to wipe the seat or not, and finally to wash our hands for as long as we like. Who can say anything? Who would even know?

This might not come as a surprise to many, but the washroom space is not as private and surveillance-free as we would like to think. It is true that some people use the quasi-intimate privacy of the public washroom setting for various purposes, for example for drug use or to conduct impersonal sex.⁴⁵ It is also true that various state courts have begun to restrict the practices of spying on men in toilet stalls.⁴⁶ These restrictions are frequently based on the linguistic formula of “reasonable expectation of privacy,” derived from the *Katz v. United States* decision regarding eavesdropping on a public telephone booth.⁴⁷ Nonetheless, the practices conducted in the space of the public washroom are highly regulated, either directly through formal legal norms such as sex-segregated washrooms, or indirectly through subtly disciplinary means such as potty training, specific dressing codes, and the particular design of public washroom fixtures. This Article focuses on the latter form of washroom regulation: the regulation of washroom conduct through architectural design.

The public washroom is considered one of the marks of civilization, says Laud Humphries in his controversial book, *Tearoom Trade*.⁴⁸ It is ironic, then, that public toilets are being shut down in many American states, mostly because of a crackdown on drugs and “tea-rooming” or “cot-tagging” (the British and American terms for male sexual behavior in toilets).⁴⁹ Clara Greed contends that in North America, washrooms are likely to be available to the public in department stores and food outlets, while in mainland Europe they are available in cafés and shops. In Britain, however, the truly public toilet is the only option available for the general public in many areas.⁵⁰

Some would disagree with Greed’s seemingly positive depiction of the accessibility of American commercial washroom facilities to the general

45. LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 3 (1970). Washrooms, Humphreys suggests, are second only to private bedrooms in their popularity for this conduct. He suggests that washrooms offer the advantages of both public and private settings.

46. David Alan Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 878 (2008).

47. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

48. HUMPHREYS, *supra* note 45, at 3.

49. GREED, *supra* note 19, at 8.

50. *Id.*

public. It is common knowledge, in the United States at least, that commercial washrooms in cafés and malls are not equally accessible to all people. Much, it seems, depends on the mood of the manager at the time and, moreover, on the particular features of the person asking to use the washroom.⁵¹ In *Sidewalk*, Mitchell Duneier provides an example of such inaccessibility.⁵² Duneier describes the washroom practices of vendors who live on the street in New York City's Greenwich Village.⁵³ While not enforced against certain non-customers, "For Customers Only" signs, which are posted in many of these businesses, are more strictly applied to homeless people who have nowhere else to go.⁵⁴

Not unlike the term "public" itself, the definition of "public washrooms" is also open to interpretation.⁵⁵ "There aren't no public bathrooms in Buffalo," Buffalo's Chief Plumbing Inspector told me in an interview.⁵⁶ His definition of the term "public" is probably similar to Greed's definition: Public restrooms are those constructed and maintained by the government and open to the general public. These types of washrooms are becoming an increasingly rare phenomenon in the United States. For example, New York State regulations define "public" differently, as facilities that the public, but not necessarily the general public, has access to. Under the title "Public Facilities," section 403.6 of New York's Plumbing Code stipulates that "customers, patrons, and visitors shall be provided with public toilet facilities in structures."⁵⁷

51. Apparently, Los Angeles' explicit policy is to eliminate public washrooms. This seems to be their way of tackling crime and homelessness. By contrast, New York currently has 327 public washrooms. Wansoo Im, *Restrooms in New York*, <http://www.nyrestroom.com> (last visited Sept. 26, 2008).

52. MITCHELL DUNEIER & OVIE CARTER, *SIDEWALK* 172-87 (Farrar, Straus & Giroux eds., 1999).

53. *Id.*

54. *Id.*; see also Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST. 195 (2003).

55. On the public/private distinction, see, e.g., Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Mimi Sheller & John Urry, *Mobile Transformation of 'Public' and 'Private' Life*, 20 THEORY, CULTURE & SOC'Y 107 (2003); Nick Blomley, *The Borrowed View: Privacy, Propriety, and the Entanglements of Property*, 30 LAW & SOC. INQUIRY 4 (2005); Anna Grear, *Theorising the Rainbow? The Puzzle of the Public-Private Divide*, 9 RES PUBLICA 169 (2003); David Cohen & Allan C. Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 13 DALHOUSIE L.J. 20 (1990); Sarah Whatmore, *De/Re-Territorializing Possession: The Shifting Spaces of Property Rights*, in 5 CURRENT LEGAL ISSUES: LAW AND GEOGRAPHY 211 (JANE HOLDER & CAROLYN HARRISON eds., 2003); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006); S.I. Benn & G.F. Gaus, *The Public and the Private: Concepts and Action*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 3 (Stanley Benn & Gerald F. Gaus eds., 1983).

56. Interview with Chief Plumbing Inspector, in Buffalo, N.Y. (Apr. 11, 2008) [hereinafter Chief Plumbing Inspector].

57. See generally PLUMBING CODE OF N.Y. STATE § 1100 (2007). The Building Code of New York State makes even more minute distinctions. In Chapter 11, which regulates "accessibility," the code distinguishes between public, common, restricted, service, and several other types of spatial categories. See generally BUILDING CODE OF N.Y. STATE § 1100 (2002).

The distinction between private and public becomes complicated in the space of the washroom. In his groundbreaking book, *The Bathroom*, Alexander Kira studies bathroom design, accounting for numerous washroom practices and examining their physical, historical, and psychological properties and functions.⁵⁸ In this context, Kira suggests that the concept of “publicness” depends on several factors: the degree of “strangeness of other users from oneself,” the extent of usage of a certain facility, and the facility’s level of cleanliness.⁵⁹ He suggests that “publicness” moves along a continuum, from one’s private bathroom to one in a hotel room, to the washroom in the golf club or the gym, and finally to the “truly” public facilities where “goodness knows who may have used or touched something before us.”⁶⁰ The more spotless the facility, Kira contends, the less overt evidence there is to remind us that it is indeed a public facility and that we are not in our own privately protected space.⁶¹

Similarly, Kira illustrates certain behavioral patterns that emerge only in the more public washroom categories, resulting from what Erving Goffman describes elsewhere as “civil inattention.”⁶² For example, a man will almost invariably use a vacant urinal that is not adjacent to the one currently in use. “A violation of this pattern,” Kira argues, “is at once suspect and cause for concern, aggression, or whatever.”⁶³ Moreover, certain physical designs are distinctive to the public washroom setting. The partial partitions constructed between the stalls — about twelve inches above the ground in the United States — are a good example for the distinctiveness of the public washroom in comparison with that of the private washroom.⁶⁴ While marketing brochures and architectural manuals explain this partition as resulting from the need for optimal ventilation, one need only consider her own personal experience to realize the increased surveillance achieved through this architectural design.

Indeed, partitions between toilet stalls are an important means for policing public conduct. While seemingly private, the partitions make possible a constant public gaze into the stall, albeit from an awkward perspective. Michel Foucault briefly alludes to this type of discipline through latrine design when describing the school building as a mechanism for

58. KIRA, *supra* note 7.

59. *Id.* at 201.

60. *Id.*

61. *Id.* at 202.

62. See GOFFMAN, *supra* note 28 (discussing the avoidance behavior practiced by strangers when interacting in the same physical setting).

63. See e.g., KIRA, *supra* note 7, at 204. See also Phil Rice & Overman, “Male Restroom Etiquette,” <http://www.youtube.com/watch?v=IzOImCAVyMw> (alternatively at <http://z-studios.com/films/mre>) (last visited Sept. 22, 2008) (illustrating the informal yet highly enforced norms of male washroom conduct).

64. In contrast, in Europe there are complete floor-to-ceiling closures creating, in effect, complete rooms. KIRA, *supra* note 7, at 205.

training. "Latrines," writes Foucault, "had been installed with half-doors, so that the supervisor on duty could see the head and legs of the pupils, and also with side walls sufficiently high that those inside cannot see one another."⁶⁵ The policing functions of stall partitions have been especially intense in the case of homosexual conduct and recently were central to the arrest of Senator Larry Craig.⁶⁶

Needless to say, most washrooms in private dwellings do not contain partitions. In addition, the precise ratio between urinals and stalls, and the segregation of the washroom space between touchables and untouchables, black and white, and women and men, have all been properties of the public washroom, as are the acute avoidance of noise and the control of smells, all of which are most relevant in the public setting. People seem to resist any inference to the public when they are in a private washroom. Hence, one usually does not find a urinal or a toilet seat with a front opening in a private dwelling.⁶⁷

The modern person's need to secure the public/private divide is reflected and even magnified in the space of the public washroom. Simultaneously, the ambiguity and messiness of that distinction is also intensified in this space. Most obviously, the demand that shit be removed from the public gaze and dealt with in the privacy of the single-family household is frustrated in the case of the public washroom, which forces us to encounter the "other" in her most material — smelly, dirty, and noisy — sense.

In what follows I depict the intensely detailed maze of regulations pertaining to public washrooms.

65. FOUCAULT, *supra* note 16, at 173. The issue of policing through design, and especially through the design of automated fixtures, is further explored in Irus Braverman, *Eyeing the Automated Public Washroom: Flushometers, Infrared Faucets, and Sensor Dryers*, in *OUTING THE WATER CLOSET: SEX, GENDER AND THE PUBLIC RESTROOM* (Harvey Molotch and Laura Noren eds., forthcoming 2009) (manuscript on file with author).

66. See generally HUMPHREYS, *supra* note 45. On the Larry Craig issue, see Patti Murphy & David Stout, *Idaho Senator Says He Regrets Guilty Plea in Restroom Incident*, N.Y. TIMES, Aug. 29, 2007, at A19 (explaining that Craig "tapped his right foot [under the partition] in a signal used by people wishing to engage in lewd conduct." The undercover officer seated in the other stall also reported that Craig swiped his left hand under the stall three times before the officer held his police identification down by the floor).

67. Public toilet seats are usually made with a gap in the front-center, which supposedly reduces the amount of spatter, accommodates male users, and eases the job of cleaning for janitorial staff. It also used to be the case that toilet seats were black. However, certain states, such as Maryland and Florida, have banned this practice, suggesting that such seats mask unsanitary conditions.

IV. THE REGULATION OF PUBLIC WASHROOMS

“Everything is regulated.”

– Chief Plumbing Inspector, Buffalo, New York⁶⁸

A simple reading of public washroom regulation — although difficult because of the eclectic nature of the regulations — suffices to make one realize that this is a uniquely regulated space. The intensity of this form of washroom regulation does not leave much room for innovation on the part of the user. It is no wonder, then, that American public washrooms look strikingly uniform. While the regulation of washrooms occurs on multiple legal scales, this Article is concerned with its formal aspects, and mostly with the regulation of this space through state codes and officially adopted standards.⁶⁹

On the federal level, the enactment of the Americans with Disabilities Act (“ADA”) in 1990 introduced rigid standards of compliance for all private businesses open to the public.⁷⁰ Other laws and regulations govern the number, type, and form of washroom design. While these regulations might initially seem technical and insignificant, further observation exposes the moral and political assumptions lurking behind their enactment as such. I start this Section by discussing the regulation of the number of toilet facilities and how these regulatory figures reflect gender roles. I then proceed to discuss the regulation of disability. Finally, I study the regulation of washroom conduct through the design of accessories and fixtures meant for “normal” users.

A. REGULATION OF GENDER MATTERS

One of the major issues that arises when studying public washrooms in the United States is gender. The intersection of washrooms and gender has generated a large number of public debates, as well as a growing body of

68. Chief Plumbing Inspector, *supra* note 56.

69. Another, less official form of regulation is through religious norms. The laws regarding washrooms are quite intense in the Jewish tradition and even more so in Islam. Christianity, for some reason, seems more lax about the regulation of washroom conduct, although the modern separation between men and women’s washrooms probably originates from the Victorian era. Barbara Penner, *A World of Unmentionable Suffering*, 14 J. DESIGN HIST. 35, 36–37 (2001). Here are some examples for the Jewish regulation of washroom conduct: “On entering a privy one should say: ‘Be honoured, ye honoured and holy ones. . . . Wait for me till I enter and do my needs, and return to you.’” ISIDORE EPSTEIN, *THE BABYLONIAN TALMUD: SEDER ZERA’IM 377* (Maurice Simon trans., Soncino Press, vol. 1, 1948). “A man should not recite the Shema’ . . . in front of human excrement.” *Id.* Examples of Islamic laws regarding washrooms include: “Do not talk while inside the toilet unless it becomes essential;” “It is not permissible to face the Qiblah while relieving oneself nor is it permissible to have one’s back towards the Qiblah;” “It is not permissible to stand while urinating;” and “It is not permissible to read inside the toilet. Many Westernized Muslims are in the habit of reading the newspaper or some magazine inside the toilet.” YOUNG MEN’S MUSLIM ASS’N, *KITAABUT TAHAARAH (THE BOOK OF PURIFICATION AND PURITY)* (HANAFI) 62, 63 (1994).

70. 42 U.S.C. §§ 12181–12189 (2006).

scholarly work. Many scholars take a clear position, either in defense or in condemnation of, gender segregation.⁷¹ While I do not attempt a unique contribution on this front, I would nonetheless like to use the issue of gender to illustrate the relationship between spatial design and the law. Specifically, this issue demonstrates how ostensibly technical rules and number counts, in particular, carry a significant implication for the design of the public washroom — and thereby for the form and scope of surveillance over public conduct.

The mandatory segregation of public washrooms in the United States is usually determined by state-level legislation. Section 403.2 of the Plumbing Code of New York State states, “[w]here plumbing fixtures are required, separate facilities shall be provided for each sex.”⁷² There are only a few exceptions for this rule, including private facilities and occupancies in which fifteen or fewer people are employed. Various federal regulations also require sex-segregated toilet facilities.⁷³ The use of the public washroom of the “wrong” sex might even lead to arrest.⁷⁴

New York’s policy on toilet segregation in restaurants regulates this situation in even more minute detail. Specifically, a “Policy on Toilet Facilities in Restaurants” was developed as a supplement to Chapter 1 of the New York State Sanitary Code and New York State Uniform Building Code.⁷⁵ This document states, “if there are five or more employees working at any time, separate facilities must be provided for female and male employees.”⁷⁶ It also adds that while “food service establishments with a seating capacity of twenty or more are to provide toilet facilities for their

71. See generally Mary Anne Case & Liz Deschenes, *Changing Room? A Quick Tour of Men's and Women's Rooms in U.S. Law Over the Last Decade from the U.S. Constitution to Local Ordinances*, 13 PUB. CULTURE 333 (2001); Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007); GREED, *supra* note 19; Cristyn Davies, *Queering the Space of the Public Toilet*, Presentation at Queer Space: Centres and Peripheries (Feb. 20, 2007), http://www.dab.uts.edu.au/conferences/queer_space/proceedings/beats_davies.pdf (last visited Oct. 1, 2008).

72. PLUMBING CODE OF N.Y. STATE § 403.2 (2002).

73. Kogan, *supra* note 71, at 4; See, e.g., 29 C.F.R. § 1910.141(c)(1)(i) (2007).

74. Lisa Belkin, *Seeking Some Relief, She Stepped Out of Line*, N.Y. TIMES, July 21, 1990, at 16. In 1990, at a concert in Houston, Texas, Denise Wells was arrested and fined \$200 for entering and using an otherwise empty men’s room after finding thirty women ahead of her in line for the women’s room. However, not only did a jury ultimately acquit Wells, the Texas legislature responded with legislation mandating twice as many stalls for women than for men in public toilets. This became a model for “potty-parity” around the country. Also, in 1998 Bob Glaser sued the city of San Diego for over \$5 million in damages for an emotional trauma when a group of women invaded the men’s room (where he stood at the urinal) at a Rolling Stones concert. Glaser’s lawsuit was dismissed and he was ordered to pay \$4,000 to the defendants. Case & Deschenes, *supra* note 71, at 335-36.

75. *Policy on Toilet Facilities in Restaurants*, Food Service Protection Program, Environmental Health Services, Erie County Dept. of Health (Mar. 1995) (provided by Supervising Public Health Sanitarian, Erie County Department of Health) (on file with author).

76. *Id.*

patrons,” “establishments with a seating capacity of thirty-one or more must provide separate facilities for male and female patrons.”⁷⁷ Supervising Public Health Sanitarian of Erie County’s Department of Health clarified in an interview that “the permit costs money according to the number of chairs in the establishment.”⁷⁸

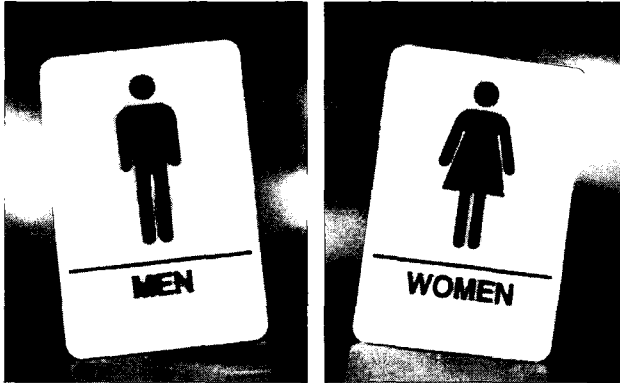


Figure 2: Common signifiers of washroom segregation in compliance with ADA accessibility requirements

Although it seems obvious and is even taken for granted in the American setting, the segregation of public washrooms is actually a genealogy still in the making. A careful examination of the language of the existing legal codes and regulations can perhaps teach us something about this genealogy of washroom separation. Although they might appear technical and arbitrary, I argue that the number of urinals and WCs required by legal codes are quantitative expressions of the struggle over gendered access to washrooms. As is probably the case in most American cities, in Buffalo, New York, the number of toilets in each place of assembly is a very specific matter. Chapter 4 of the Plumbing Code of New York State defines the minimum number of required plumbing fixtures in at least twelve places of assembly (for example, theaters, nightclubs, restaurants, terminals, places of worship, prisons, childcare, hospitals, and educational facilities) as well as in mercantile spaces (retail stores, service stations, and shopping centers) and residential areas (including hotels).⁷⁹

One could conduct an entire study on the taxonomy of space that is expressed through the Plumbing Code. For the purpose of this Article though, I will focus only on the ratio of male-to-female WCs, as established by the Code. The relevant section utilizes only two types of ratios.

77. *Policy on Toilet Facilities in Restaurant*, *supra* note 75.

78. Interview with Supervising Public Health Sanitarian, Erie County, Dep’t of Health, in Buffalo, N.Y. (April 16, 2008) [hereinafter Supervising Public Health Sanitarian].

79. PLUMBING CODE OF N.Y. STATE § 403.1 (2002).

In some instances, the ratio between the number of WCs for men and women is identical (for example one WC per forty occupants for night clubs and restaurants, or one WC per 500 occupants in passenger terminals and transportation facilities).⁸⁰ In other instances, the number of female washrooms is double that of males (for example, in theaters, pools, auditoriums without permanent seating, and places of worship).⁸¹ As for male urinals, the Code determines that they should not be "substituted for more than sixty-seven percent of the required WCs," and that they should conform to Chapter 11 of the Building Code of New York State, which regulates "accessibility."⁸²

What story does the New York's Plumbing Code tell us about the relationship between law, space, and gender? The Code seems to adopt one or the other of two parallel approaches to the sex segregation of public washrooms. It sometimes adopts a strict, egalitarian approach, providing an equal number of toilet facilities for men and women, which literally expresses an "all equal before the law" approach. This is the case with restaurants, night clubs, and various terminals. On the other hand, the Code sometimes adopts an affirmative action-type approach, the underlying assumption being that, physically and psychologically, women need more toilet facilities than men. The position adopted by the legal Code in these instances is that due to women's needs and uses, distributing toilets evenly actually produces unequal results. This concern is reflected in the two-to-one ratio of women's-to-men's washroom facilities required in theaters, pools, and religious places.

The two-to-one ratio would probably be heralded by most gender-oriented toilet scholars as the more adequate, even the proper, ratio. Clara Greed, for example, suggests that women should be provided with twice as many facilities because of physical as well as biological differences. "If you want to know the true position of women in society," she says, "look at the queue for the Ladies toilets."⁸³ "What would a non-sexist city be like?" wonders another toilet scholar.⁸⁴ Olga Gershenson and Barbara Penner mention that the first women's bathroom on the U.S. Senate floor was established only in 1992.⁸⁵ Before that, female senators, risking missing a vote, had to rush downstairs to share the public washroom with tourists. Statistics are also thrown into the mix. According to Kira, men take an average of thirty-five seconds to urinate while women take ninety-one seconds.⁸⁶

80. PLUMBING CODE OF N.Y. STATE § 403.1 (2002).

81. *Id.*

82. *Id.* § 419.2.

83. Viv Groskop, *Sex and the City: Why Is There Always a Queue for the Ladies?*, GUARDIAN (London), Sept. 19, 2008, at 16.

84. Delores Hayden, *What Would a Non-Sexist City Be Like? Speculations on Housing, Urban Design, and Human Work*, 5 SIGNS S170 (1980).

85. GERSHENSON & PENNER, *supra* note 36, manuscript at 7.

86. GREED, *supra* note 19, at 8.

Similarly, sociologist Harvey Molotch argues that unless the cultural demands of society change, only an “asymmetric distribution of space” will improve the situation and provide an “equality of opportunity” between the genders.⁸⁷ Molotch’s argument anticipated the move toward affirmative action in public washroom legislation, which has, in certain academic circles, been dubbed “potty-parity” legislation. This sort of legislation passed in various U.S. states in the 1980s and 1990s.⁸⁸ Although a simple count of toilet numbers still seems to be the only legal remedy offered to women by the state, many question this strategy on behalf of rational, gendered, not to mention environmental, perspectives.⁸⁹ As an alternative, some have suggested the reintroduction of the unisex washroom into the American public arena.⁹⁰

Clearly, the New York State Plumbing Code is part of the legal shift toward a more gender-sensitive washroom design. It remains unclear, however, why the code distinguishes between restaurants and theaters, places of worship, and bus terminals. Are such distinctions status-oriented, a matter of a peculiar history, or perhaps just a result of regulatory inconsistency? Either way, the legal code reflects the current state of the struggle over the washroom as a gendered space, in which all actors seem confined, despite their best of intentions, to neo-liberal number counts that mask moral values.

The issues that arise with respect to the gender orientation of public washroom regulation directly intersect with those pertaining to another marginalized group: disabled people. Many advocates of washroom accessibility actually promote a similar solution to that promoted by radical feminists and transgender activists: the abolition of sex-segregated toilets and their replacement with unisex facilities. In the case of disabled people, the argument for unisex washrooms is based on their frequent need of assistance,⁹¹ sometimes by the “opposite” sex.

87. Harvey Molotch, *The Rest Room and Equal Opportunity*, 3 SOC. F. 128, 130 (1988).

88. John F. Banzhaff III, *Final Frontier For the Law?*, 10 NAT’L L.J. 13 (1988). In Missouri, however, the Uniform Building Code of the state issued a violation for St. Louis University’s installation of 120 toilets for women, compared with 103 toilets and urinals for men. “Apparently, the state of Missouri is set on a 1-to-1 ratio and has chosen not to keep up with the trend of other U.S. states and cities that have passed specific regulations calling for double, triple or even quadruple the number of toilets for women’s restrooms.” Editorial board, Editorial, *Failing Potty Parity*, SPECTRUM & DAILY NEWS, July 11, 2008, at A6.

89. GERSHENSON & PENNER, *supra* note 36, manuscript at 11.

90. *Id.*; see Safe2pee.org, Mapping of Gender Neutral Bathrooms, <http://www.safe2pee.org/beta> (last visited Sept. 23, 2008) (website that directs users to gender-free washrooms).

91. See Richard et al., *supra* note 3, at 80, 82-83 (describing the difficulties of people with disabilities in the washroom).

B. REGULATION OF DISABILITIES

Refusing people washroom access remains a remarkably effective form of social exclusion. Consequently, public washrooms have become potent means for marginalizing social untouchables. Urban geographer Mike Davis observed that public washrooms have become "the real frontline in the city's war on the homeless."⁹² Another such "untouchable" group is the physically disabled.

The ADA regulates the design of certain spaces so as to enable access for disabled people. Restroom accessibility is an essential element for compliance with the ADA, and is one of four design priorities stated by the ADA's Title III regulations.⁹³ If you own, operate, or lease to a business that serves the public, then you are legally obligated to comply with the rules and regulations of the ADA. One of the ADA's primary purposes is to give the estimated one in five Americans with disabilities the same access to buildings, transportation, and telecommunications that people without disabilities enjoy. Accordingly, section 1109.2 of the New York Building Code establishes that "toilet rooms and bathing facilities shall be accessible," and that "at least one of each type of fixture, element, control or dispenser in each accessible toilet room and bathing facility shall be accessible."⁹⁴ The types of fixtures listed by the Code "include but are not limited to toilets, urinals, lavatories, bath-tubs and showers."⁹⁵ The same section lists five exceptions to this general rule; for example, in the case where only one urinal is provided in a facility, and in certain dwelling and sleeping units.⁹⁶ An article in a facility maintenance trade publication clarifies that for the washroom to comply with the code, installation of certain products is essential, but "[w]hat matters most is how and where these [mandatory] products are installed to ensure that a facility is truly accessible."⁹⁷

This article also identifies several guidelines to help meet the ADA standards for washrooms.⁹⁸ Here are a few examples: washroom dispensers must be operable with one hand and should not "require tight grasping, pinching, or twisting of the wrist;"⁹⁹ the force required to operate the controls cannot exceed five pounds; a clear floor space of 30 by 48 inches must be available to operate all controls and operating mechanisms from a sta-

92. MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 233-34 (First Vintage Books 1992) (1990).

93. 42 U.S.C. § 12101 (2006).

94. BUILDING CODE OF N.Y. STATE § 1109.2 (2002).

95. *Id.*

96. *Id.*

97. John Watson, *The New ADA Affects Restrooms*, BUILDING SERVICES MANAGEMENT (May 2004) (on file with author), available at <http://www.bsmmag.com/bsmmag/BSMArticle.asp?id=117>.

98. *Id.*

99. Watson, *supra* note 97.

tionary wheelchair; and in general, it is recommended not to place anything above forty-eight inches or below fifteen inches in the space of the washroom.¹⁰⁰

The word “accessibility” has acquired almost magical powers in legitimizing certain public washroom designs. For the most part, people do not dare question the experts on this front, preferring the experts’ decisions over their own mundane experiences of the washroom space. For example, many people with visual impairments prefer to use a standard toilet cubicle instead of those specifically designed by experts for people with disabilities. In the regular washroom there is “less stuff that you have to feel around for,” some of the visibly impaired have indicated; hence you don’t have to “feel around the walls” to actually find the fixtures and accessories as in the larger space of the specifically designed facility.¹⁰¹ In this sense, the legal inclusion of all physical impairments in one modular washroom design actually results in various forms of exclusion.¹⁰²

In the remainder of this Article I further discuss the less obvious, more physically-based assumptions and rationales that lurk behind the design of the public washroom.

C. REGULATION OF OTHER (DIS)ABILITIES

The legal definition of physical disabilities is somewhat arbitrary and also a social construction. Today’s disabilities could have been yesterday’s strengths. Moreover, disability in general can be interpreted in a range of ways. The washroom, like so many other designed spaces, is constructed around functionality for the “normal” person. In this sense, the space of the washroom is a reflection of the range of the “normal” person’s abilities and disabilities in the context of urination, defecation, rinsing, and drying. But as much as it is supposedly designed with inclusiveness in mind, the engineering of washroom space is also bound to exclude. The major question, then, is precisely who is excluded through its seemingly technical design, and what are the reasons for this exclusion?

For instance, public washrooms inform not only a woman’s ability to move comfortably through a city but also define what her needs are and how she is expected to conduct herself publicly. Also, Muslim men might

100. Watson, *supra* note 97.

101. Richard et al., *supra* note 3, at 80.

102. Is a “disabled” washroom even possible? Can it account for the astounding range of disabilities? Maybe it is meant only to accommodate people with physical handicaps that make navigation difficult and not for handicaps that have to do with vision or hearing. See News Release, University at Buffalo, “Universal Bathroom” Prototypes Win National Design Award for UB Architects (Oct. 22, 2001), <http://www.buffalo.edu/news/fast-execute.cgi/article-page.html?article=54210009> (describing newly designed universal washrooms, indicating that changes in bathroom design are necessary because bathroom technology, which has not changed since bathrooms were invented, is not very functional. Existing bathrooms, with permanently installed fixtures and a single design for all users do not work well for most people because every person has different needs.).

find the design of Western urinals as exclusionary as steep stairs would be for a person in a wheelchair. A Muslim student shared his frustration with me: In the entire State University of New York at Buffalo campus, he was not able to find a foot-wash sink for proper ablution. As a result, he said, he refrains from using university washrooms, instead "holding it in" until he returns home in the late afternoon.¹⁰³

There are also more mundane examples for the inclusive/exclusive design of the public washroom. On the face of things, these seem like matters of technical design only. However, this Article shows that, time and time again, such matters are fraught with moral subtexts. Most fixtures seem to be designed around the physical properties and functions of the "average" user. In his study of bathroom design, Kira accounts for the ostensibly physical rationales for the specific design of various bathroom fixtures. In many cases, he contends, this design is impractical. For example, Kira demonstrates how the flush handle would be much better if it was not situated in its present, somewhat inaccessible, location on the back, left side of the WC, and that many toilet bowl designs make their cleaning — supposedly a central function of this fixture — almost impossible. According to Kira, the sink should accommodate the average human height.¹⁰⁴ Instead, the "average" Western person must bend to rinse properly, rather than assume the much preferred and natural standing posture.¹⁰⁵

Another of Kira's examples of the disparity between function and form is the position utilized by the user of the WC. Although he postulates that for defecation, the full-squatting posture practiced by most of the world's population is ideal from the standpoint of physiological functioning, Kira maintains that this posture is difficult for most Western people to assume.¹⁰⁶ While this difficulty can easily be overcome with practice, he continues, a more serious impediment to its adoption in the design of the toilet seat is the problem posed by contemporary Western clothing.¹⁰⁷ Kira claims that the issue of clothing has been a major reason for Japan's gradual shift from the traditional squat closet to a Western-style one.¹⁰⁸ These physical properties are expressed and further institutionalized through informal legal norms such as that depicted in Figure 3, below.

103. Interview with student, SUNY Buffalo Law School, in Buffalo, N.Y. (May 2008).

104. The law requires that for adult use, the top of the lavatory may be no higher than 34 inches above the floor, and the faucet's operable parts may be placed as far back as 25 inches. See 42 U.S.C. § 12101 (2006).

105. But perhaps this is to accommodate shorter people such as children.

106. KIRA, *supra* note 7, at 118-19. For a brief history of Japanese toilets see WENZ-GAHLER, *supra* note 6, at 122-23.

107. KIRA, *supra* note 7, at 119.

108. *Id.*



Figure 3: A sign depicting “correct” washroom conduct¹⁰⁹

According to Kira, clothing is also a major reason behind the difference between female and male urination practices. “[I]t is physiologically perfectly possible for females to urinate in a standing position,” he claims, adding that women’s “[c]ontemporary undergarments are problem enough with regard to a sitting position, but one would be forced to disrobe completely in order to urinate in a standing position.”¹¹⁰ At the same time, Kira maintains that “[w]hile, from a purely physiological viewpoint, males can urinate equally well from either a standing or sitting position, the restrictive effects of clothing, not to mention the psychological problems involved, have caused men to favor the standing position almost universally.”¹¹¹ These differences have enormous implications. For example, in *The Second Sex*, Simone de Beauvoir argues that toilet training is the first act that indoctrinates women into a subordinate (crouching) position.¹¹²

At the same time, from a hygienic perspective, the WC is less than adequate for male urination because of the messy results:

Still another problem that arises in the use of the water closet is the back splash resulting when the [male] urine stream hits a hard surface. . . . [This] poses particular difficulties with the water closet since this fixture has obviously been primarily designed to accommodate defecation, and urination has, as it were, been left to be a hit-or-miss affair.¹¹³

109. *Toilet Iconography*, *supra* note 2.

110. KIRA, *supra* note 7, at 146.

111. *Id.*

112. SIMONE DE BEAUVOIR & H.M. PARSHLEY, *THE SECOND SEX* (First Vintage Books 1997) (1949); see also GERSHENSON & PENNER, *supra* note 36.

113. KIRA, *supra* note 7, at 148. See also Gerba et al., *supra* note 28, at 229 (show-

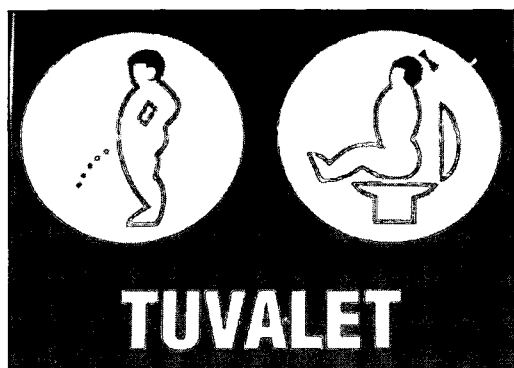


Figure 4: Gender figures in “appropriate” postures¹¹⁴

While Kira does not attempt to explain how such a long list of impractical washroom design has come about, his study shows that design is not necessarily and exclusively a matter of function, but rather an ever-evolving cultural process with a complex genealogy.

Another, more strictly legal example in which the design of public washrooms is meant to accommodate the regular person’s perceived range of abilities and disabilities is the washroom’s location in commercial buildings. Section 403.6 of the Plumbing Code of New York State maintains that “public toilet facilities shall be located no more than one story above or below the space required to be provided with public toilet facilities and the path to travel to such facilities shall not exceed a distance of 500 feet (152 m).”¹¹⁵ Subsection (1) is yet more detailed, applying to employees in “covered mall buildings,” where “the path of travel shall not exceed a distance of 300 feet (91 m),”¹¹⁶ and subsection (2) asserts that “required facilities shall be free of charge.”¹¹⁷

The signage system in “public facilities” is also regulated to accommodate “natural” abilities. Section 403.7 states that “required public facilities shall be designated by a legible sign for each sex. Signs shall be readily visible.”¹¹⁸ Again, the visibility of the public washroom’s sign system — ostensibly a technical and even obvious matter — is also at the core of more contentious issues such as gender segregation and its corresponding stereotypical imagery, as well as the level of accessibility for persons with disabilities and for sight-impaired people in particular.

ing that large numbers of bacteria and viruses remain in the bowl, even after continual flushing, and remain airborne long enough to settle on surfaces throughout the bathroom and to cause infection).

114. Toilet Iconography, *supra* note 2.

115. PLUMBING CODE OF N.Y. STATE § 403.6 (2002).

116. *Id.* § 403.1.

117. *Id.* § 403.1.

118. PLUMBING CODE OF N.Y. STATE § 403.7.

Alongside the New York State Building and Plumbing Codes, the regulation of washrooms also depends on their specific spatial categorization. For example, the State Sanitary Code enacted under section 225 of New York's Public Health Law imposes particular requirements on food service establishments. In the context of washrooms for employees, section 14-1.142 requires:

(a) Each food establishment is to have adequate, conveniently located, and properly installed toilet facilities for its employees. Such facilities are to be accessible at all times. Toilet facilities are to be of sanitary design and readily cleanable. Toilet rooms are to be completely enclosed and to have tight-fitting, self-closing doors.

(b) Toilet facilities are to be kept clean, in good repair and free from objectionable odors. A supply of toilet tissue is to be provided at all times at each toilet. Easily cleanable receptacles for waste paper and other refuse are to be provided. One receptacle, in toilet rooms used for women, is to be covered. Employee hand-washing signs are to be posted in each employee toilet room area.

Section 14-1.143 requires:

(b) Each handwashing facility is to be provided with running hot and cold or tempered portable water. Self-closing or metering faucets used are to provide a flow of water for at least 15 seconds without need to reactivate the faucet.¹¹⁹

Similarly, dozens of other washroom facilities are regulated separately and in minute detail according to their specific spatial categorization: for example, swimming pools, childcare, and nursing homes.¹²⁰ While the design of washrooms through regulatory norms is a rather detailed matter, it still leaves much to the designer's imagination. Terms such as "sanitary design" and "readily cleanable" are vague enough to invite multiple interpretations. This is where standards enter the picture. The standardization of washroom fixtures seems to fill in all possible legal lacunas, providing more detail than one could ever imagine exists, as the next Section illustrates.

V. STANDARDIZATION

When thinking about the law, most people have in mind the more formal black letter statutes enacted by government officials and applied throughout a relevant jurisdiction. Standards are usually not part of the traditional thinking about the legal makeup of a place. However, a closer ex-

119. I further discuss the requirement of a fifteen second water flow in my exploration of policing through things in Braverman, *supra* note 65.

120. See N.Y. COMP. CODES R. & REGS. tit. 1, §§ 6-1.15, 14-1.142.

amination of the washroom reveals just how crucial standards are in the spatial design of this place. An even closer look teaches us that what might initially seem like technical and neutral standards are actually expressions of certain moral and cultural preferences. That technical norms embody certain moral assumptions, and that such moral assumptions are embodied in the spatial design of a place, will probably not come as a revelation to most of us. But in the case of the public washroom, the underlying ideology is not as obvious or easily assumed as in many other spaces. Moreover, it is disguised behind a set of technical and quantitative modes of design.

In addition to the more obvious regulation of washrooms through the enactment of specific laws and regulations, the space of the washroom is also governed — and perhaps even more intensely so — through the standardization of its fixtures and artifacts. Buffalo's Chief Plumbing Inspector clarified in an interview:

Every fixture has to have a stamp of approval. The state has a list of companies that it approves. ASTM is one of the accepted standards. If we're looking at toilets, everything has a stamp of approval right on it. We know the names already, so we don't really check the piece of paper unless something looks strange. On a new piece of copper pipe there is always a name and number. Every piece of pipe needs to have the proper ASTM stamp.¹²¹

A few words about the ASTM: Originally known as the American Society for Testing and Materials, ASTM International is a source of technical standards for materials, products, systems, and services, and is one of the largest voluntary standards development organizations in the world. ASTM International was formed in 1898, when a group of engineers and scientists met to address frequent rail breaks in the railroad industry. Their work led to standardization on the steel used in rail construction. The ASTM website indicates that as the century progressed and new industrial, governmental and environmental developments created new standardization requirements, ASTM answered the call with consensus standards that have made products and services safer, better, and more cost-effective. "The proud tradition and forward vision that started in 1898 is still the hallmark of ASTM International."¹²²

Another major institution that coordinates development and use of voluntary consensus standards in the United States and "represents the needs and views of U.S. stakeholders in standardization forums around the globe," is the American National Standards Institute ("ANSI").¹²³ Accord-

121. Chief Plumbing Inspector, *supra* note 56.

122. ASTM International, <http://www.astm.org/ABOUT/aboutASTM.html> (last visited Nov. 13, 2008).

123. See ANSI Standards Store, American National Standards Institute,

ing to its website, the Institute “oversees creation, promulgation and use of thousands of international norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more.”¹²⁴ Founded in 1918, ANSI serves as the coordinator of the U.S. voluntary standards, providing a neutral forum for the development of policies on standards issues and serving as a “watchdog for standards development and conformity assessment programs and processes.”¹²⁵

The Institute does not write standards, but oversees creation, promulgation, and use of thousands of international norms and guidelines that directly impact businesses in nearly every sector. ANSI accredits programs that assess conformance to standards, including the ISO 9000 (quality) and ISO 14,000 (environmental) management systems. ANSI also facilitates the development of American National Standards. According to its website, “[a]ccreditation by ANSI signifies that the procedures used by the standards body in connection with the development of American National Standards meet the Institute’s essential requirements for openness, balance, consensus and due process.”¹²⁶ All this goes to illustrate the complex network that the area of standardization encompasses.

The voluntary standards agreed upon within the relevant organizational networks become officially binding when adopted by formal laws. The New York State Plumbing Code includes numerous examples of this sort of adoption in almost every one of its sections. For example, Chapter 4 of the Code includes the following instances of standard adoptions: the walls of WCs need to be thoroughly washed at each discharge according to ASME A112.19.2M;¹²⁷ the metal carrier supporting the bowl shall conform to ASME A112.6.1.M;¹²⁸ urinals shall conform to ASME A112.19.2;¹²⁹ and sinks shall conform to ANSI Z124.6.¹³⁰

In addition, section 403.7 of the New York Plumbing Code states that

store.ansi.org/?source=google&adgroup=American_Standards&keyword=american%20standards&gclid=CPLhssnnqJQCFQJtFQodfzBztg (last visited July 20, 2008).

124. *Id.*

125. See *ANSI Endorses “Visitability” Criteria*, United Spinal Association, <http://www.unitedspinal.org/publications/action/2008/04/08/ansi-endorses-”visitability”-criteria> (last visited July 8, 2008).

126. *Id.*

127. PLUMBING CODE OF N.Y. STATE § 401.2 (2002). Founded in 1880 as the American Society of Mechanical Engineers (“ASME”), the ASME “promotes the art, science & practice of mechanical & multidisciplinary engineering and allied sciences around the globe.” Its vision is to develop the “preeminent, universally applicable codes, standards, conformity assessment programs, and related products and services for the benefit of humanity. Involved the best and brightest people from around the world to develop, maintain, promote, and employ” ASME products and services globally. *About Codes and Standards*, ASME International, <http://www.asme.org/Codes/About> (last visited Nov. 13, 2008).

128. PLUMBING CODE OF N.Y. STATE § 405.4.3.

129. *Id.* § 419.1.

130. *Id.* § 418.1.

"signs for accessible toilet facilities shall comply with ICC/ANSI A117.1." This specific standard, also called the "visitability" standard was first published in 1961 and has since then been updated periodically. The 2008 edition of ANSI A117.1, for instance, includes design criteria for "visitability" in private homes, such as entrance and toilet access for disabled persons. Enforced through formal legal norms, accessibility standards dictate the precise design of washrooms and, recently, even those that are in private rather than in public settings.

VI. CONCLUSION

This Article has highlighted the role of law in designing public washrooms. Moving between multiple legal scales — federal, state, and municipal laws as well as international voluntary standards and local policy documents — this Article has claimed that public washrooms are the most regulated of all mundane spaces, at least in the United States. This Article has also shown that beyond the usual form of legal regulation, the regulation of washrooms takes place through the official adoption of a web of voluntary standards set by various national and international networks. Finally, I illustrated that these standards mostly regulate things rather than human conduct.¹³¹

Loo Law has suggested several explanations for the unique regulatory regime of public washrooms in the United States. First and foremost, the Article proposed that the dense regulation of public washroom space has to do with the physical, symbolic, and imaginary sanitary status of the washroom, which renders it the focus of a variety of purity laws. Secondly, the Article suggested that the intense regulatory regime is also a consequence of the mixed public/private status of commercial washrooms, which makes them more prone to various provisions and to extensive modes of surveillance and discipline. Finally, the Article has pointed to the dense physiological faculties performed in the limited physical space of the public washroom. A thick regulatory web is thus applied so as to make the public washroom accessible to the "normal" user.

In all, *Loo Law* has shown that the values governing toilet conduct are deep-seated and taboo-related. Indeed, the study of the public washroom has brought to the surface issues of sexual conduct, gender roles, and the human relationship to the body. It has also brought up issues concerning religion and even environmental protection. While it was beyond the scope of the Article to address all of these issues, I have sought to expose some of the underlying ideologies of public washroom design. These various ideologies have turned the public washroom into a densely controlled and hy-

131. Elsewhere, I pick up the discussion from this point, illustrating the process of public washroom inspection through both human and nonhuman devices. See Braverman, *supra* note 65.

per-regulated space with tight constraints that govern almost every aspect of its mundane usage.

Finally, the Article argued that the minute regulation of public washrooms is not purely an American fetish. All over the world, growing hygienic and sanitarian concerns have made the public washroom into a space that is increasingly subjected to regulatory scrutiny. Soon enough, when one's "gotta go," rather than experiencing "toilet-shock," she will encounter a similar experience anywhere in the world.