

## The Disappearing Public Toilet

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“Not having a place to go must surely be one of life’s great indignities . . . [I]nequities of class, gender, and physical capacity gain their expression in moments of anxiety over how to eliminate one’s waste.”<sup>1</sup>

*Contemporary discussions about toilets in the public sphere focus on access to public toilets and discrimination based on sex and gender identity. These discussions largely presuppose that public toilets are widely available. Free or low-cost public toilets operated by the government, however, have largely disappeared, supplanted by toilets in office buildings, hotels, department stores, restaurants, and theaters. Thus, private businesses, who often limit access to their customers, control access to toilet facilities in the public sphere. As a result, many people lack reasonable access to toilets outside their home, as private operators determine who has access and when. Further, many urban cities criminalize public urination, considered a sex offense by some jurisdictions. Lack of toilet access in the public sphere is a chronic problem not limited to homeless individuals. It also impacts others whose needs often are invisible to the casual observer—taxi drivers, utility workers, gas and electric service workers, people doing street repair, and pedestrians on main streets after normal business hours.*

*In this Article, I assert that the lack of government operated or sponsored public toilets in urban areas and their replacement with toilets controlled by private business creates opportunities to discriminate against people seeking access to those toilets based on occupation, socioeconomic status, gender-identification, race, and even medical condition. There also are health issues related to lack of access to public toilets, including the transmission of hepatitis A. Therefore, the lack of public toilets constitutes*

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<sup>1</sup> Harvey Molotch, *Peeing in Public*, 7 CONTEXT 60, 60 (2008).

*a public health problem as well. I argue that state and local governments should be more proactive in making public toilets more widely available, especially in dense population centers.*

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## I. INTRODUCTION

In April 2018, a downtown Philadelphia Starbucks denied an African American man access to the business' toilet because he was not a paying customer.<sup>2</sup> Shortly thereafter, the Starbucks employee asked the man and his African American male companion to leave and, when the men refused, called 911.<sup>3</sup> When the police arrived, the men calmly explained that they were waiting for a business associate.<sup>4</sup> The associate arrived verifying their claim as several police officers carted the handcuffed men away for booking: their crime—criminal trespass.<sup>5</sup>

“People care a great deal how they pee and shit. Their strivings for decency confront the facilities available to them as well as the social

<sup>2</sup> Martin Vassolo, *Philadelphia Mayor Calls for Probe of Starbucks Policy After Arrests*, MIAMI HERALD (Apr. 14, 2018), <http://www.miamiherald.com/news/local/crime/article208914494.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The police released the men nine hours later after Starbucks declined to pursue the trespass charge. *Id.*

strictures and hierarchies that order who goes where.”<sup>6</sup> Yet discussions about public toilets today tend to focus only on access issues for transgender individuals<sup>7</sup> or women.<sup>8</sup> These discussions assume, however, that public toilets are widely available. This Article adopts a broader perspective by pointing out that free or low-cost public toilets operated by the government have largely disappeared from parks and downtown spaces like city subway systems.<sup>9</sup> Further, since the 1995 attack on the federal office building in Oklahoma City and the 2001 attack on the World Trade Center, even government office buildings are not as accessible to the general public as in the past. You may need specific identification to gain entrance.

Toilets in private office buildings, hotels, department stores, restaurants, and theaters have largely supplanted government operated public toilets. Thus, although Starbucks subsequently changed its policy, other private businesses, who often limit bathroom access to their customers, control access to toilet facilities in the public sphere.<sup>10</sup> Sociologist Harvey Molotch writes:

In the United States, those of the wrong class, race, or both, can have trouble easing themselves into places where they don’t quite fit. Even the more privileged, as we all know, sometimes must deploy a certain cunning for getting past control points to access restaurants, and bars that will “let us” use the toilet.<sup>11</sup>

As a result, many people lack reasonable and reliable access to toilets outside their home. In fact, *Philadelphia Magazine* published an article in 2012 lamenting the lack of places in the city where one could go and “pee for free.”<sup>12</sup>

<sup>6</sup> Molotch, *supra* note 1, at 60.

<sup>7</sup> Catherine Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1 (2016); Sharon R. Cruz, *The Search for Third Options in a Two-Bathroom Society*, 1 INT’L COMP., POL’Y & ETHICS L. REV. 77 (2018); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017); Stephen Rushin & Jenny E. Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1 (2017); 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 (2017); Robert W. McGee, *Toilets, Transgenders, and the Supreme Court* (Fayetteville St. U., Working Paper, 2016), <https://ssrn.com/abstract=2861035>; Robert W. McGee, *Some Thoughts on Toilets, Transgenders, and the LGBT ‘Community’* (Fayetteville St. U., Working Paper, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2763663](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763663).

<sup>8</sup> See *infra* note 27.

<sup>9</sup> Molotch, *supra* note 1, at 60.

<sup>10</sup> See Steve Cuozzo, *Starbucks Bathrooms May Be Open to All but Good Luck Finding a Free Stall*, N.Y. POST (Dec. 8, 2018), <https://nypost.com/2018/12/08/starbucks-bathrooms-may-be-open-to-all-but-good-luck-finding-a-free-stall/>.

<sup>11</sup> Molotch, *supra* note 1, at 60.

<sup>12</sup> Dan McQuade, *Where to Pee for Free in Philadelphia*, PHILA. MAG. (Sept. 12, 2012,

Lack of toilet access in the public sphere is not simply a problem for homeless individuals; it extends to others whose needs often are invisible to the casual observer. Consider, for example, taxi drivers interviewed by social scientist Laura Norén in Manhattan and other cities, who were too embarrassed to admit that they often urinated in bottles in their cars because they have no access to public toilets.<sup>13</sup> As Norén points out,

[a] rare, strictly emergency solution is to find a place to go on the street. Joining the free-peeing dogs risks . . . an uncomfortable recognition of oneself as out of order . . . . Many [street-based workers] are new immigrants working to construct themselves as regular folks and hardly in a position to readily engage in public protest on behalf of access to “rights” that are only ambiguously present in the first place. [Instead t]hey contend with post 9/11 xenophobia, racism, and the difficulty of being near the bottom of the economic hierarchy.<sup>14</sup>

There are collateral consequences associated with relieving oneself on the public street. As Norén notes, “public urination [in New York City and other cities] is an offense subject to a maximum fine of \$1,000 and a potential charge of public exposure or lewd behavior.”<sup>15</sup> For people forced to urinate in bottles, some jurisdictions like Washington penalize anyone who improperly disposes a urine-filled bottle or container. The Washington law, aimed at truck drivers who throw their urine-filled bottles into fields near the highway, can result in a \$1025 fine for littering.<sup>16</sup> Thus, taxi drivers and others unable to find a private business that allows people other than customers and employees to use their restroom have few options. They can go home and lose time and potential customers or face the risks and indignity of relieving themselves outdoors. The latter option not only may result in a hefty fine but also an arrest for an offense that might jeopardize the immigration status of non-citizen drivers.<sup>17</sup> Homeless

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8:42 AM), <https://www.phillymag.com/news/2012/09/12/guide-free-bathrooms-philadelphia/>.

<sup>13</sup> Laura Norén, *Only Dogs Are Free to Pee*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 93, 94 (Harvey Molotch & Laura Norén eds., 2010) [hereinafter “TOILET”]. Instead, the drivers admitted to hearing of other taxi drivers who resorted to that tactic. *Id.* at 96.

<sup>14</sup> *Id.* at 94.

<sup>15</sup> *Id.* at 104. Norén also pointed out the gendered health-related differences in holding your urine. “[W]omen menstruate, which generates a need to stop that truly cannot wait. Women are also more likely to suffer urinary-tract infections than men . . . . Half of all women will have a urinary-tract infection in their lifetime, and women who have one infection are more likely to have another.” *Id.* at 109.

<sup>16</sup> Harvey Molotch & Laura Norén, *Rest Stop: Trucker Bomb*, in *TOILET*, *supra* note 13, at 115.

<sup>17</sup> *Id.* at 96. A seemingly simple solution would be for the drivers to use the restroom at the location where they are queued to pick up customers, but one of the interviewees

individuals, the most visible targets of public urination laws, have even fewer options.

Taxi drivers are not the only people routinely impacted by the lack of public toilets. Many others, like street merchants, utility workers, gas and electric service workers, people doing street repair, and pedestrians on main streets after normal business hours have little or no access to toilet facilities. Criminalizing a natural and necessary bodily function like urinating and defecating while not providing public toilet facilities seems unconscionable. Yet few American courts have addressed the validity of public urination laws.<sup>18</sup>

The consequences of a public urination conviction extend beyond criminal liability. The taxi drivers surveyed complained about the health issues that come with “holding it”—incontinence, UTIs, and diabetes are some of the health effects they attribute to lack of access to toilets.<sup>19</sup> These health concerns are genuine. One medical specialist observed that “[t]he longer you hold your urine, the bladder can become a breeding ground for bacteria to grow’ . . . . This bacteria can lead to infections, which can spread to kidneys and cause greater damage to the body.”<sup>20</sup> Holding it in has even more health consequences for women. British social scientist, Clara Greed, reports a correlation between closed public toilets and increased “urinary tract infections, problems with distended bladders, and a range of other urinary and gynecological problems among women.”<sup>21</sup>

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explained why that often is not an option: “You get a \$115 ticket if you leave your cab while it’s in the queue . . . . The valets, they could let you in [to the restroom], watch the cab, but they don’t. Sometimes you just think it’s easier not to drink so much [points to a bottle of water in the cup holder].”

<sup>18</sup> See *infra* section II.A.

<sup>19</sup> Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 108–09. Norén writes: “I was pretty sure Ricky’s bladder and kidney problems were related to years spent holding it in behind the wheel.” Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 108.

<sup>20</sup> Arti Patel, *Holding Your Pee: Health Risks from Ignoring Nature’s Call*, HUFFINGTON POST (Oct. 26, 2016), [http://www.huffingtonpost.ca/2012/02/27/holding-your-pee-health-\\_n\\_1299435.html](http://www.huffingtonpost.ca/2012/02/27/holding-your-pee-health-_n_1299435.html) (quoting Dr. Chamandeep Bali). There seems to be a similar problem in the European Union: “Surveys have shown that one in four women in the European Union between thirty-five and seventy years of age suffers some degree of urinary stress incontinence, which restricts their freedom to travel.” Clara Greed, *The Role of the Public Toilet in Civic Life*, in LADIES AND GENTS: PUBLIC TOILETS AND GENDER 35, 36 (Olga Gershenson & Barbara Penner eds., 2009).

<sup>21</sup> Greed, *The Role of the Public Toilet in Civic Life*, in LADIES AND GENTS: PUBLIC TOILETS AND GENDER, *supra* note 20, at 36. There are exceptions: “In Baltimore, an agreement between the yellow-cab organization and city hotels grants drivers access to hotel-lobby bathrooms while their cabs are parked outside, a sensible solution that has not been adopted in New York.” Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 101.

The exclusion of certain outsider groups from public toilets “reflect[s] systemic and structural patterns of discrimination and marginalization.”<sup>22</sup> Inga Winkler in arguing for a right to sanitation, including access to public toilets, observes the connection between lack of access, discrimination, and inequality.<sup>23</sup> Further, the intersection of “[s]ocial, cultural, economic and political inequalities . . . have reinforcing effects that perpetuate exclusion.”<sup>24</sup>

Toilets in public spaces remain a battleground for social justice. Until the mid-1960s black Americans, especially in southern states, by law or custom, were forced to use racially segregated toilets or denied access to public toilets altogether.<sup>25</sup> It took another decade before states outlawed pay-to-use toilets that effectively excluded the poorest members of our society from public toilets.<sup>26</sup> Women’s continuing lack of “potty parity” is a subject of much scholarship.<sup>27</sup> Nevertheless, as feminist theologian

<sup>22</sup> Inga Winkler, *The Human Right to Sanitation*, 37 U. PA. J. INT’L L. 1331, 1340 (2016).

<sup>23</sup> *Id.* at 1340–41.

<sup>24</sup> *Id.* at 1341.

<sup>25</sup> Judith Lorber, *Why Do Bathrooms Matter?*, 41 CONTEMP. SOC. 598, 598 (2012) (reviewing SHEILA L. CAVANAGH, *QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION* (2010), and TOILET, *supra* note 13). Racially segregated bathrooms seldom existed in fact “[s]ince there were unlikely to be four separate bathrooms, only white women and men could depend on having someplace to pee when traveling.” *Id.* Restrictions were not limited to black Americans, but also applied in some states to Mexican Americans, especially in the Southwest. *See Hernandez v. Texas*, 347 U.S. 475 (1954). “On the courthouse grounds at the time of the hearing, there were two men’s toilets, one unmarked, and the other marked ‘Colored Men’ and ‘Hombres Aqui’ (‘Men Here’).” *Id.* at 480; Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 667 (1975) (citing PAULINE R. KIBBE, *LATIN AMERICANS IN TEXAS* 160 (1946)).

<sup>26</sup> *See* Scott M. Solkoff, *If the Law Is a Jealous Mistress, What Ever Happened to Pay Toilets? A Digest of the Legally Profound*, 17 NOVA L. REV. 715, 720 (1993). In a challenge to a 1975 New York State law fining business that permitted public pay toilets on their premise, a New York court in upholding the statute wrote: “Pay toilet facilities are essentially a tax on human biological functions. In addition, it is a discriminatory tax, in that women often have no choice but to use these pay facilities, while men frequently have access to free toilet facilities.” *Nik-O-Lok Co. v. Carey*, 378 N.Y.S.2d 936, 938, *aff’d*, 384 N.Y.S.2d 211 (N.Y. App. Div. 1976), *aff’d*, 360 N.E.2d 1076 (1977). Two companies that provided pay toilets, Nik-O-lok and Advance Pay Toilet Lock Company, challenged the law on equal protection grounds, to which the court responded that toilets had no equal protection rights. *Nik-O-Lok Co.*, 378 N.Y.S.2d at 939.

<sup>27</sup> *See, e.g.*, Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 J. PLANNING LITERATURE 267 (2007); Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263 (1990); Sarah A. Moore, Note, *Facility Hostility? Sex Discrimination and Women’s Restrooms in the Workplace*, 36 GA. L. REV. 599 (2002); Sharon La Franiere, *For Chinese Women, a Basic Need, and Few Places to Attend to It*, N.Y. TIMES (Feb. 29, 2012), <http://www.nytimes.com/2012/03/01/world/asia/chinese-women-demand-more-public-toilets.html>.

Judith Plaskow pointed out in 2008, scholars tend to ignore the role of public toilets in “perpetuat[ing] social inequality” for many groups.<sup>28</sup> Rather, they focus on access for a particular group without looking at the whole picture. She argues that access to public toilets is not only “a pressing health issue” but also “a prerequisite for full public participation and citizenship,” especially for homeless individuals.<sup>29</sup> Plaskow questioned why non-legal scholars, even those “who have written extensively about the body,” are silent on this issue.<sup>30</sup> Yet her focus in that article is on how inadequate access to public toilets affects women.

Most legal scholars writing in this area fail to see the whole picture created by the demise of free public toilets and the government’s almost total reliance on the business community to provide toilets for the public. Like Plaskow, legal scholars focus primarily on equal toilet access for women<sup>31</sup> and more recently, for transgender individuals.<sup>32</sup> Recently, potty parity efforts in the United States shifted from equal access to the elimination of sex-segregated toilets because it addresses the concerns of both women and transgender Americans.<sup>33</sup> Treating bathroom access issues raised by women and transgender individuals separately obscures the larger social justice issues surrounding the demise and privatization of urban free or low-cost public toilets.

I argue in this Article that these earlier efforts are shortsighted because they focus only on the denial of or restrictions on access to existing facilities and not the lack of public toilets more generally. Instead, I assert that the lack of government operated or sponsored free or low-cost public toilets in urban areas, and their replacement with toilets controlled by private business, creates opportunities to discriminate against people seeking access to those toilets based on occupation, socioeconomic status,

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<sup>28</sup> Judith Plaskow, *Embodiment, Elimination, and the Role of Toilets in Struggles for Social Justice*, 58 CROSS CURRENTS 51, 52 (Spring 2008).

<sup>29</sup> *Id.* at 53.

<sup>30</sup> *Id.*

<sup>31</sup> See, generally, Louise M. Antony, *Back to Androgyny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1 (1998); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145 (2017); Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007).

<sup>32</sup> See, generally, Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y 1 (2016); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205 (2017); Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. & GENDER 301 (2013).

<sup>33</sup> See, e.g., Kogan, *supra* note 32; Colker, *supra* note 31; Marc Edelman, *Exploring Gender Minorities’ Bathroom Rights Under the Donald Trump Presidency*, 56 U. LOUISVILLE L. REV. 381 (2018); Kelly Levy, Note, *Equal, but Still Separate?: The Constitutional Debate of Sex-Segregated Restrooms in the Twenty-First Century*, 32 WOMEN’S RTS. L. REP. 248 (2011).

gender-identification, race, and even medical condition.

The remainder of this Article is organized in five Parts. Part II starts with a brief history of the rise and demise of public toilets in the United States. It explains why, despite the great need for public toilets, American society resists these efforts. Historically, American societal norms treated bodily excretions with a sense of disgust and disdain.<sup>34</sup> These Victorian-like attitudes about bodily excretions remain deeply embedded in Americans' psyches, and this cultural attitude contributes to society's ambivalence toward public toilets. Part II also explores the reasons for the decline of public toilets in the late twentieth century. Knowledge of this history with its gendered and class components, I argue, is important in understanding the current ambivalence about providing more toilets open to all the public.

Part III discusses the criminalization of public urination, arguing that enforcement of these laws in areas without access to public toilets is unconscionable. As Denver Law School's Homeless Advocacy Policy Project reminds us, "[p]rohibitions on public urination coupled with inadequate public restroom facilities make it impossible for people who live outside to lawfully meet their own most basic needs."<sup>35</sup> This Part also discusses possible constitutional challenges to these laws.

In Part IV, I briefly argue that forcing a person denied access to public toilets to soil themselves or endanger their health by "holding it" constitutes an indignity that can substantially interfere with an individual's ability to participate fully in public life, an essential aspect of American citizenship. There is a strong analogy between the dignitary claims of black Americans pushing for full citizenship rights and the dignitary claims implicit in any movement for more public toilets. I concede, however, that dignitary jurisprudence in the United States is just emerging and is not very robust. Thus, claims of indignity alone are not sufficiently persuasive when pressuring the government to reverse its stance on public toilets.

In Part V, I argue that the lack of public toilets is a public health problem. Thus, from a public health perspective, governments should be proactive in making public toilets more widely available, especially in dense population centers like Los Angeles and New York City. I briefly outline the basic steps while acknowledging the barriers any movement to

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<sup>34</sup> Zena Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 51 (Harvey Molotch & Laura Norén eds., 2010) [hereinafter "TOILET"] (discussing recent studies in Africa, India, the Netherlands and the UK).

<sup>35</sup> Rachel A. Adcock et al., *Too High a Price: What Criminalizing Homelessness Costs Colorado* (2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf>.



expand the number of public toilets will face—toilet safety, cleanliness, and the cost of creating and maintaining public toilets—the same issues that contributed to the closing of earlier government-operated public toilets. I conclude by offering several suggestions that address these concerns while increasing the number of accessible public toilets.

## II. THE RISE AND DEMISE OF PUBLIC TOILETS

The idea of public toilets is not new. Modern day visitors to the ancient Roman city of Ephesus will see dozens of marble-seat toilets in the remains of the Scholastica Baths built in 1 A.D.<sup>36</sup> Most major Roman cities had public toilets. Some toilets were located in or next to bathhouses; others were located near big water sources.<sup>37</sup> The “recurrent locational pattern [of public toilets] in busy and frequently visited parts of the city suggests that most people [in Ancient Roman cities] would have known where to find a public latrine . . . . [T]he central[] public locations of these facilities suggest that [city residents and visitors] would have been regular users.”<sup>38</sup> Granted, not every Roman had access to these toilets because you had to pay to use the bathhouses.<sup>39</sup> The evidence suggests that people unable to pay to use the toilet used apartment stairways instead.<sup>40</sup>

As the Roman Empire expanded its reach so did the construction of toilets, but some regions reacted more positively to this development than other regions. Ready acceptance of toilets occurred in Italy and North Africa but not in Britain and the Near East.<sup>41</sup> Oxford University archaeologist Zena Karmash offers several explanations including the tendency of Roman toilets to use water to dispose of waste and the resistance to this idea by some regions worried about water contamination.<sup>42</sup> By the Middle Ages, public toilets virtually disappeared

<sup>36</sup> Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in TOILET, *supra* note 34, at 8. These toilets, arranged side-by-side with no partitions, were quite sophisticated. The “waste was constantly removed by a continuous flow of water from the baths next door [and] a gutter in front of the seats, [provided] a steady stream of fresh water allowed for cleaning.” *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> JULIE L. HORAN, *THE PORCELAIN GOD: A SOCIAL HISTORY OF THE TOILET* 16 (1997).

<sup>40</sup> *Id.* at 16. Some Roman homes also had toilets. For a price, wealthy Romans could obtain a permit to get their home connected to the city sewers. *Id.* at 12. Less privileged Romans, however, used clay jars and chamber pots throwing the waste into cesspits or out the window. *Id.* at 14.

<sup>41</sup> Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in TOILET, *supra* note 34, at 55.

<sup>42</sup> Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in TOILET, *supra* note 34, at 60–63. “[I]t would appear that Roman public latrines triggered a variety of sociocultural, moral, and religious responses.” Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in TOILET, *supra* note 34, at 63.

from the European landscape.

Public health concerns about public sanitation in large Eastern and Midwestern American cities were a major factor contributing to the creation of public toilets in the United States. By the 1880s and 1890s, medical science acknowledged a connection between filth and poor health.<sup>43</sup> Poor and working-class men, for want of a toilet, tended to urinate in the city streets and alleys.<sup>44</sup> Saloons, places traditionally reserved for men, were the only toilets in the public sphere.<sup>45</sup> Thus in 1860, Boston opened one of the first public toilets.<sup>46</sup> Providence, Rhode Island and Cincinnati, Ohio followed in 1863.<sup>47</sup> In 1865 after a New York City sanitation inspector complained that “public urinals were urgently needed on the Lower East Side to quell ‘the disgusting stench that is kept reeking at every alley-corner, yard, and warehouse wall,’” that city followed suit.<sup>48</sup>

From the beginning, however, the focus of these efforts was on providing public toilets for men. Women’s needs were secondary. According to one writer, “[m]any nineteenth-century facilities did not accommodate women, who were not known for such indiscreet behavior.”<sup>49</sup> In other words, public urination by women was not commonplace. The lack of public toilets may help to explain the reluctance of women to participate more fully in the public sphere. Other reasons why women did not urinate in public had to do with clothing restrictions, as well as fear of sexual assault.

Nevertheless, in 1869 when New York City opened public toilets in a heavily trafficked part of the city, there were facilities for men *and* women.<sup>50</sup> The women’s toilet, probably an afterthought, was inadequate. While the women’s stalls in the New York toilets could accommodate working-class women, they were too small to accommodate the large dresses of upper-class women.<sup>51</sup> The toilets also were unheated, which made the seats very cold in winter, and the stalls lacked enough privacy; thus few women used them.<sup>52</sup>

By the end of the nineteenth century, most urban upper- and upper-

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<sup>43</sup> Peter C. Baldwin, *Public Privacy: Restrooms in American Cities 1869-1932*, 48 J. Soc. Hist. 264, 268 (2014).

<sup>44</sup> *Id.* at 266–67.

<sup>45</sup> *Id.* at 270.

<sup>46</sup> *Id.* at 269.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 267.

<sup>49</sup> Baldwin, *supra* note 43, at 266.

<sup>50</sup> Baldwin, *supra* note 43, at 268.

<sup>51</sup> Baldwin, *supra* note 43, at 269.

<sup>52</sup> Baldwin, *supra* note 43, at 268–69.

middle-class residents had access to bath and toilet facilities at home, but working-class and poor residents did not. Unsurprisingly, there is a connection between the public bath movement of the late nineteenth and early twentieth century and the creation of public toilets in urban areas.<sup>53</sup> In the 1890s a report by New York City Mayor William L. Strong's Committee on Public Baths, Water Closets, and Urinals concluded

that New York lagged behind European cities in building public bathhouses, laundries and toilets . . . . "[As a result,] several hundred thousand people in the city have no proper facilities for keeping their bodies clean[;] [this situation] is a disgrace to the city and to the civilization of the nineteenth century."<sup>54</sup>

From the beginning, class and gender influenced who used public toilets. Government saw early American public toilets as public health measures targeting working-class and poor residents who lacked proper toilet facilities at home. Public toilets were available to all classes, but toilets owned by private businesses and open to their customers were more appealing to middle- and upper-class patrons.<sup>55</sup> Hotels provided toilets for their guests, and middle- and upper-class women preferred department store restrooms because they were more private.<sup>56</sup> These private venues were not welcoming to all classes. Department stores used "bargain basements" that catered to working-class and poor customers as barriers to separate socioeconomic classes.<sup>57</sup> The hotels, often filled with well-dressed people, discouraged the lower classes from entering to use the toilets.<sup>58</sup> Thus, saloons remained the only public toilets that did not divide the classes but, as mentioned previously, these facilities were largely male domains.<sup>59</sup>

During the early twentieth century, many women's groups led campaigns for health and moral reforms that would require public toilets nationwide.<sup>60</sup> "The civic value of public toilets . . . came not simply from their power to clean up the urban environment but from their effect on the physical well-being and personal integrity of citizens."<sup>61</sup> This new focus on public health vastly increased the presence of public toilets.

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<sup>53</sup> Baldwin, *supra* note 43, at 273–74.

<sup>54</sup> Baldwin, *supra* note 43, at 270.

<sup>55</sup> Baldwin, *supra* note 43, at 270–72.

<sup>56</sup> *Id.*

<sup>57</sup> Baldwin, *supra* note 43, at 272.

<sup>58</sup> Baldwin, *supra* note 43, at 270.

<sup>59</sup> *Id.*

<sup>60</sup> Baldwin, *supra* note 43, at 274.

<sup>61</sup> Baldwin, *supra* note 43, at 273. "Sanitarians and social reformers who advocated public toilets regularly noted the collective interest in helping individuals care for their own bodies . . . a shift of focus from filthy surroundings to unhealthy people." *Id.*

The Prohibition Era (1920–1933) was another reason for the increase in public toilets because the closure of saloons greatly reduced access to toilets for men in the private sector.<sup>62</sup> Women reformers presented the provision of public toilets as a duty owed by the government to all of its citizens. Cities across the country followed the lead of New York and Boston creating underground public toilets available for all.<sup>63</sup> Nevertheless, for financial and political reasons, large cities never came anywhere close to providing widespread access to public toilets.<sup>64</sup>

After the end of the Prohibition era, and the re-opening of saloons, public perceptions of public toilets changed. The public saw toilets as dirty and difficult to maintain.<sup>65</sup> Public toilets also had an immoral reputation—as places for covert sexual encounters between gay men.<sup>66</sup> In addition, “[p]hysicians in the early twentieth century warned that the toilet seats could spread intestinal and venereal disease, and that the roller towels in restrooms smeared germs from hand to hand.”<sup>67</sup>

Approximately eighty years later, public toilets became the subject of debate again because of their ability to spread serious disease. Public health officials warned “while MRSA in hospital toilets has grabbed the headlines, CA-MRSA, a different strain, may prove more lethal. It is found in *shared and community facilities such as toilets . . . as well as in public toilets.*”<sup>68</sup> Thus, while public health concerns initiated the movement for public toilets, they contributed to their decline as well.

By the 1970s and 1980s, most public toilets closed because of concerns about crime, the expense of maintenance, and vandalism.<sup>69</sup> Today there is a public toilet at New York’s Times Square Subway station that is monitored five days a week from 7:30 a.m. until 3:30 p.m.<sup>70</sup>

The large, underground comfort stations of the early twentieth century are almost all gone now throughout the United States. City pedestrians . . . usually forced to rely on facilities in semi-private buildings such as hotels, stores, restaurants, and coffee shops. Instead of a right conferred by government on all

<sup>62</sup> Baldwin, *supra* note 43, at 265.

<sup>63</sup> The Woman’s City Club of Chicago “argued that the city government should conscientiously attend to making Chicago clean and healthy—performing on a large scale the work that women performed in the home.” Baldwin, *supra* note 43, at 274.

<sup>64</sup> Baldwin, *supra* note 43, at 280.

<sup>65</sup> Baldwin, *supra* note 43, at 278.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Greed, *The Role of the Public Toilet in Civic Life*, in LADIES AND GENTS: PUBLIC TOILETS AND GENDER, *supra* note 20, at 38 (emphasis added).

<sup>69</sup> Baldwin, *supra* note 43, at 281.

<sup>70</sup> They are small and uncomfortable. Harvey Molotch & Laura Norén, *Rest Stop: Times Square Control*, TOILET, *supra* note 13, at 87.

citizens, bodily privacy is a purchasable commodity. Even if provided free of charge, the use of the toilet is understood to be the result of an agreement between an individual and a business. It is an awkward, grudging agreement, inflected by judgments of the individual's social status.<sup>71</sup>

Thus the only toilets reliably available throughout the city are in private businesses that can and do limit access to customers only. Yet, people looking for a public bathroom during the 2016 St. Patrick's Day parade in New York City, which attracts approximately fifty-seven million tourists a year, found no place to relieve themselves—not even at the Starbucks on Eighth Avenue near Times Square.<sup>72</sup> The privatization of urban public toilets is almost complete, and government efforts to correct this situation are floundering.

Public urination is not as much of a public health issue today. Urine “is generally sterile, [and] poses no risk to public health.”<sup>73</sup> Nevertheless, urinating in public is a “violation of symbolic order that contributes to the social construction of both class and gender.”<sup>74</sup> While feces poses a greater public health risk, some claim that this threat is “exaggerated” and “removing refuse—even feces—from the street has much more to do with quality of life than with public health.”<sup>75</sup> The focus on quality of life is a recurring theme in discussions of public urination laws. The next Part more closely examines this point.

### III. THE CRIMINALIZATION OF PUBLIC URINATION

#### A. Generally

A 2006 survey of 222 American cities by the National Coalition for the Homeless found that forty-six percent of these cities listed public urination as a prohibited conduct.<sup>76</sup> Troublingly, at least thirteen states

<sup>71</sup> *Id.*

<sup>72</sup> Jim Dwyer, *With Few Public Toilets, New York Has No Place to Go If You Have to Go*, N.Y. TIMES (Mar. 17, 2016), [http://www.nytimes.com/2016/03/18/nyregion/with-few-public-toilets-new-york-has-no-place-to-go-if-you-have-to-go.html?\\_r=0](http://www.nytimes.com/2016/03/18/nyregion/with-few-public-toilets-new-york-has-no-place-to-go-if-you-have-to-go.html?_r=0).

<sup>73</sup> Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 105.

<sup>74</sup> Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 113. “Even in cases in which the urinator has an active bladder infection, it is highly unlikely that the infecting organism can survive long enough outside the body to come into contact with appropriate tissue type on a new host to cause infection.” Norén, *Only Dogs Are Free to Pee*, in TOILET, *supra* note 13, at 105.

<sup>75</sup> *Id.*

<sup>76</sup> NATIONAL COALITION FOR THE HOMELESS, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 135–44 (2006), <https://www.nationalhomeless.org/publications/crimreport/report.pdf>.

require persons convicted of public urination to register as sex offenders!<sup>77</sup> Entertainment districts where people are often drunk late at night are especially prone to public urination complaints.<sup>78</sup> Without question, public urination, if not controlled, has an “adverse effect on the tone of the district” and “conveys a message that the city lacks courtesy and hospitality.”<sup>79</sup> Laws criminalizing public urination treat this offense as a quality of life issue and thus a legitimate governmental regulation. Yet one cannot always control the pressing need to eliminate waste. Further, the elimination of waste is a necessary life-sustaining activity. The unresolved issue is how to balance the tension created by these competing interests.

Aside from the obvious gender bias against men who are more likely to be arrested for urinating in public, there are several problems with public urination laws. First, some cities have several often-conflicting provisions prohibiting public urination. In 2010, a New York court noted that two city provisions treated public urination differently.<sup>80</sup> “The New York Administrative Code treats public urination as a violation carrying a maximum sentence of 10 days, while the New York City Health Code treats it as a misdemeanor punishable by up to a year in jail.”<sup>81</sup> The defendant in *United States v. Morgan* challenged a magistrate’s decision that his detention for public urination was legal. Morgan’s arrest for urinating in public led to discovery of a firearm, which resulted in his indictment for possession of a firearm by a felon.<sup>82</sup> Thus, he challenged his arrest as based on an “unconstitutional statutory scheme,”<sup>83</sup> claiming that

<sup>77</sup> HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US, 19:4(G) 43 (2007), <https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (citing ARIZ. REV. STAT. § 13-3821 (if the individual has more than one previous conviction for public urination—two if exposed to a person under 15; three if exposed to a person over 15)); CAL. PENAL CODE § 314(1)-(2), 290 (West 2020); CONN. GEN. STAT. § 53a-186, § 54-250, § 54-251 (2019) (if the victim was under 18); GA. CODE ANN. § 42-1-12, § 16-6-8 (2019) (if done in view of a minor); IDAHO CODE ANN. §§ 18-4116, 8306, 8304 (2019); KY. REV. STAT. ANN. § 510.148, § 17.520, 500, § 510.150 (LexisNexis 2019); MASS. GEN. LAWS ch. 272, §16 (2018), MASS. GEN. LAWS ch. 6, §§ 178G, 178C (2020); MICH. COMP. LAWS § 167(1)(f), § 28.722, 723 (2020); N.H. REV. STAT. ANN. § 651-B:1, RSA 651-B:2, 645:1(II), (III) (2020); OKLA. STAT. tit. 57, § 582.21, § 1021 (2019); S.C. CODE ANN. § 23-3-430 (2019); UTAH CODE ANN. § 77-27-21.5, § 76-9-702.5 (LexisNexis 2020); VT. STAT. ANN. tit. 13, §2601, §5407, 5401 (2020); Erin Fuchs, *Seven Surprising Things That Could Make You a Sex Offender*, BUS. INSIDER (Oct. 19, 2013), <http://www.businessinsider.com/surprising-things-that-could-make-you-a-sex-offender-2013-10>.

<sup>78</sup> Blair J. Berkley & John R. Thayer, *Policing Entertainment Districts*, 23 POLICING INT’L J. POLICE STRAT. & MGMT. 466, 469–70 (2000).

<sup>79</sup> *Id.* at 469.

<sup>80</sup> *United States v. Morgan*, No. 09-CR-00573 BMC MDG, 2010 WL 4168624, at \*6 (E.D.N.Y. Oct. 19, 2010).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

the conflicting public urination laws violated the Fourteenth Amendment.<sup>84</sup>

The New York State Supreme Court judge sidestepped the Fourteenth Amendment question saying that Morgan's "case fits within the good faith exception to the exclusionary rule."<sup>85</sup> Specifically, the judge reasoned that the two police officers who had "issued more than 10 summons each for public urination" could not have reasonably known that the public urination laws were constitutionally suspect because "[n]o New York Court has held that the public urination statutory scheme is unconstitutional."<sup>86</sup> Thus, the court disposed of the case without directly reaching the constitutional issue.

Second, not all laws specifically refer to public urination, using instead vague terms like "physically offensive condition."<sup>87</sup> Thus, courts must divine whether the legislature intended to include public urination as one of the behaviors prohibited. For example, in *Wainwright v. Procunier*, a 1971 case, the Ninth Circuit questioned the initial arrest of the defendant for public urination after examining a Berkeley City ordinance that declared certain conditions as "nuisances."<sup>88</sup> The ordinance did not specifically mention public urination, and, therefore, the court concluded that it was not a criminal offense.<sup>89</sup> It is worth noting, however, that in *Wainwright* and *Morgan*, an allegation of public urination, *presumed* by police observation, served as the basis for an arrest for more serious charges.<sup>90</sup> Thus, arrests for public urination may be a pretext to justify searches and seizures not normally permitted under the Fourth and Fourteenth Amendments, a topic beyond the scope of this Article.<sup>91</sup>

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing the "good faith exception" approved in *Illinois v. Krull*, 480 U.S. 340, 355 (1987) (where a reasonable police officer had no reason to know that a statute is unconstitutional)).

<sup>86</sup> *Morgan*, 2010 WL 4168624, at \*6.

<sup>87</sup> *People v. Cooke*, 152 Misc. 2d 311, 314 (N.Y. Just. Ct. 1991). A key issue in this case was whether public urination constituted a "physically offensive condition" as defined in the New York Penal Law § 240.20 (7) based upon a provision of the Model Penal Code. *Id.*

<sup>88</sup> *See generally*, *Wainwright v. Procunier*, 446 F.2d 757 (9th Cir. 1971).

<sup>89</sup> *Id.* at 758–59.

<sup>90</sup> *Id.*; *Morgan*, 2010 WL 4168624, at \*2.

<sup>91</sup> A possible constitutional argument is that criminalizing a necessary human function of elimination, not illegal in itself, without establishing that there are reasonable alternatives violates constitutes cruel and inhuman treatment in violation of the Eighth Amendment. In *Catron v. City of St. Petersburg*, for example, homeless individuals challenged the City of St. Petersburg's enforcement of various state and local laws criminalizing public urination at times and places when no public bathrooms were available as constituting cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. *Catron v. City of St. Petersburg*, No. 809-CV-923-T-23EAJ, 2009 WL 3837789 (M.D. Fla. Nov. 17, 2009). The federal district court, however, did not directly address this issue. Instead, it denied the city's motion to dismiss the Eighth Amendment claims saying: "a more developed record and more focused briefs were needed." Stipulation of Dismissal, *Catron v. City of St.*

The statute challenged in *Columbus v. Breer* is another example of a court asked to interpret whether a general public decency statute included public urination.<sup>92</sup> In that case, the trial court ruled that public urination did not constitute public indecency under an Ohio statute that reads:

No person shall recklessly do any of the following, under circumstances in which his or her conduct is likely to be viewed by and affront others, not members of his or her household: Expose his or her private parts, or engage in masturbation; Engage in sexual conduct; Engage in conduct which to an ordinary observer would appear to be sexual conduct or masturbation.<sup>93</sup>

But an Ohio court of appeals reversed the ruling, saying because the defendant was observed holding his penis while urinating outdoors within ten to twenty feet of police officers and citizens, his conduct constituted “reckless exposure of private parts in which the conduct would likely be viewed by and affront others.”<sup>94</sup>

The court distinguished *Breer* from an earlier decision relied on by the defendant, *Cleveland v. Pugh*.<sup>95</sup> In *Pugh*, the defendant, who suffered from urinary problems dating from his service in the military, found it difficult at times to control his bladder and admitted urinating in public because he could not hold it until he reached his home.<sup>96</sup> The appellate court ruled that his conduct fell within the exception in the statute “for a person who exposes his or her private parts when done for the purpose of ‘answering an urgent call of nature.’”<sup>97</sup> *Breer*, unlike *Pugh*, incurred criminal liability because he was “imprudent in choosing a site,” which in this instance was the wall of a porch within view of police and the public.<sup>98</sup>

The *Pugh* case falls within a third category of public urination cases where a few courts acknowledge that public urination, when the result of physical “urgency, necessity or incontinence” in a situation where there is no nearby toilet, and where “the defendant [makes reasonable efforts] to

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Petersburg, (M.D. Fla. Mar. 29, 2010) (No. 809-CV-923-T-23EAJ), ECF No. 57. The plaintiffs subsequently stipulated to dismissal of Eighth Amendment claims. Order Approving Plaintiffs Stipulation of Dismissal, *Catron v. City of St. Petersburg*, (M.D. Fla. April 1, 2010) (No. 809-CV-923-T-23EAJ), ECF No. 58. The court entered an order approving the stipulation of dismissal of Eighth Amendment claims. That court in reviewing the Equal Protection class discrimination claim rejected the argument that homeless individuals are a suspect class. *Id.* at 11–12.

<sup>92</sup> See *Columbus v. Breer*, 789 N.E.2d 1144 (Ohio Ct. App. 2003).

<sup>93</sup> *Id.* at 1145.

<sup>94</sup> *Id.* at 1146.

<sup>95</sup> See *Cleveland v. Pugh*, 674 N.E.2d 759 (Ohio Ct. App. 1996).

<sup>96</sup> *Breer*, 789 N.E.2d at 1146.

<sup>97</sup> *Pugh*, 674 N.E.2d at 761.

<sup>98</sup> *Id.*



conceal his act” negates the elements of the offense.<sup>99</sup> The so-called “necessity” exemption cases, however, usually depend heavily on notoriously biased police discretion. Some courts recognize the impossibility of complying with quality of life laws where cities provide no alternative as a basis for declaring enforcement of the law unconstitutional.<sup>100</sup>

Nevertheless, courts routinely dismiss challenges to the constitutionality of these laws.<sup>101</sup> The distinction the Ohio appellate court in *Pugh* drew between “answering the call of nature” in a secluded “public” place as opposed to urinating within view of the public is seldom drawn in most public urination cases, and this creates problems especially for homeless individuals.<sup>102</sup> This third category of cases also raises the question of whether courts can constitutionally uphold public urination statutes where government does not provide a reasonably accessible alternative, an issue discussed in Part III.

More importantly, the public toilet movement more than a century ago was a response to the needs of working-class and poor city residents. Today these same people remain most adversely affected by the privatization of toilets in the public sphere. For individuals without homes, public urination laws create a conflict between their need to perform an essential function in public spaces because there is no alternative and the government’s interest in maintaining orderly and aesthetically pleasing public streets and parks.<sup>103</sup>

<sup>99</sup> *People v. Cooke*, 152 Misc. 2d 311, 315–16 (N.Y. Just. Ct. 1991) (citing *People v. Carter*, 13 A.D.2d 652 (Sup. Ct. App. Div. 1961)), *accord* *State v. McCall*, 2010-Ohio-4283, 2010 WL 3528994, at \*5 (Ohio Ct. App. 2010) (where the court “presumes” without deciding that an exemption exists).

<sup>100</sup> Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 FORDHAM URB. L.J. 741, 780 (2016) (citing *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564, 1577 (S.D. Fla. 1992); *Anderson v. Portland*, No. 08-1447- AA, 2009 WL 2386056, at \*7 (D. Or. July 31, 2009); *Abbotsford (City) v. Shantz*, [2015] B.C.S.C. 1901 (Can. B.C.); *Victoria (City) v. Adams*, [2009] 100 B.C.L.R. 4th 28 (Can. B.C.)).

<sup>101</sup> *Cooke*, 152 Misc. at 313 (citations omitted). The court writes that public urination is “offensive to the sense of sight[,] and can also be offensive to the sense of smell. [It] constitutes the defendant’s creation of a ‘physically offensive condition’ where . . . it is done literally and figuratively in the public glare, without legitimate purpose or necessity, and in the total absence of any attempt to conceal the act from public view.” *Id.* at 315–16; *State v. Putzi*, 225 P.3d 1154 (Ariz. Ct. App. 2010); *Elliott v. State*, 435 N.E.2d 302 (Ind. Ct. App. 1982).

<sup>102</sup> *McCall*, 2010 WL 3528994, at \*5. The court also failed to draw distinctions between urinating within the view of police as opposed to the general public, or whether police to arrest for public urination must actually see the person urinating or simply discern as much from viewing the back of the person.

<sup>103</sup> See *Pottinger*, 810 F. Supp. at 1554 (commenting on a class action against the city upholding the homeless plaintiffs’ allegations that the city’s actions violated the Eighth

Arguably, arresting a homeless person for public urination punishes his involuntary status—being homeless with no access to a public toilet.<sup>104</sup> This is the point suggested by the federal district court in *Pottinger v. City of Miami*, a class action by homeless individuals challenging the Miami Police Department's efforts to prevent them from sleeping, standing, or congregating in the parks.<sup>105</sup> The court in *Pottinger* found that the city's actions violated the Eighth Amendment and the right to travel.<sup>106</sup> It is worth noting that in this case, homeless individuals did have access to a public toilet in the park, access that the police action prevented.<sup>107</sup>

Arguably, the criminalization of public urination for people who lack access to a toilet, public or private, effectively criminalizes homelessness,<sup>108</sup> a status offense. Canadian legal theorist Terry Skolnik argues that enforcing laws that are difficult or impossible for homeless individuals to obey undermines the legitimacy of the law and “disregards their dignity and autonomy.”<sup>109</sup> Arrests for public urination, for example, presuppose that the offender is making “a conscious and rational choice[] to break” the law.<sup>110</sup> Even though a few courts, like *Pottinger*, recognize exceptions to public urination law prosecutions using a necessity rationale, this approach seems inappropriate in situations that are repetitive and where compliance is impossible.<sup>111</sup>

As mentioned previously, increasingly businesses limit toilet access to paying customers. Further, city residents and visitors are unable to locate toilets outside of regular business hours and face criminal sanctions if they must urinate in a public space. Some cities have responded to the problem in various ways. The next section examines one of these responses.

#### B. Linking Criminalization of Public Urination to Increased Toilets

As the cases in the foregoing section indicate, a few cities recognized the impossible, and arguably illegal, situation that criminalizing public urination creates when there are no nearby public toilets. For example, in 2003, Los Angeles City Council passed an ordinance banning public

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Amendment and the right to travel). It is worth noting that in this case homeless individuals did have access to a public toilet in the park and were challenging police efforts to prevent them from sleeping, standing or congregating in the parks.

<sup>104</sup> Winkler, *supra* note 22, at 1346.

<sup>105</sup> *Pottinger*, 810 F. Supp. at 1577.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1560.

<sup>108</sup> Winkler, *supra* note 22, at 1345–46.

<sup>109</sup> Skolnik, *supra* note 100, at 742.

<sup>110</sup> Skolnik, *supra* note 100, at 745.

<sup>111</sup> Skolnik, *supra* note 100, at 744, 776–80.

urination in places exposed to public view.<sup>112</sup> Co-extensive with the ban, the Council announced that it planned to increase the number of public toilets throughout the city. Specifically, the city entered into a twenty-year contract with CBS Outdoor and JCDecaux to “install[] transit shelters, public kiosks and toilets as part of a massive ‘coordinated street furniture’ deal with the city. The companies foot the bill for installing all the structures, including the toilets, and for the maintenance on each.”<sup>113</sup>

Initially, most of the new toilets placed throughout Los Angeles were automatic, installed by the toilet manufacturer in exchange for ad space in the toilets.<sup>114</sup> Unfortunately, the city’s experience with these new toilets mirrors the experience of Northeastern and Midwestern urban areas fifty years earlier. In May of 2007, the *Los Angeles Times* published an article on the rise of automatic toilets seen around the city.<sup>115</sup> The paper found that of the seven automated toilets for the public (ATPs) installed, only one was functional; yet up to 150 more ATPs were planned.<sup>116</sup> The need for public toilets was obvious, the ATP on Los Angeles’ skid row generated about 120 to 130 flushes a day.<sup>117</sup> The presence of this toilet generated a lot of use and presumably reduced incidences of public urination in the surrounding area.

Nevertheless, four years later, when David Busch felt the need to create an improvised public toilet (a bucket, soapy water, and a tent), because the available toilets were often closed, he was charged with public nuisance and leaving property on the sidewalk.<sup>118</sup> Busch’s action illustrated another aspect of providing public toilets: access. For example, all the public restrooms around Venice Beach, a popular tourist area, close at 11 p.m. and do not open again until 6 a.m.<sup>119</sup> According to the *Los Angeles Times*, followed by a report issued by the city’s Department of

<sup>112</sup> L.A., CAL., MUN. CODE § 41.47.2 (2003), [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterivpublicwelfare?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles\\_ca\\_mc\\$anc=JD\\_41.18](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterivpublicwelfare?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_41.18) (“No person shall urinate or defecate in or upon any public street, sidewalk, alley, plaza, beach, park, public building or other publicly maintained facility or place, or in any place open to the public or exposed to public view, except when using a urinal, toilet or commode located in a restroom, or when using a portable or temporary toilet or other facility designed for the sanitary disposal of human waste and which is enclosed from public view.”).

<sup>113</sup> Cara Mia DiMassa, *Automated Public Toilets Get off to Very Slow Start in L.A.*, L.A. TIMES (May 3, 2007, 12:00 AM), <http://articles.latimes.com/2007/may/03/local/me-toilet3>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Making the Streets a Little Less Mean*, L.A. TIMES (Dec. 24, 2012, 12:00 AM), <http://articles.latimes.com/2012/dec/24/opinion/la-ed-restrooms-homeless-20121224>.

<sup>119</sup> *Id.*

Health a year later, public toilets in Los Angeles were largely unavailable.<sup>120</sup> “During two inspections in May, survey teams found human or animal waste piled at 14 sidewalk locations. The report by the Department of Public Health said that most of the \$250,000, self-cleaning toilets were out of order and ‘strongly recommended’ [that] the city install more public restrooms.”<sup>121</sup>

The Los Angeles experience highlights the problems connected with linking the criminalization of public urination to a *promise* by government to provide public toilets—the promise is unenforceable. It is unlikely that a court would suspend enforcement of public urination laws because the city is trying, albeit unsuccessfully, to address the problem. Thus, linking the criminalization of a natural human bodily function to the promise to provide spaces to avoid the need to urinate in public seems an unworkable approach.

Inga Winkler argues for a right to sanitation distinct from the right to water.<sup>122</sup> She argues, “[a]ccess to sanitation has always been essential for human dignity, health and well-being.”<sup>123</sup> In the process, she critiques the criminalization of urination in public spaces, positing that “in order to guarantee substantive equality, states have to find alternatives to the criminalization of homelessness and enable people experiencing homelessness to practice adequate, safe, and dignified sanitation.”<sup>124</sup> She continues, “[m]any individuals and groups who lack access to sanitation are stigmatized and pushed to the margins of society, having their needs rendered invisible, even being criminalized, altogether giving their right to sanitation a low priority.”<sup>125</sup>

The question not clearly answered by Winkler or Skolnik, however, is whether any right to sanitation includes access to toilets in the public arena. As stated at the outset of this Article, the question is whether the lack of access to public toilets is a dignitary affront because the consequences of not being able to hold one’s waste while in public is humiliating; and if so, whether the law provides a legal remedy. The next Part examines the dignitary interest involved in lack of public toilet access.

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<sup>120</sup> Gale Holland, *Skid Row Bathrooms Are a Perennial Debate*, L.A. TIMES (July 29, 2013, 12:00 AM), <https://www.latimes.com/local/la-xpm-2013-jul-29-la-me-skid-row-toilets-20130729-story.html>.

<sup>121</sup> *Id.*

<sup>122</sup> Winkler, *supra* note 22, at 1374–76.

<sup>123</sup> Winkler, *supra* note 22, at 1367.

<sup>124</sup> Winkler, *supra* note 22, at 1346.

<sup>125</sup> Winkler, *supra* note 22, at 1347.

## IV. PUBLIC TOILETS AND DIGNITARY RIGHTS

While the notion of a human right to dignity is a relatively recent development globally dating back to the post-World War II era, today the concept is mentioned in the constitutions of more than 100 nation-states.<sup>126</sup> The United States is not one of those nations.<sup>127</sup> Yet even in those countries that recognize the right, what constitutes dignity, and the corresponding obligation of government to protect or preserve dignity, is more elusive. “[S]ometimes [dignity appears] as a right; sometimes as a value; sometimes in ways that make it hard to distinguish between the two.”<sup>128</sup> Although considered inherent in contemporary western societies, dignity as a value is hard to define. The notion that we are all “equal in dignity” simply “by virtue of having been born human”<sup>129</sup> is largely empty rhetoric in the United States. Despite increasing references to “dignity” in the United States Supreme Court decisions, the term and concept lacks any clear definition.<sup>130</sup> Thus, dignity may be a useful political rhetorical device, but it lacks legal substance. Its primary judicial function, according to Leslie Meltzer Henry, “is to give weight to substantive interests that are implicated in specific contexts.”<sup>131</sup>

Further, Catharine MacKinnon reminds us of the flaw in a dignity-based approach to discrimination.<sup>132</sup> The dignity approach tends to be under-inclusive; it overlooks how inequality includes indignity but is not reducible to it.<sup>133</sup> “Reducing inequality to its dignitary dimension misses too much . . . to be able, upon remediation, . . . to produce equality.”<sup>134</sup> A

<sup>126</sup> ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS AND THE WORTH OF THE HUMAN PERSON 11–13 (2012).

<sup>127</sup> Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 16 (2004) (“The U.S. Constitution does not refer specifically to human dignity. Yet there are some cognate concepts in the Constitution’s text, such as the ban on cruel and unusual punishments, the protections of the due process clause, and others that have been developed in the U.S. Supreme Court’s constitutional jurisprudence.”).

<sup>128</sup> DALY, *supra* note 126, at 16; *see also* Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J.L. & PUB. POL’Y 415 (2017).

<sup>129</sup> *See* DALY, *supra* note 126, at 14.

<sup>130</sup> Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011). The notion of dignity “was a central organizing concept in the civil rights movement in the United States, and in the articulation of feminist demands concerning the role of women . . . . [Today, d]ignity is playing a major role in discussions on the ethics of biomedical research[.]” Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 666 (2008).

<sup>131</sup> Henry, *supra* note 130, at 190.

<sup>132</sup> *See* Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 10–11 (2011).

<sup>133</sup> *Id.*

<sup>134</sup> CATHARINE A. MACKINNON, BUTTERFLY POLITICS 307 (2017).

focus only on the indignity aspect of no public toilet access misses the material inequality that helps create the situation. “[D]ignity is a value or feeling. Equality is only secondarily a value or feeling. Primarily, [it] is a fact.”<sup>135</sup>

Even in countries whose constitutions contain a dignity guarantee, it is not clear that it includes having reasonable access to public toilets in large urban settings. Finland’s constitution, for example, contains the following provision: “[T]hose who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.”<sup>136</sup> This provision seems to impose some sort of affirmative duty on government to provide a minimum level of care to those without the means. Whether this obligation translates into an obligation to provide public toilets is unclear. Resistance in the courts to this idea is apparent from the cases discussed previously. The public must buy into the need for accessible public toilets.

As the earlier discussion about the demise of public toilets in the United States suggests, governments advance both fiscal and social reasons to justify not providing public toilets. In addition, there is not much public clamor for more toilets, probably because the more politically influential people are those people with the greatest access to public toilets. Most businesses seldom refuse toilet access to “respectably dressed” middle- or upper-class white people, customers or not. Thus, these members of the policy-making class seldom experience situations where they lack access to a public toilet. Nevertheless, the lack of toilets and the presence of human waste is a chronic problem in populous American cities. The next Part asks whether a public health rationale might be a more persuasive basis upon which to base a right to *reasonable* access to public toilets.

## V. PUBLIC TOILETS AS A PUBLIC HEALTH ISSUE

In this Part, I argue that health concerns, individual and public, remain a pressing justification for increasing the availability of public toilets, especially in high-traffic areas. I also argue that the public’s fears about the connection between transmissible diseases and toilets is overblown.

### A. *The Public Health Rationale*

Today, the health hazards posed by not having access to toilets are greater than the threat posed by toilet seats. As mentioned at the outset, lack of access to public restrooms forces people to choose between

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<sup>135</sup> *Id.* at 315.

<sup>136</sup> DALY, *supra* note 126, at 55 (citing CONSTITUTION OF FINLAND, Art. 19 (1999) (731/1999, amendments to 802/2007 included)).

“holding it” and compromising their dignity by relieving themselves in public. According to the Occupational Safety Health Organization (OSHA), “[a]dverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections (UTIs), which can lead to more serious infections and, in rare situations, renal damage.”<sup>137</sup> Further, “UTIs during pregnancy have been associated with low birthweight babies, who are at risk for additional health problems compared to normal weight infants.”<sup>138</sup> Furthermore, some health effects “including constipation, abdominal pain, diverticuli and hemorrhoids, can result if individuals delay defecation.”<sup>139</sup>

In order to protect workers from these health issues in the workplace, OSHA promulgated rules to require employers to provide their employees with toilet facilities so that they will not suffer the adverse health effects that can result if toilets are not available.<sup>140</sup> Note, OSHA places the burden on the employer, not the government. Further, OSHA’s rules do not protect all employees.<sup>141</sup> Employers are not required to provide access to toilet facilities for mobile employees working outside the employer’s physical office.<sup>142</sup>

Lack of access to public toilets not only contributes to the illness mentioned above, lack of access also can trigger outbreaks of contagious diseases, like hepatitis A. If people do not have access to restrooms, they also do not have access to soap and water. People forced to relieve themselves outside are carrying germs on their hands and transfer these germs to whatever they touch. People who must defecate in public could possibly end up with feces on their hands. One-trillion germs on just one

<sup>137</sup> Memorandum from John B. Miles, Jr., Dir., OSHA Directorate of Compliance Programs, on Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities to Regional Administrators & State Designees (Apr. 6, 1998), [http://osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22932](http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932) (citation omitted).

<sup>138</sup> *Id.* (citations omitted).

<sup>139</sup> *Id.* (quoting National Institutes of Health (NIH) Publ’n No. 95-2754, July 1995).

<sup>140</sup> The sanitation standards (29 C.F.R. § 1910.141, 29 C.F.R. § 1926.51, and 29 C.F.R. § 1928.110) are intended to ensure that workers do not suffer adverse health effects that can result if toilets are not sanitary and/or are not available when needed.” UNITED STATES DEPARTMENT OF LABOR, *Restroom and Sanitation Requirements*, [https://www.osha.gov/SLTC/restrooms\\_sanitation/](https://www.osha.gov/SLTC/restrooms_sanitation/) (last visited Feb. 27, 2020).

<sup>141</sup> OSHA’s rules “do not apply to mobile [work] crews” or to locations that are normally unattended, “so long as [the] employees working at these locations have transportation immediately available to nearby toilet facilities which meet the other requirements” of the standard. 29 C.F.R. § 1910.141(c)(1)(ii) (2019).

<sup>142</sup> OSHA’s rule says that employees who are members of mobile crews, or who work at normally unattended locations must be able to leave their work location “immediately” for a “nearby” toilet facility. *Id.* The rule assumes that there is a nearby facility that they can use, but this is not always the case. Thus, if there are no nearby facilities, many employees may elect to relieve themselves outside, which can create more health issues.

gram of human feces could cause salmonella, E. coli, norovirus, and hand-foot-mouth disease.<sup>143</sup> These germs can pass to others by touching objects that someone with the germs previously touched.<sup>144</sup> Yet washing hands is an easy way to prevent these diseases.<sup>145</sup>

The consequences of inadequate toilet access can be severe, as the City of San Diego discovered during the summer of 2017. That summer the city experienced an outbreak of hepatitis A tied directly to the lack of public toilets in the downtown area. The people most likely to be infected due to a lack of access to handwashing facilities were homeless and/or illicit drug users, who transmitted fecal matter from person-to-person.<sup>146</sup> In September of that year, “the San Diego County Public Health Officer declared a local public health emergency.”<sup>147</sup>

According to news accounts, grand jury reports repeatedly warned the city of the problem:

[A] review of public records found that since 2000, four grand jury reports attempted to steer attention to the risks posed by human waste on city streets and a shortage of toilets available for use by the city’s growing homeless population. . . . Each of the reports called on the city to either add more all-hours, publicly available restrooms or bolster its street cleaning regimen to ensure the public would not be exposed to human waste.<sup>148</sup>

As a result of the outbreak, sixteen people died in less than a year and more than 300 were hospitalized.<sup>149</sup> The total number of hepatitis A cases for a ten-month period between November 2016 and September 2017 was 444, “as many as the combined total reported by California, Texas and New York in all of 2015, the most recent year for which statewide data is

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<sup>143</sup> *Show Me the Science—Why Wash Your Hands?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/handwashing/why-handwashing.html> (last visited Feb. 8, 2019).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* According to the Center for Disease Control, “Teaching people about handwashing helps them and their communities stay healthy. Handwashing education in the community: reduces the number of people who get sick with diarrhea by 23–40%, reduces diarrheal illness in people with weakened immune systems by 58%, [and] reduces respiratory illnesses, like colds, in the general population by 16–21%.” *Id.*

<sup>146</sup> Bill Marler, *San Diego Hepatitis A Outbreak, 2017*, FOOD POISON J. (Oct. 11, 2017), <https://www.foodpoisonjournal.com/food-poisoning-watch/san-diego-hepatitis-a-outbreak-2017-2/>.

<sup>147</sup> *Id.*

<sup>148</sup> James DeHaven, *San Diego Officials Were Warned About Restroom Shortage Repeatedly Before Hepatitis Outbreak*, SAN DIEGO UNION-TRIB. (Sept. 20, 2017, 9:00 PM), <http://www.sandiegouniontribune.com/news/watchdog/sd-me-grand-jury-20170920-story.html>.

<sup>149</sup> *Id.*



available.”<sup>150</sup>

Hepatitis A is highly contagious but preventable disease. The Centers for Disease Control and Prevention (CDC) reported an increase in outbreaks of hepatitis A in many states during 2017.<sup>151</sup> Days after San Diego declared a local public emergency, Los Angeles County health officials announced a similar outbreak.<sup>152</sup> Around the same time, public health officials in Maricopa County Arizona traced a hepatitis outbreak in that community to a person who came from San Diego.<sup>153</sup> By the time California health officials slowed the outbreak, it has spread to Santa Cruz and Monterey counties.<sup>154</sup>

It is important to note, not all the individuals infected with hepatitis A during the outbreak were homeless and/or drug users. Infected individuals included restaurant patrons.<sup>155</sup> As mentioned previously, failure to wash hands after excreting and lack of access to toilets with hand washing facilities are factors contributing to outbreaks of the disease.<sup>156</sup>

#### B. Public Health Concerns about Public Toilets

Both the existence and lack of public toilets pose significant public health issues. According to the Gallo Institute of Health and Nutrition, one can contract a few diseases like chlamydia, E. coli, streptococcus, hepatitis A virus, staphylococcus, shigella, and gonorrhea in public toilets.<sup>157</sup> Nevertheless, as the Institute’s website notes, the public’s perceptions of the dangers of public restrooms are exaggerated.<sup>158</sup> Specifically, while

<sup>150</sup> *Id.* A later article listed the total victims as 418 and the number of deaths at 17. Coral Beach, *CDC Finds Hepatitis A Was Carried from San Diego to AZ Shelter*, FOOD SAFETY NEWS (Oct. 5, 2017), <http://www.foodsafetynews.com/2017/10/cdc-finds-hepatitis-a-was-carried-from-san-diego-to-az-shelter/#.Wh8vrEqnE2w>.

<sup>151</sup> 2017- *Outbreaks of Hepatitis A in Multiple States Among People Who Use Drugs and/or People Who Are Homeless*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/outbreaks/2017March-HepatitisA.htm> (last visited Feb. 8, 2019); *Outbreak of Hepatitis A Virus (HAV) Infections among Persons Who Use Drugs and Persons Experiencing Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 11, 2018), <https://emergency.cdc.gov/han/han00412.asp>.

<sup>152</sup> *Hepatitis A Outbreak in LA County as San Diego Washes Down Streets*, FOX NEWS (Sept. 20, 2017), <http://www.foxnews.com/health/2017/09/20/hepatitis-outbreak-declared-in-la-county-as-san-diego-washes-down-streets.html>.

<sup>153</sup> See Beach, *supra* note 150.

<sup>154</sup> See *Hepatitis A Outbreak Associated with Drug Use and Homelessness in California, 2016–2018*, CAL. DEP’T PUB. HEALTH (Apr. 11, 2018), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Immunization/2016-18CAOutbreakAssociatedDrugUseHomelessness.pdf>.

<sup>155</sup> See Beach, *supra* note 150.

<sup>156</sup> See, *infra* note 142–144 and accompanying text.

<sup>157</sup> See *Health Hazards of Using Public Toilets*, GALLO INST. HEALTH & NUTRITION (Oct. 23, 2013), <http://www.galloinstitute.org/health-hazards-of-using-public-toilets/>.

<sup>158</sup> See *id.*

public toilets harbor bacteria, most of the bacteria can only survive a very short time on a toilet seat.<sup>159</sup> Moreover, these bacteria usually do not affect people with strong immune systems, and skin is one of the strongest parts of the human immune system.<sup>160</sup>

The rise in autoimmune diseases explains increased public support for toilet access laws. “‘It’s estimated that 1.4 million Americans have IBD’ [Intestinal Bowel Disorder]. . . .When you think about that, you realize this is becoming such an enormous public health issue.’”<sup>161</sup> The availability problem is especially important for people with health complications such as Crohn’s disease and irritable bowel syndrome because they need to use the restroom more frequently than others.

Consider the plight of fourteen-year-old Ally Bain who has Crohn’s disease.<sup>162</sup> There was no public toilet available in a Chicago Old Navy store. Denied access to the employee’s toilet, Ally soiled herself.<sup>163</sup> Outraged, Ally and her mother fought for The Reasonable Access Law (Ally’s Law), which was enacted in over sixteen states.<sup>164</sup> Ally’s Law “requires businesses to make employee-only restrooms available to people with irritable-bowel disorders and other medical conditions such as pregnancy and incontinence.”<sup>165</sup>

To some public toilet advocates, Ally’s Law is more divisive than helpful because it mandates toilet access for a limited group of people and fails to address the larger problems caused by the lack of public toilets:

Robert Brubaker, a program manager for the American Restroom Association, an advocacy group formed in the 2005 to increase quality and access to restrooms . . . believes [that Ally’s Law, and its progeny,] sends a message to retailers that they can ignore the needs of those who fit outside these narrow categories. “Let’s fix it for everybody, even for the healthy person who got food poisoning. They don’t normally have a

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<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> Simon Owens, *The Grassroots Movement to Change the Nation’s Public Restroom Laws*, U.S. NEWS (Dec. 20, 2012), <https://www.usnews.com/news/articles/2012/12/20/the-grassroots-movement-to-change-the-nations-public-restroom-laws>. According to Dr. James Lewis, a professor of medicine and clinical epidemiology at the University of Pennsylvania, “[i]f you expand that to all autoimmune diseases, it gets up to about 23.5 million Americans, or about one in 12.” *Id.*

<sup>162</sup> Julie Deardorff, *Restroom Doors No Longer Closed to the Distressed*, CHI. TRIB. (Aug. 14, 2005), <https://www.chicagotribune.com/news/ct-xpm-2005-08-14-0508140381-story.html>.

<sup>163</sup> *Id.*

<sup>164</sup> Ally Bain, *10 Years of Fighting for Bathroom Access*, CROHN’S & COLITIS FOUND., <https://site.crohnscolitisfoundation.org/living-with-crohns-colitis/personal-stories/allybain.htm> (last visited Feb. 19, 2020).

<sup>165</sup> Deardorff, *supra* note 162.

problem but they do today.”<sup>166</sup>

Increasing access to clean and safe public toilets is a difficult problem for state and local governments. As California learned, lack of access to toilets and hand washing facilities poses serious health risks that threaten the general public. More fundamentally, reliable access to public toilets is a quality of life issue. People without access to public toilets either will use public spaces, making those places undesirable for general public use, or not venture far from home. Research suggests that lack of access to clean and safe public toilets contributes to the under use of public transportation.<sup>167</sup> The next Part looks at measures to improve access to public toilets.

## VI. HOW TO ADDRESS PERSISTENT PUBLIC TOILET ACCESS ISSUES

Often, visitors to Japan report being surprised about the ready availability of public toilets—“they are everywhere.”<sup>168</sup> Modern public toilet facilities, “created jointly by . . . local government and Toto, Japan’s biggest toilet maker,” are fast replacing the traditional squat toilet.<sup>169</sup> Not only are toilet facilities readily available in public transportation stations, shrines, and tourist areas, they are extremely clean and stocked with toilet paper!<sup>170</sup> Several apps help people locate the nearest public toilet.<sup>171</sup> The government endorses these efforts to improve toilet access seeing greater access as a way to encourage more women to participate in Japanese society.<sup>172</sup>

Granted, Japan’s approach to public toilets reflects cultural preferences, but the outcome is also the result of a government campaign to increase access to “clean and safe” toilets.<sup>173</sup> Nevertheless, Japan’s success

<sup>166</sup> Owens, *supra* note 161.

<sup>167</sup> See Kate M. Washington, *Go Before You Go: How Public Toilets Impact Public Transit Usage*, PORTLAND ST. U. MCNAIR SCHOLARS ONLINE J. 8, 8–9 (2014), <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1134&context=mcnair>.

<sup>168</sup> Helen Lewis, *Squeamishness Costs Lives: Why the World Needs Better Loos*, NEW STATESMAN (June 5, 2013), <https://www.newstatesman.com/sci-tech/2013/06/squeamishness-costs-lives-why-world-needs-better-loos>.

<sup>169</sup> Reuters, *Japan’s Next Restroom Revolution? Phasing out Squat Toilets for Tokyo 2020*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/reuters/2020/02/18/sports/olympics/18reuters-olympics-2020-toilets.html?searchResultPosition=2>.

<sup>170</sup> See Lewis, *supra* note 168.

<sup>171</sup> See Anna Fifield, *How Japan’s Toilet Obsession Produced Some of the World’s Best Bathrooms*, WASH. POST (Dec. 15, 2015, 2:02 AM), [https://www.washingtonpost.com/news/worldviews/wp/2015/12/15/how-japans-toilet-obsession-produced-some-of-the-worlds-best-bathrooms/?noredirect=on&utm\\_term=.cd5459a41123](https://www.washingtonpost.com/news/worldviews/wp/2015/12/15/how-japans-toilet-obsession-produced-some-of-the-worlds-best-bathrooms/?noredirect=on&utm_term=.cd5459a41123).

<sup>172</sup> See *id.*

<sup>173</sup> See Kiyoma Oni, *Smoking in Japanese Toilet Facilities*, 2 TOBACCO CONTROL 336 (1993).

is instructive. It suggests that two things are needed to improve public toilet access: identifying the availability of public toilets and working in conjunction with private business to improve access. This Part looks at the need to identify the problem by periodic surveys of public toilet facilities and contemporary efforts to increase the number of public toilets.

*A. Knowledge is Power: Periodic Public Toilet Surveys*

One way to increase public awareness of the problem is to make regular public toilet censuses by large cities mandatory and require cities to provide the public with that information. Unless you have small children who always need to use the bathroom at the most inopportune times and places, the average middle-class American is unaware of the bathroom scarcity problem. Instead, they may attribute the problem of public urination to homeless people. Recognizing that the absence of public toilets is a problem, the Charmin Toilet Tissue company created the app *Sit or Squat: Restroom Near Me!*, which identifies nearby bathrooms.<sup>174</sup> The information gained from use of this app, however, may be misleading. In New York City, for example, most of the bathrooms identified are in private businesses that can refuse to let non-customers use their facility.<sup>175</sup>

People need to know where to locate *accessible* public toilets, and governments need better information about the availability of public toilets. Australia, for example, has a nation-wide registry of public toilets to “‘improve independence and quality of life’ for all people, but especially for those who deal with incontinence.”<sup>176</sup> The City of Melbourne in Australia created a toilet management plan in 2002 which is periodically updated.<sup>177</sup> The goal of the plan is to “maintain a network of safe, accessible clean and environmentally sustainable public toilets.”<sup>178</sup> Similarly, in the United States, the City of Portland is trying to improve access to public toilets.<sup>179</sup> Yet, it is hard to develop effective policies if you have no idea about the availability of public toilets. Thus, as a first step, laws need to be enacted mandating that state and local governments undertake periodic surveys of public toilets in their jurisdiction. This step is not especially costly.

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<sup>174</sup> See *Sit or Squat: Restrooms Near Me*, CHARMIN, <https://www.charmin.com/en-us/about-us/sitorsquat> (last visited Jan. 22, 2020).

<sup>175</sup> See *infra* note 171 and accompanying text.

<sup>176</sup> See Washington, *supra* note 167, at 5.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.* at 5–6.

### B. Contemporary Efforts to Increase the Number of Public Toilets

Once cities conduct their census and identify underserved areas, the next step is increasing toilet access. This step is problematic, but there is much to learn from the efforts of cities that are attempting to address the problem. This section looks at some of these efforts and comments on what they teach us about providing greater toilet access.

As mentioned previously, many of the same problems that plagued earlier government efforts to maintain public toilets persist today. The City of Seattle tried to address its ongoing problem of public urination and “a lack of adequate public toilet facilities for homeless people and others in the downtown area.”<sup>180</sup> After a 1990 city study found that Seattle was “almost devoid of public restrooms[,]”<sup>181</sup> the city agreed to a fund “a local non-profit, the Low Income Housing Institute, to create a public hygiene center in the downtown area.”<sup>182</sup> The Urban Rest Stop, a hygiene center, opened in 1999.<sup>183</sup> Like the public baths of the early twentieth century, this facility contains shower and laundry facilities as well as public toilets.<sup>184</sup>

The single facility proved insufficient for downtown areas and popular tourist locations. So in 2003 the city installed five high-tech, self-cleaning toilets in Pioneer Square and other neighborhoods.<sup>185</sup> When they became a “refuge[] for drug use, prostitution and hanky-panky[,]” the city removed them.<sup>186</sup> The reasons advanced for closing these public toilets mirror the experiences of other cities in the mid-twentieth century. The automated toilets were located near neighborhoods populated by drug users and transients, people who normally do not have access to privately maintained public toilets. They became too costly to maintain because local ordinances prevented the city from using privately sponsored advertisements to offset the cost of installation and maintenance.<sup>187</sup>

A few years later, pressure mounted again to place public toilets at Pioneer Square.<sup>188</sup> The need for public toilets was embarrassingly

<sup>180</sup> Maria Foscarinis et al., *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL’Y 145, 160–61 (1999).

<sup>181</sup> History, URBAN REST STOP, <https://urbanreststop.org/about/information/history/> (last visited Feb. 8, 2019).

<sup>182</sup> Foscarinis et al., *supra* note 180, at 161.

<sup>183</sup> History, *supra* note 181.

<sup>184</sup> *Id.*

<sup>185</sup> Daniel Beekman, *After Embarrassment, Seattle Finds Public Toilet That’s Just Right*, SEATTLE TIMES (May 25, 2015, 8:51 PM), <https://www.seattletimes.com/seattle-news/politics/after-earlier-embarrassment-seattle-resumes-public-toilet-quest/>.

<sup>186</sup> *Id.*

<sup>187</sup> Christopher Maag, *Seattle to Remove Automated Toilets*, N.Y. TIMES (July 17, 2008), [http://www.nytimes.com/2008/07/17/us/17toilets.html?\\_r=0](http://www.nytimes.com/2008/07/17/us/17toilets.html?_r=0).

<sup>188</sup> Beekman, *supra* note 185.

apparent. “Between Jan. 1 and May 5 [of 2015], Pioneer Square [a popular tourist site] accounted for 3,496 of 11,120 human- and animal-waste cleanups by the Metropolitan Improvement District (MID), which patrols every neighborhood downtown, according to MID statistics.”<sup>189</sup> Acceding to pressures from merchants, city residents, and social service advocates, the city agreed install another automated toilet in Pioneer Square.<sup>190</sup>

It is unclear, given the costs of public toilets, whether government, on its own, can increase toilet access without allowing private advertising to off-set the cost. As the experience of San Francisco illustrates, public-private partnerships seem a more viable alternative to increasing toilet access.

The Department of Public Works for the City of San Francisco has a web page devoted to public toilets that touts its Pit Stop Program, which “provides clean and safe public toilets, as well as used needle receptacles and dog waste stations, in San Francisco’s most impacted neighborhoods.”<sup>191</sup> The site provides information on where to report problems with broken or unclean toilets. The city relies heavily on self-cleaning, automatic toilets that are also accessible to people with disabilities. The program is funded by a private vendor who installs the toilets in exchange for allowing installation of advertising kiosks and newsstands.<sup>192</sup>

The experiences of New York, Los Angeles, San Francisco, and Seattle suggest that there is a need for greater public toilet access and that providing more toilet access is expensive. Cities struggling financially may have to rely on and collaborate with private business to help defray the building and maintenance costs. This possibility is explored more closely in the next section.

### C. *Developing an Effective Approach to Public Toilets*

Any effort to provide public toilets must address several problems: increasing access, cost (including maintenance), cleanliness, and safety. Access issues are magnified where there are gender-specific toilets. Unisex toilets provide equal and full use of toilet facilities.<sup>193</sup> Unisex toilets,

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *San Francisco Pit Stop*, S.F. PUB. WORKS, <https://sfpublicworks.wixsite.com/pitstop> (last visited Jan. 14, 2020).

<sup>192</sup> *Public Toilets*, S.F. PUB. WORKS, <https://sfpublicworks.org/services/public-toilets> (last visited Jan. 14, 2020).

<sup>193</sup> See generally Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211 (Harvey Molotch & Laura Norén eds., 2010).

common in some European countries,<sup>194</sup> also avoid questions about access for people who may experience discrimination because of their real or imputed gender identity. There are several models. Individual cubicles, increasingly common in restaurants, are most private but also more expensive. Cheaper are bathrooms with multiple stalls and with full-length doors for more privacy.

No matter whether the public bathroom model is publicly or privately funded, providing bathrooms for the public is costly. Most financially stretched cities have more pressing priorities. For these cities, automatic toilets are an attractive option because private companies bear the cost of providing and maintaining them in exchange for advertising space. This model may work as a short-term option in certain high traffic urban areas, but the current technology makes these toilets unreliable without constant oversight, an additional cost. Further, automated toilets are ripe for potential misuse. They can serve as shelter for homeless individuals or havens for drug users, illustrating the need for frequent monitoring.

Given the widespread availability of toilets in private business that serve the public, there is a less expensive option that addresses availability, cleanliness, and safety concerns. One low-cost option might be partnership arrangements between a city and businesses who voluntarily contract with the city to make their toilets available to the public.<sup>195</sup> Cities could provide modest compensation for the increased costs of maintaining the bathroom.<sup>196</sup> Stronger measures might include requiring all restaurants and bars to make their toilets available to the general public, a system used in Amsterdam.<sup>197</sup>

Another option, suggested by one scholar, is to license “public toilets [that] are privately maintained, whether inside a business or adjacent to a kiosk.”<sup>198</sup> These toilets might even be portable. The author suggests the process would be like the mechanism used to license food carts.<sup>199</sup> The toilets, like food carts and restaurants, would be subject to sanitation inspections.

If private businesses cannot be enticed to help alleviate the problem, another, less desirable model is to bring back the pay-to-use toilet, especially monitored pay toilets like those used in some European

<sup>194</sup> See, e.g., Leonid Bershidsky, *The Nordics Get Toilet Equality (Almost) Right*, BLOOMBERG (Jan. 9, 2019), <https://www.bloomberg.com/opinion/articles/2019-01-09/scandinavia-s-switch-to-ungendered-public-toilets-is-step-forward>.

<sup>195</sup> Washington, *supra* note 167, at 17.

<sup>196</sup> *Id.* Two cities in Britain reimburse private business that voluntarily open their toilets to the general public. *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

countries. Even advocates for the homeless support *modest* fees if payment means increased access to clean toilets.<sup>200</sup> Another viable option for some cities is to use fees from private advertisers to supplement the cost of monitored public toilets.

Monitored toilets help address the problem of bathroom cleanliness and safety. But surveillance, especially by government agencies, includes a policing aspect that might discourage some people from using public toilets. Thus, monitoring efforts must find a way to balance the conflicting interests between the need to provide safe toilets and the individual need for toilet privacy. There are other things that state and local government must decide, like where public toilets are most needed and the hours of operation. Partnering with private business might help with these decisions since business owners are more aware of public demand.

Finally, access to public toilets is not simply an urban issue. The second most popular response to a recent survey of residents in Arlington, Virginia about the three improvements they would like to see at local parks and facilities was “yearlong open restrooms.”<sup>201</sup> This finding suggests that people would be more likely to go to parks and get their recommended exercise if public parks had more restrooms.

Bottom line, solving the public bathroom access problem is a local matter and depends on a variety of factors including the extent of the problem, funding alternatives, and public will. There is no single approach that best achieves the desired result. But it is hard to develop effective policies if you have no idea about the availability of public toilets. Thus, at the very least, state and local governments need to mandate periodic toilet surveys and express a commitment to improving access to public toilets for all.

## VII. CONCLUSION: A FEW PARTING THOUGHTS

Inga Winkler, in arguing for a right to sanitation, warned that “complete health benefits can only be experienced when entire communities move to safe sanitation practices.”<sup>202</sup> Clara Greed proposes that a “public toilet policy be included in town plans, urban policy

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<sup>200</sup> See Sophie House, *Pay Toilets Are Illegal in Much of the U.S. They Shouldn't Be*, CITYLAB (Nov. 19, 2018), <https://www.citylab.com/perspective/2018/11/pay-toilets-should-have-another-chance-world-toilet-day/576169/>.

<sup>201</sup> *Support for Public Amenities Can Win Votes*, AM. RESTROOM ASS'N, <https://americanrestroom.org/support-for-public-amenities-can-win-votes/> (last visited Feb. 27, 2020) (citing *Parks and Recreation Citizen Survey: Executive Summary of Citizen Survey Results*, ARLINGTON COUNTY GOV'T 1, 17 (2002), [https://americanrestroom.org/misc/support\\_for\\_public\\_arl\\_cnty\\_pr\\_survey\\_p1\\_17.pdf](https://americanrestroom.org/misc/support_for_public_arl_cnty_pr_survey_p1_17.pdf)) (the most popular response was water fountains).

<sup>202</sup> Winkler, *supra* note 22, at 1377.



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documents, or urban regeneration policy.”<sup>203</sup> Even if adopted, Greed’s proposal is no guarantee that the results would be satisfactory. The problems that stopped the development of a comprehensive public toilet system in urban cities—cleanliness, security, societal attitudes, and cost of construction and maintenance—remain as barriers. In the distant future, advances in artificial intelligence may address issues of maintaining toilet cleanliness and safety. In the meantime, Americans, and their visitors, continue to search for public toilets in large, densely-populated cities.<sup>204</sup> There is no simple solution, but the lack of a quick fix for a real problem should not be an excuse for inaction. Cities and states need to commit to improving access to public toilets. Simultaneously, legal advocates need to more vigorously attack the enforcement of public urination laws in jurisdictions without adequate access to public toilets.

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<sup>203</sup> Greed, *The Role of the Public Toilet in Civic Life*, in LADIES AND GENTS: PUBLIC TOILETS AND GENDER, *supra* note 20, at 44.

<sup>204</sup> See *Sit or Squat: Restrooms Near Me!*, *supra* note 174.