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Tobias Barrington Wolff

University of Pennsylvania Carey Law School

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Civil Rights Reform and the Body

*Tobias Barrington Wolff**

INTRODUCTION

Discrimination on the basis of gender identity or expression—encompassing discrimination against transgender people because they are transgender and also discrimination against people of all identities whose appearance or actions do not conform to the gender expectations of those around them—has emerged as a major focus of civil rights reform. Transgender people are among the most targeted populations in the United States, subject to widespread and sometimes violent mistreatment in places of public accommodation, the workplace, and the housing market. Gender-variant young people become homeless in vastly disproportionate numbers, facing hostility in foster care and sexual exploitation on the streets.¹ Some states have enacted legislation prohibiting such discrimination and abuse, and the Obama Administration has taken steps to extend similar protections within the federal civilian workforce and in administrative programs like federally subsidized housing and veterans services.² Nonetheless, a condition of threat and vulnerability remains the norm for many who depart from the gender expectations of those around them, and efforts to enact protections have become a priority in Lesbian, Gay, Bisexual, and Transgender (LGBT) advocacy.

Opponents of these civil rights reforms have structured their opposition around one dominant image: the bathroom. With striking consistency, opponents have invoked anxiety over the bathroom—who uses bathrooms, what happens in bathrooms, and what traumas one might experience while occupying a bathroom—as the reason to permit discrimination in the workplace, housing, and places of public accommodation. Antagonists brand proposed civil rights laws as “bathroom bills,” promoting fear of sexual assault and employing icons and imagery that raise the specter of invasive voyeurism, all in response to the suggestion that transgender people might be able to hold a job, rent an apartment, or use places of public accommodation with-

* Professor of Law, University of Pennsylvania Law School. I am grateful to Sally Gordon, Katie Eyer, Shannon Minter, Lisa Mottet, Serena Mayeri, Sophia Lee, Shawn Nacol, Peter Pazzaglini, Daniel Redman, and Stephen Burbank for their valuable input.

¹ *Gay and Transgender Youth Homelessness by the Numbers*, CTR. FOR AM. PROGRESS (June 21, 2010), http://www.americanprogress.org/issues/2010/06/homelessness_numbers.html (on file with the Harvard Law School Library).

² See NAT'L CTR. FOR LESBIAN RIGHTS, STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE (2010), available at <http://www.nclrights.org/site/DocServer/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf>; Sunnive Brydum, *President Obama's Commitment to Transgender Equality*, ONE COLO., <http://www.one-colorado.org/news/president-obamas-commitment-to-transgender-equality> (last visited Dec. 5, 2011) (on file with the Harvard Law School Library).

out discrimination. The tactic has proven effective. Proponents of reform in the 111th Congress identified their colleagues' anxiety over gender-identity protections, and in particular the rhetoric of the bathroom, as a major reason they could not successfully advance a federal Employment Non-Discrimination Act, which would prohibit employment discrimination on the basis of both sexual orientation and gender identity.³ Similar battles in state legislatures have either been lost or rendered more difficult by anxiety over the bathroom. And the effect is not felt in the vote count alone. These political struggles impose yet more indignity upon transgender people, who find themselves reduced to a caricature of a bodily function when seeking the assistance of their government in enjoying the basic features of a safe and dignified existence.

When a single image or rhetorical device becomes so dominant in a public policy debate, it requires an analysis on two levels. One must interrogate the device on its own terms, examining the factual predicates underlying its claims. But one must also lift the device out of this narrow and oversimplified pocket of debate—the power of the device being its very capacity to flatten discussion—and place it within a historical and analytical context where its origins and meaning can be scrutinized.

The rhetoric of the bathroom in the debate over gender-identity protections seeks to exploit an underlying anxiety that has played a role in many efforts at civil rights reform: anxiety over the body. The body can be a site of vulnerability and pain, shame and pleasure, excitement and embarrassment—human experiences that are often unmediated by rational thought and impervious to reasoned argument. When opponents of civil rights reform mobilize these primal forces in response to progressive efforts, they wield a potent tool for preserving existing arrangements of status and power.

This Article makes a first attempt to identify and analyze the role that anxiety over the body can play in civil rights reform, using as its primary point of reference the obsessive focus on bathrooms that antagonists exhibit in seeking to justify discrimination on the basis of gender identity and expression. It begins by exploring the mode of subordination that characterizes much anti-LGBT discrimination: the wholesale erasure of the target population. Debates over gender-identity discrimination are regularly framed around an implicit invitation to negate transgender people entirely—to behave as though they can be conjured out of existence by establishing public policy that refuses to take them into account. The maneuver is persistent in disputes over LGBT equality and has been a regular feature of anti-gay advocacy. When deployed against transgender people, this aggressive form of erasure takes shape around anxiety over the body, for it is the transgender body itself that the antagonist wishes to erase. The bathroom obsession offers a prime example of this dynamic of erasure.

³ See Valerie Keefe, *Not to Praise Barney Frank . . .*, HUFFINGTON POST (Nov. 29, 2011, 11:00 AM), http://www.huffingtonpost.com/2011/11/29/not-to-praise-barney-fran_n_1117559.html (on file with the Harvard Law School Library).

The Article then identifies some of the core anxieties of the body—fear of sexual predation and invasion; fear of pain and injury; and fear that the body will be exposed, with the attendant feelings of shame and loss of control that many people experience when their unclothed bodies are scrutinized—and analyzes resistance to civil rights reform around these themes. Anti-transgender discrimination implicates each of these core anxieties, coupled with the pervading insecurity over sexual or gender identity that is brought to the fore in some people when confronted with the reality of a transgender body. Past civil rights efforts have likewise provoked sharp reactions around these anxieties. The fight over the segregation of municipal swimming pools took shape around widely expressed fears of sexual predation by Black men toward White women, as well as unspoken anxieties about exposure of the body by some White men. Anxiety around physical injury and mutilation threw additional fuel on the long simmering battle over the segregation of railroad cars when travel by rail was still a new and dangerous technology, subjecting passengers to pervading physical peril. And purported fears over exposure of the body in barracks and showers played an outsized role in the resistance to the repeal of the military's Don't Ask, Don't Tell (DADT) policy, under which lesbian, gay, and bisexual servicemembers had to lie about their identities as the price of their service. The Article examines these core anxieties of the body and analyzes the role that they have played in resistance to civil rights reform.

I. THE RHETORIC OF THE BATHROOM AND GENDER-IDENTITY PROTECTION

Transgender identity is characterized by a mismatch between the gender that a person is assigned by the world at birth and the gender that the person experiences internally and desires to express outwardly. Many transgender people transition, rejecting the gender that has been assigned to them and claiming their true gender. A gender transition can entail changes in dress and self-presentation, hormone treatments, and other forms of physical alteration or surgery. The range of physical alterations among transgender people varies greatly, with only some electing surgery to reconfigure the genitals. Recent estimates suggest that there are about 700,000 transgender people in the United States, though any estimate depends upon definitional choices regarding who counts as transgender, which are sometimes contested.⁴ With the growing acknowledgment that transgender identity and sexual orientation are distinct phenomena, legal protections have begun to treat each type of discrimination separately. Laws that prohibit discrimination based upon gender identity and expression aim primarily to protect peo-

⁴ GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> (estimating that 0.3% of adults in the United States are transgender).

ple with a transgender identity. Such laws also reach a range of characteristics shared by non-transgender people—effeminacy in men, for example, or a refusal by women to wear makeup—but the exploitation of bathroom imagery arises exclusively in debates over transgender equality.

Transgender people report some of the most virulent discrimination of any group for whom data are collected. In one study cited by the Department of Housing and Urban Development, nineteen percent of transgender respondents reported being denied housing, eleven percent reported being evicted, and nineteen percent experienced homelessness, all because of their gender identity.⁵ The rates at which transgender people experience job discrimination and unemployment, or encounter danger and menace when navigating public spaces, are similarly punitive.⁶ Providing access to appropriate sex-segregated facilities in all these settings is one goal of legislation targeting gender-identity discrimination.⁷

State legislative efforts to combat this discrimination have been concomitantly broad in scope, typically adding gender identity and expression to the list of protected categories specified throughout the State's framework of civil rights laws. In California, protection from gender-identity discrimination has been added to the Unruh Act and the state Fair Employment and Housing Act by defining the protected category of gender to include "a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."⁸ Recently enacted legislation in Connecticut follows a similar approach.⁹ Bathrooms are not typically mentioned as a separate category of concern in such legislation. Rather, the application of a civil rights statute to bathrooms would most frequently arise when transgender people encounter discrimination while using facilities at work or in places of public accommodation.¹⁰

⁵ JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 4* (2011), available at http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf, cited in John Trasvina, *LGBT Housing Discrimination in 2011: A Time for Pride and Action*, HUFFINGTON POST (June 24, 2011), http://www.huffingtonpost.com/john-trasvina/lgbt-housing-discrimination_b_884180.html (on file with the Harvard Law School Library).

⁶ See GRANT ET AL., *supra* note 5, at 3.

⁷ As Professor Dean Spade has written, "Because many sex-segregated facilities are necessary to daily survival (bathrooms, domestic violence shelters, foster care group homes, homeless shelters) or are mandatory (prisons, mandated drug treatment, juvenile justice group homes), and because being placed in a facility inappropriate to the gender identity of a person can be dangerous, the rules regarding gender classification for purposes of sex-segregation are very significant." Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 776 (2008) (citation omitted).

⁸ CAL. PENAL CODE § 422.56(c) (West 2010), incorporated by reference in CAL. CIV. CODE §§ 51(b), (e)(4) (West 2007); see also Technical Corrections—Gender, 2011 Cal. Legis. Serv. ch. 719 (West) (clarifying protections for gender identity and expression).

⁹ See An Act Concerning Discrimination § 1(21), CONN. GEN. STAT. § 46a-51 (2011).

¹⁰ New Jersey's Law Against Discrimination is an exception and contains several sections that speak to the use of sex-segregated facilities. See N.J. STAT. ANN. § 10:5-12(f)(1) (West 2011) (exempting from the statute's sex discrimination provisions any place of public accommodation "which is in its nature reasonably restricted exclusively to individuals of one sex,"

When transgender people face hostility in using a bathroom, it is typically in a multiple-occupancy facility where others object to sharing the space with the transgender individual, or where management anticipates such hostility and acts preemptively to exclude the transgender person. The remedy sought by the targets of discrimination is equal access to a bathroom facility appropriate to the gender that they express or present to the world. It is not the goal of transgender advocates to create multiple-occupancy bathrooms that are unisex (that is, not sex segregated), and such facilities have never been required by statute or regulation.¹¹ In the arena of housing discrimination, transgender people seeking single-room occupancy (SRO) housing may have to use shared facilities, and those who experience homelessness may rely upon public bathrooms or shelter facilities. Gender-identity protections do not require building owners to perform physical renovations on their bathrooms or other facilities—creating single-occupancy unisex bathrooms may be desirable, but it is not mandatory. For an employer, the primary impact of the law is the requirement that transgender applicants be considered for employment on equal terms and that transgender employees, including those who transition their gender while on the job, be allowed to work free from discriminatory firing or adverse employment action.

Thus, the practical role that bathrooms play in crafting and enforcing gender identity protections is real but limited. The ability to use safe, gender-appropriate bathroom facilities is a significant concern for transgender people that usually manifests as a subset of a larger issue: the ability to secure and hold employment or use places of public accommodation without experiencing discrimination or abuse.

Nonetheless, bathrooms have been the alpha and omega of opposition to gender-identity protections—the first word uttered and the last word emphasized in advertising campaigns, lobbying efforts, and legislative testimony. The opposition to Connecticut’s 2011 civil rights law was typical. Antagonists branded the legislation “The Bathroom Bill” and structured their opposition around that theme. In their online campaign, the summary of the bill began with a classic bit of anti-transgender imagery and then pivoted to the bathroom: “[T]his bill as now constituted[] would permit ANY man who claims female ‘gender identity’ even if he just wears a dress

but providing that “individuals shall be admitted based on their gender identity or expression”). See generally C.J. Griffin, Note, *Workplace Restroom Policies in Light of New Jersey’s Gender Identity Protection*, 61 RUTGERS L. REV. 409 (2009) (discussing the application of New Jersey’s Law Against Discrimination to bathrooms in the workplace).

¹¹ Interview with Lisa Mottet, The Nat’l Gay & Lesbian Task Force (June 2011). There have been isolated occasions on which activists have asked for unisex multiple-occupancy bathrooms as a solution to gender-identity discrimination. Such requests appear to be limited to college campuses, which sometimes elect in any event to provide unisex multiple-occupancy bathrooms on an optional basis to their students. Single-occupancy bathrooms are often segregated by sex and can present problems over self-identification, but multiple-occupancy bathrooms are the most contested spaces. *Id.*

cannot [sic] be excluded from any job statewide, and MUST be given access to women's facilities, including public and private women's restrooms, locker rooms and showers."¹² Their literature goes on to explain "How the 'Bathroom Bill' Would Affect CT Residents," setting forth a parade of horrors that reiterates the danger of "sexual predator[s]" in bathrooms, locker rooms, and showers.¹³

The graphical imagery has been equally blunt. One online campaign employed an icon with two figures, male and female, in the style typical of the signs on public bathroom doors. They are in adjoining bathroom stalls (with the label "Toilet" underneath), and the man is pulling himself up above the dividing wall. The tagline for the campaign reads, "Gentlemen, if you have the plumbing—please stay out of the ladies room."¹⁴



Even in this attempt to generate fear, the creator of the image inadvertently exposes a telling gender panic. Is the male figure trying to peep at the woman in her stall? Or is he trying to join her on the other side of the divide? Does the image bespeak a desire to see, or a desire to become? Opponents

¹² *Stop the CT "Bathroom Bill" (Gives Cross-Dressing Men Access to Women's Restrooms, Locker Rooms)*, FREE REPUBLIC (May 10, 2011, 9:11 AM), <http://www.freerepublic.com/focus/f-news/2717667/posts> (on file with the Harvard Law School Library).

¹³ *Id.*

¹⁴ Family Inst. of Conn. Inc., *Gentlemen, If You Have the Plumbing—Please Stay Out of the Ladies Room*, FACEBOOK GROUP, <http://www.facebook.com/NoBathroomBill> (last visited Dec. 2, 2011) (on file with the Harvard Law School Library).

of gender-identity protections have structured their efforts around similar bathroom rhetoric and imagery in many states, often with success.¹⁵

The purported threat that gender-identity protections pose to women in public restrooms is twofold. The first is rape or sexual assault. Here, the claim is that predatory men will use these laws to gain access to their targets by “putting on a dress” and invading the women’s bathroom. One inflammatory campaign in Gainesville, Florida, even ran a television advertisement urging repeal of a local antidiscrimination ordinance in which it showed a sinister man following a young girl into a playground bathroom, all but claiming that gender-identity protections would result in the rape and molestation of children.¹⁶ The second purported threat is rampant voyeurism—a threat to women’s privacy or modesty through involuntary exposure of the body. Here, the claim is that salacious men will use gender-identity protections to invade women’s bathrooms and lurk there peeping at women, as in the image reproduced above.

Both claims are incoherent. For the rapist seeking available targets, of what help could a gender-identity law be? A predator who targets women using public restrooms would not hesitate to enter because a rule tells him he is not allowed. The child rapist in the inflammatory Florida ad did not bother “putting on a dress” before he entered behind the young girl. In order for these sexual predation claims to make sense, one would have to posit that predators would lurk in public restrooms for extended periods of time, hoping for a chance to assault a target. Lurking is not a protected activity, whatever the gender identity of the lurker—the enactment of gender-identity protections would not authorize such behavior. The danger of sexual predators following their targets into unmonitored bathrooms may require attention from policy makers, but gender-identity protections have no bearing upon that danger. Aspiring voyeurs likewise have no right to lurk in bathrooms or otherwise use them for inappropriate purposes, and a *post hoc* assertion of gender identity would not provide a voyeur with any protection—a proposition made explicit in the Connecticut legislation, which requires a showing that “gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.”¹⁷

In jurisdictions that have enacted protections against gender-identity discrimination, there is no evidence that predatory lurking has resulted from

¹⁵ In Maryland’s 2010–11 legislative session, for example, such tactics defeated an effort to add gender-identity protections to state civil rights laws. Interview with Dana Beyer, Md. Civil Rights Advocate (July 2011) (on file with the author); Interview with Jamie Raskin, Md. State Senator, (July 2011) (on file with the author).

¹⁶ As of the writing of this article, the ad can be viewed on YouTube. Citizens for Good Pub. Policy, *CGPP TV Commercial # 1—Little Girl at the Playground*, YouTube, <http://www.youtube.com/watch?v=yalHBTNB3go&NR=1> (Mar. 19, 2011). The message was effective enough that supporters of the antidiscrimination law felt the need to run a television ad expressly responding to the bathroom claim. Votenoone, *It’s Not About Bathrooms Commercial*, YouTube, http://www.youtube.com/watch?v=LML-k_xU9dA (Mar. 23, 2009).

¹⁷ An Act Concerning Discrimination § 1(21), CONN. GEN. STAT. § 46a-51 (2011).

the enactment of civil rights laws.¹⁸ To the contrary, state agencies tasked with enforcing antidiscrimination laws report an absence of evidence that predators have attempted to exploit gender-identity protections in bathrooms or other facilities. In a March 2009 response to an inquiry from an advocacy group, for example, the Washington State Human Rights Commission said the following about that state's gender-identity laws, which have been in place since 2006:

[W]e have received many questions about restroom use for transgender individuals. Since implementation, the WSHRC has offered guidance on this issue to employers and places of public accommodation. Simply, transgender individuals should be able to use the restroom [that] corresponds to his or her gender identity These questions have not been burdensome or difficult to answer, and employers have been very appreciative of the clarity we can provide on this issue.

In our effort to provide outreach and education to employers, we always remind people that these protections do not prohibit an employer from taking action in allegations of harassment or other inappropriate behavior. We are not aware of any circumstances in which people have inappropriately tried to access locker rooms, restrooms or other gender-separated facilities because of the gender expression/ identity protections under the [Washington Law Against Discrimination].¹⁹

Enforcement authorities in California, Iowa, and Colorado have written to the same effect.²⁰ It is also telling that opponents of transgender equality have never come forward with instances of abuse, molestation, or rape purportedly facilitated by gender-identity protections. Given the inflammatory rhetoric these antagonists employ, it seems safe to assume that they would exploit such claims if they were available, even as unproven allegations.

¹⁸ Lisa Mottet, Director of the Transgender Civil Rights Project of the National Gay and Lesbian Task Force, and Shannon P. Minter, Legal Director for the National Center for Lesbian Rights—both leading national practitioners—report a complete absence of any colorable claim, much less proof, that a civil rights law has led to sexual predation. See Interview with Lisa Mottet, *supra* note 11; Interview with Shannon P. Minter, Legal Dir. for the Nat'l Ctr. for Lesbian Rights (July 2011) (on file with the author).

¹⁹ Letter from Sharon Ortiz, Interim Exec. Dir., Wash. State Human Rights Comm'n, to Lisa Mottet, Dir., Transgender Civil Rights Project (Mar. 10, 2009) (on file with the author), available at <http://www.transgenderlaw.org/ndlaws/WashLetter.pdf>.

²⁰ See Letter from Annmarie Billotti, Assoc. Chief Deputy Dir., Cal. Dep't of Fair Emp't & Hous., to Kristina M. Wertz, Legal Dir., Transgender Law Ctr. (July 7, 2009) (on file with the author), available at <http://www.transgenderlaw.org/ndlaws/CaliforniaLetter.pdf>; Letter from Ralph Rosenberg, Exec. Dir., Iowa Civil Rights Comm'n, to Lisa Mottet, Dir., Transgender Civil Rights Project (Apr. 1, 2009) (on file with the author), available at <http://www.transgenderlaw.org/ndlaws/IowaLetter.pdf>; Letter from Jamie Sharp, Deputy Dir., Colo. Dep't of Regulatory Agencies, Civil Rights Div., to Lisa Mottet, Dir., Transgender Civil Rights Project (Mar. 17, 2009) (on file with the author), available at <http://www.transgenderlaw.org/ndlaws/ColoradoLetter.pdf>.

The evidence is strong that the claims made by opponents of gender-identity protections—that such laws lead to sexual assault or voyeuristic invasion of privacy—are wholly without support. There is a vast gap between the actual operation of gender-identity protections, the implementation of which has been uneventful, and the antagonists' hysterical claims of physical, sexual, and visual invasion of the body.

II. ANTI-LGBT DISCRIMINATION AND ERASURE

As a first step toward explaining the phenomenon of bathroom rhetoric in debates over gender-identity protections, one must understand the mode of subordination that characterizes antigay and anti-transgender policy. Discrimination against lesbian, gay, bisexual, and transgender people is often accomplished through erasure. It is not merely incidental that the castigation of same-sex intimacy in Western cultural history has been accompanied by the urgent command that such intimacy never be discussed—that it was “a crime not fit to be named,” “the very mention of which is a disgrace to human nature,” as Blackstone and Chief Justice Burger would have it.²¹ Gay people and gay intimacy must not merely be punished or marginalized, according to this mindset; they must be made to disappear. This distinctive mode of subordination survives today in the framing of arguments against equal treatment. “Antigay policies regularly proceed on the assumption that, if the state simply refuses to acknowledge the existence of gay people and their relationships, those . . . relationships will actually cease to be.”²² Such magical thinking is evident in the arguments about child rearing pressed by opponents of the freedom to marry, which make no effort to determine how best to support the children of gay parents, instead inviting legislators to craft policy around the unspoken fantasy that gay parents and their kids can be legislated out of existence.²³

A fully developed psychological explanation for this dynamic in anti-gay discrimination falls outside the scope of this Article, but the late English writer Quentin Crisp provides a starting point. Speaking for the documentary film *The Celluloid Closet* in characteristically supercilious terms, Crisp describes the anatomy of gay erasure:

Mainstream people dislike homosexuality because they can't help concentrating on what homosexual men do to one another. And when you contemplate what people do, you think of yourself doing

²¹ *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

²² Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2245 (2005).

²³ See *id.* at 2245–49; see also Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1635–36 (2004) (describing the military antigay policy as “rely[ing] for its operation upon the widespread, consensual hallucination that [LGB] soldiers will simply disappear when they are compelled to silence”).

it. And they don't like that. That's the famous joke: I don't like peas, and I'm glad I don't like them, because if I liked them I would eat them—and I hate them.²⁴

The instinct lying at the heart of Crisp's witticism—that antigay sentiment is spurred on by anxiety over the insidious power of gay sexuality—finds ample support. It is consistent, for example, with a frequently invoked study finding that self-identified heterosexual men who exhibit the strongest hostility toward gay people also demonstrate more pronounced physical signs of sexual arousal when shown gay male erotic material.²⁵ As philosopher Martha Nussbaum has argued, reactions of shame and disgust frequently spring from anxiety over the “idea of incorporation” of the reviled object “as contamination”²⁶—the fear that the object will get inside one's body, take over the self, and effect a transformation that breaks down the boundary “between ourselves and . . . our own animality.”²⁷ Crisp prefigures Nussbaum when he uses the metaphor of eating and ingestion to convey the image of a libidinal desire that is unwanted, invasive, and overwhelming.

This is not to say that all zealous opponents of gay equality are secretly gay or bisexual themselves. Nonetheless, antigay advocacy exhibits an obsession around the issue of same-sex intimacy, particularly between men, that is a defining feature of contemporary institutional homophobia. Dedicated opponents of equal treatment speak ominously about the seductive power of gay sexuality and its capacity to lead unwitting heterosexuals into same-sex practices (or even a “lifestyle” of same-sex intimacy) that would otherwise be alien to their nature. Advocates regularly describe the sex lives of gay people in compulsive and infatuated detail—putatively explaining the reasons why gay sex is unhealthy, unclean, to be avoided at all costs, while avidly exploring its many possibilities and permutations. (“I don't like peas, and I'm glad I don't like them, because if I liked them I would eat them”). Again Professor Nussbaum:

[T]hroughout history, certain disgust properties—sliminess, bad smell, stickiness, decay, foulness—have repeatedly and monotonously been associated with, indeed projected onto, groups by reference to whom privileged groups seek to define their superior human status. Jews, women, homosexuals, untouchables, lower-class people—all these are imagined as tainted by the dirt of the body.²⁸

²⁴ THE CELLULOID CLOSET (Sony Pictures Classics 1996).

²⁵ See Henry E. Adams, Lester W. Wright, Jr. & Bethany A. Lohr, *Is Homophobia Associated With Sexual Arousal?*, 105 J. ABNORMAL PSYCHOL. 440 (1996).

²⁶ MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 87 (2004).

²⁷ *Id.* at 88–89.

²⁸ *Id.* at 108.

Whether the underlying anxiety is a repressed desire for same-sex intimacy itself, or a fear of being subjected to the kind of sexual scrutiny from male strangers that women regularly experience, or discomfort with the inward scrutiny of one's own sex life that may occur when the idea of same-sex intimacy changes one's ideas about the boundaries of the possible, many of the most ardent antigay voices find gay sexuality compelling.²⁹ Experience suggests that the impulses driving these reactions, though unusually intense in the case of true zealots, are continuous with the reactions of more casual opponents of equal treatment. For antagonists who find the mere thought of gay sexuality overwhelming and invasive, erasure is the only answer, and that answer is a comfortable one for people whose reactions to the thought of gay sexuality, though more muted, are still nonplussed. As a consequence, the unspoken instinct toward eradication continues to define much antigay policy, even as the outward expression of sentiments like those of Blackstone and Burger increasingly falls away before the judgment of history.

Anti-transgender sentiment and resistance to reform around gender identity exhibit a similar dynamic of erasure. Against all evidence, transgender people are presented as sexual predators in antireform efforts, or as facilitating the predatory behavior of others by their very existence.³⁰ In particular, antagonists treat the physical reality of the transgender person—his or her genital configuration or other physical characteristics—as requiring obsessive attention. Whereas same-sex sexual intimacy between men is the free radical that inspires the compulsive efforts of antigay advocates, it is the very body of the transgender person that animates anti-transgender hostility.

That hostility, in turn, is born of anxiety over the antagonist's own gender. A transgender woman may challenge a male antagonist's understanding that his own male gender is stable, fixed, and inevitable, unsettling his confidence in his ability to live up to the requirements of his manhood. A transgender man may upset the negotiated peace that a female antagonist has reached concerning her relationship with male privilege in a world still dominated by men. The mere idea of a change in gender may turn unwelcome inward scrutiny toward the manner in which an antagonist expresses gendered identity. In each case, the physical reality of the transgender person is the source of anxiety and disruption for the hostile audience.

Professor Elaine Scarry discusses an analogous phenomenon in *The Body in Pain*, her canonical work on the rhetoric, language, and sociology of physical pain. Scarry examines the role that weapons and other physical

²⁹ In her monograph on disgust as a tactic in legal debates over homosexuality, Professor Nussbaum observes of antigay zealots: "The gaze of a homosexual male is seen as contaminating because it says, 'You can be penetrated.'" MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY 19 (2010).

³⁰ See, e.g., Spade, *supra* note 7, at 776–77 ("Anxieties about transgender people, especially stereotypes about transgender people as imposters or as sexual predators, frequently emerge in controversies over sex-segregated facilities like bathrooms.").

objects play in generating our way of understanding and describing pain. We have long spoken of physical objects as though they contain within themselves the pain that they inflict. “The mental habit of *recognizing* pain in the weapon (despite the fact that an inanimate object cannot ‘have pain’ or any other sentient experience) is both an ancient and an enduring one”³¹—so much so, Scarry argues, that not only can pain “be apprehended in the image of the weapon,” but “it almost cannot be apprehended without it.”³² The physical fact of the weapon confirms the reality of pain. In the practice of torture, which Scarry subjects to extended analysis, the brandishing of a weapon or other instrument before the target is a common device employed by the torturer, converting “every conceivable aspect of the event and the environment into an agent of pain.”³³ The device itself embodies the pain that it promises to inflict.

In the mind of the anti-transgender antagonist, the body of the transgender person acquires an analogous destabilizing power: it becomes a physical embodiment of the antagonist’s sense of pain and anxiety in his or her own gendered self. Whatever threat or harm the antagonist experiences from being confronted with a challenge to the expected ordering of gender identity, that gender threat is externalized and intensified in the physical reality of the transgender body. Indeed, purveyors of anti-transgender rhetoric sometimes make the parallel to the torture implement even more direct, reducing the multifaceted reality of the transgender individual to a single surgical procedure and describing the imagined procedure in barbaric terms—hacking, chopping, cutting, lopping off—in order to intensify the threat reaction that the audience experiences from the transgender body.

Such threat reactions are not limited to social conservatives. To the contrary, the history of anti-transgender antagonism in the United States has been ecumenical. In *The Transsexual Empire: The Making of the She-Male*, a much-noted 1979 book, second-wave feminist Janice Raymond charged transgender women with colonizing the feminine for their own purposes. In an infamous passage, Raymond asserted: “All transsexuals rape women’s bodies by reducing the real female form to an artifact, appropriating this body for themselves Transsexuals merely cut off the most obvious means of invading women so that they *seem* non-invasive.”³⁴ Professor Raymond presents transgender people, who are among the most vulnerable and abused members of modern American society, as the violent aggressors in a battle for control over the definition of the feminine, charging the body of the transgender woman with destroying the capacity of other women to form bonds of sisterhood and control their own female identity.

³¹ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 16 (1985).

³² *Id.*

³³ *Id.* at 27–28.

³⁴ JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 104 (1979).

Even gay rights advocates sometimes resort to similar tactics, employing mutilating imagery to distance themselves from transgender identity. Political operative and blogger John Aravosis wrote an essay in 2007 urging that the equality claims of transgender people be excised from LGBT advocacy, complaining: "It is simply not [politically correct] in the gay community to question how and why the T got added on to the LGB, let alone ask what I as a gay man have in common with a man who wants to cut off his penis, surgically construct a vagina, and become a woman."³⁵ And syndicated sex columnist Dan Savage offered this advice to a woman whose teenage son was angered by his father's decision to undergo a gender transition: "Perhaps I'm a transphobic bigot, but I honestly think waiting a measly 36 months to cut your dick is a sacrifice any father should be willing to make for his 15-year-old son. Call me old-fashioned."³⁶ It is difficult to imagine a policy discussion on, for example, the Caesarean section being conducted through the use of such aggressive imagery. The closest parallel in modern American discourse may be the work of antiabortion activists, who structure their advocacy around bloody images of surgical procedures designed to shock and disturb.

For the antagonist who experiences the transgender body as an existential threat, the erasure of the transgender person appears to be the only solution. Just as the antigay mind must treat same-sex intimacy as unspeakable, unnamable, a possibility never to be acknowledged much less entertained, so the anti-transgender mind must erase the body of the transgender person from view, force it out of frame, drive it into hiding, eradicate it. In this important respect, the subordination of both transgender and gay people is markedly different from the Jim Crow system of racial subordination. Jim Crow was obsessively concerned with defining and enforcing an African American's "place" in the social order. The visible presence of African Americans in the larger community, occupying a materially and symbolically inferior status, was not just acceptable but necessary to the confirmation of White supremacy that the Jim Crow system demanded.³⁷ For the

³⁵ John Aravosis, *How Did the T Get in LGBT?*, SALON (Oct. 8, 2007, 7:10 AM), <http://www.salon.com/2007/10/08/lgbt/> (on file with the Harvard Law School Library).

³⁶ Dan Savage, *Bad Tranny*, THE STRANGER (Jan. 9, 2003), <http://www.thestranger.com/seattle/SavageLove?oid=13054> (on file with the Harvard Law School Library).

³⁷ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing Jim Crow as a mechanism for social control). During slavery times, in contrast, several non-slave states did seek to exclude free Black people altogether, purportedly as a concomitant to the total exclusion of slavery from their borders. See ILL. CONST. of 1848, art. XIV ("The general assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in this state; and to effectually prevent the owners of slaves from bringing them into this state for the purpose of setting them free."); IND. CONST. of 1851, art. XIII, § 1 ("No negro or mulatto shall come into or settle in the State, after the adoption of this Constitution."); OR. CONST. of 1859, art. XVIII, § 4 ("And if a majority of all the votes given for and against free negroes, shall be given against free negroes, then the following section shall be added to the Bill of Rights, and shall be a part of this Constitution: Section _____. 'No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State'").

transgender person, as for gays, lesbians, and bisexuals, the antagonist recognizes no place at all. LGBT people must be cured, closeted, converted, or killed, but never accommodated.³⁸ Accordingly, the bathroom issue is framed as one of total exclusion and erasure in debates over gender-identity protections. The antagonist sees no place in public facilities for the transgender person. Therefore, the implicit demand of those opposing the enactment of gender-identity protections is that transgender people be kept from ever invading the sanctum of the public bathroom—*any* public bathroom.³⁹

This implicit framing device, when named and scrutinized, is easily shown to be incoherent. Transgender people exist. They have the same need that everyone experiences to use bathrooms. Sometimes that need arises at work or in places of public accommodation, where shared bathrooms are the only option. It makes no sense to speak of excluding transgender people altogether from shared public bathrooms, unless one means to convey a further suggestion that transgender people themselves might be wholly excluded from public places or eradicated. The only rational way to frame the public policy debate is to ask which facilities transgender people should use, taking into account their needs and dignity and the legitimate concerns of fellow patrons, if any.

But this is not the conversation that the antagonist wishes to have. For the antagonist, there is no “right” answer to the question, “Which public bathroom facilities should transgender people use?” The anti-transgender mind urgently resists the desire of the transgender person to use a facility that is appropriate to his or her own gender, which would confirm and accept the reality of the transgender body and all that it implies. But neither is it acceptable (to the antagonist, or to transgender people themselves) for the transgender person to use facilities based upon the gender he or she was assigned at birth, which would place transgender men in women’s bathrooms and transgender women in men’s, in visible defiance of the gender-segregation norm. Rather, the antagonist’s response to the question, “Which public bathroom facilities should transgender people use?”—usually unspoken but pervasively serving to frame the opposition to civil rights reform—is simply, “I want them to go away.”

³⁸ See VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* (1987) (detailing the representation of gay people throughout the history of film as either victims or predators and in need of elimination in either case).

³⁹ This dynamic sets the current exploitation of bathrooms apart from the use to which they were put in the 1970s debate over the Equal Rights Amendment (ERA). Some opponents of the ERA attempted to use fear over unisex bathrooms to organize their resistance. The tactic failed in part because it lacked credibility—most legislators knew that the ERA would not require the abandonment of sex-segregated bathrooms. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 112–14, 143–44 (1986). Equally important, the bathroom issue did not map onto an underlying mode of subordination. Most opponents of the ERA did not harbor fantasies of eradicating women altogether. Rather, the debate over the ERA had much more to do with competing views about the role of women in public life. The rhetoric and imagery of the bathroom speaks most powerfully to shame and vulnerability around the physical reality of the body. Such issues lie near the heart of anti-transgender antagonism but were of less importance to the ERA.

The very incoherence of this framing device is the reason that it must go unstated in order to be effective. As with the erasure of lesbian, gay, and bisexual people in debates around marriage and children, few anti-transgender advocates would explicitly argue that transgender people can be made to go away by the simple expedient of refusing to enact civil rights laws or that our public policy concerning transgender people in the workplace, housing, or places of public accommodation should be one of affirmative eradication. As with the marriage debate, the point of the framing device is not to describe an actual state of affairs that might be brought about through government action. The point of the argument, rather, is to encourage people to think and act as if such legislative transformation were possible. That is what is meant by the term “mode of subordination.” It is a behaving-as-if—a way of thinking and acting that will keep a group in a disempowered position, even when the factual predicates on which that way of thinking and acting rests are demonstrably false.⁴⁰

A similar dynamic operates when couples that include a transgender spouse seek to marry. States that police access to civil marriage according to the gender of the spouses encounter a problem when confronted with transgender citizens: What is the “right” way to classify a transgender person for purposes of the restriction? If the state classifies based upon the gender that the transgender individual presents to the world or has indicated on a revised birth certificate,⁴¹ then a transgender woman who antagonists believe is still “really” a man will be allowed to marry a man. If instead the state refuses to take gender transition into account and classifies transgender people based upon the gender assigned to them at birth or indicated by their chromosomes,⁴² then a transgender man who identifies as a man, presents himself to the world as a man, and is as fully male in his social and interpersonal relations as any other self-identified man will be allowed to marry another man. For a system that polices access to marriage based upon sex and gender roles, neither answer is analytically or socially satisfying.

These internal contradictions are all the more salient in the case of someone who transitions after having entered into an opposite-sex marriage. In a state that polices access to marriage based upon the gender a person presents to the world, does transitioning one’s gender suddenly void a previously valid marriage? And what of a same-sex couple that secures a civil marriage in one of the states that recognizes equal marriage rights? If one spouse later transitions gender, does that transition “cure” what would otherwise be a voidable marriage according to the hostile state?

There is no “right” answer to any of these questions, no way of policing the opposite-gender requirement for transgender spouses that the antagonist would find acceptable. Nonetheless, it is clear that transgender people cannot be categorically denied the constitutional right to marry. Every adult

⁴⁰ I borrow here from my own language in Wolff, *supra* note 22, at 2247.

⁴¹ See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

⁴² See, e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

enjoys that right, even if only in sex-limited terms. Gay and lesbian people are permitted to marry individuals of the opposite sex—a fact that antigay antagonists emphasize when decrying constitutional claims for equal relationship rights, inadequate and dehumanizing as that response may be. A transgender person must enjoy the right to marry *someone*, even under the stingiest interpretation of the Court's constitutional marriage precedents. Nonetheless, when questions arise about access to civil marriage or the rights and obligations that flow from the marital relationship, hostile states sometimes offer *ad hoc* answers to those questions in a manner that consistently disfavors the transgender individual.⁴³ The implicit response, unspoken but pervasively framing the analysis, is simply, "We want them to go away."

III. ANXIETY OVER THE BODY AND RESISTANCE TO CIVIL RIGHTS REFORM: HISTORICAL ANTECEDENTS

Three core anxieties of the body contribute to the power of the bathroom imagery relied upon by opponents of gender-identity protections. First is the fear of vulnerability to sexual predation and invasion, which is perhaps the dominant anxiety that bathroom alarmists invoke in these debates—the panicked claim that women's bodies will be sexually violated by hypothetical hordes of cross-dressing rapists who will use antidiscrimination laws to access their targets. Second is the fear of pain and loss of physical integrity, a reaction that antagonists invoke when they use aggressive imagery to describe what they imagine to be the reconfiguration of sex organs that transgender people undergo—chopping off penises, cutting off breasts—provoking the wincing defensive crouch that many men exhibit when they imagine their own genitals being harmed or the protective crossing of the arms across the chest in women. Third is the fear of bodily exposure— anxiety that the body will be laid bare to an unwanted audience, with the attendant feelings of shame and loss of control that many people experience when portions of their unclothed bodies are scrutinized. Underlying all these core anxieties is insecurity over one's own sexual or gender identity, brought to the fore in some people when confronted with a transgender body.

Each of these forms of anxiety over the body has antecedents in America's civil rights history. The effort to combat gender-identity discrimination may be distinctive in provoking such a concentrated array of body-

⁴³ In Texas, for example, a court refused to recognize a change in gender as indicated on an amended birth certificate, framing its analysis in the following terms: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?" *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999). Relying upon *Littleton*, another Texas appellate court invalidated the prior divorce decree of a transgender spouse, relaxing the ordinary rule against reliance upon extrinsic evidence in a collateral attack in order to take account of her trans status. *See Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815 (Tex. Ct. App. Apr. 2, 2009).

centered responses, but the basic story is a familiar one. Transgender Americans join a long tradition of struggle when they encounter such arguments in their fight for equal treatment.

A. *Fear of Sexual Predation and the Segregation of
Municipal Swimming Pools*

The fear of sexual predation has been deployed to justify repressive policies throughout our shared history. In early America, native peoples were figured as a threat to the flower of White women, who were often described as the targets of their raids.⁴⁴ Black men have been presented as rapacious sexual animals (always in search of White victims) with such regularity that the trope is self-sustaining.⁴⁵ Throughout, women themselves have been caged by such paternalism, as when the Supreme Court justified its 1948 decision upholding a law that prohibited most women from working as bartenders by describing the “moral and social problems” and the “hazards” that might confront women working without male supervision.⁴⁶ When antagonists describe women as the putative beneficiaries of their efforts to defeat gender-identity protections, claiming a need to discriminate in order to protect women’s physical safety inside bathrooms, they exploit those women in a well-worn fashion.

The segregation of municipal swimming pools in twentieth century America along lines of race and gender offers one of the richest case studies of this phenomenon. By the time the Supreme Court issued its 1971 decision in *Palmer v. Thompson*,⁴⁷ finding a lack of state action and thus no constitutional violation when municipal authorities closed public pools rather than operate them on an integrated basis, cities and towns had close to a century of experience with the struggle over how and when different groups would swim together. Professor Jeff Wiltse’s fine examination of that history, *Contested Waters: A Social History of Swimming Pools in America*,⁴⁸ details how usage policies at municipal swimming pools in different periods mapped onto anxieties around the body with different ideological underpinnings.

Municipal pools went through two distinct phases of development in American cities. Public pools began as bathing facilities, offering poor and

⁴⁴ See JAMES AXTELL, *The White Indians of Colonial America*, in *THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL AMERICA* 168, 180–82 (1981) (describing “the English horror of the Indians as bloodthirsty fiends who defile ‘any Woman they take alive’” and explaining the inaccuracy of the stereotype).

⁴⁵ See ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 172–201 (Vintage Books 1983).

⁴⁶ *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). The ambiguity in the Court’s opinion about the precise nature of the hazard—would the women be sexually assaulted, or would they be “asking for it” after compromising their morals—itself exemplifies the blend of putative concern and aggressive sexuality that can characterize discussions of rape.

⁴⁷ 403 U.S. 217 (1971).

⁴⁸ JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* (2007).

working-class people who had no showers or baths in their homes a means of washing grime and odor from their bodies without resorting to skinny dipping in rivers and lakes—a practice that had become increasingly common among lower-class men as population growth in cities outstripped the availability of adequate housing. In keeping with their ablutionary purpose, early public pools were unadorned and located in basements or covered facilities to hide their patrons from public view.⁴⁹

Three important facts defined the usage of early public pools designed for sanitation. First, they were operated on a gender-segregated basis, due to the nudity and physical touching that washing involved. Typically, the pools would be open to men and women on different days. Second, the pools were effectively class segregated because they were located in the neighborhoods of the poor and working classes they primarily served. Third, bathing pools were operated on a racially integrated basis. Black and White members of the working class waited in line together and washed together in the Northern and Midwestern cities where pools were first built, men with men and women with women, apparently without generating serious tension or unrest.⁵⁰

In the opening decades of the twentieth century, with the flowering of the Progressive Era and government's embrace of neighborhood improvement as a core function, municipalities began to design public swimming pools for recreation, to uplift the spirit of the community. Facilities like Fairground Park in St. Louis, Missouri, were constructed on a monumental scale and resembled outdoor palaces. The middle and upper classes embraced public pools as their own and turned them into a focus of community life. And, in keeping with their new social function, these glorious recreational pools were gender integrated, so that men and women could relax, play, and flirt together in their bathing suits as the strictures of Victorian public morals fell away.⁵¹

As an immediate consequence of gender integration—a consequence that seems to have been widely understood as inevitable and not subject to any sustained public debate—racial segregation became a prerequisite for recreational public pools. As soon as men and women began swimming together, Black and White swimmers were separated. Fairground Park was opened as a racially segregated facility and operated along lines of strict racial separation for thirty-seven years, until a federal court order in 1949 required an end to the practice, leading White malefactors to respond with violence and rioting. That violence combined with shifting urban demographics to render the St. Louis pool unprofitable, resulting in its closure in 1954—a pattern that played out in cities around the country, where the dual factors of White resistance to integration and White flight to subur-

⁴⁹ *See id.* at 8–30.

⁵⁰ *See id.*

⁵¹ *See id.* at 8–77, 87–120.

ban communities brought an end to the golden age of the public swimming pool by the 1960s.⁵²

The fear of sexual predation by Black men toward White women—the familiar stereotype that defined so much of the received understanding of race relations in post-Civil War America—was the dominant justification relied upon by forces opposed to the integration of municipal pools. The possibility that Black men would view White women in the increasingly more revealing bathing suits that came into fashion as Victorian era modesty receded, and the even more alarming prospect that Black men would brush up against White women or otherwise have physical contact with them in the roiling waters of the crowded pool, made the need for racial segregation manifest to the pre-Civil Rights Era sensibility, lending incendiary urgency to their arguments.⁵³

With racial segregation established as the norm in this new era of gender-integrated facilities, anxiety over the body intensified as a mechanism for policing the day-to-day operation of the racial caste system. The many deprecations of *Plessy v. Ferguson* notwithstanding, the regime of separate but equal did require municipalities that built public swimming pools to serve Black citizens on some terms, and there was litigation around the adequacy of the solutions that they implemented.⁵⁴ Building wholly separate facilities often was not a financially viable option, particularly for smaller communities. One economical solution, recapitulating a practice from the gender-segregated bathing pools, was to make recreational pools available to White and Black patrons on different days, or during different times of the day. In many communities, however, that practice met sharp resistance from White citizens, who reacted with disgust to the physical immersion of their Black neighbors into shared facilities and insisted that a pool employing alternating times be drained and refilled between uses—a distressingly literal example of Professor Nussbaum's discussion of contagion and subordinated groups, and an unsustainable waste of resources. Intense disputes over how to administer such policies were still being contested when courts began to hold segregation itself to be unconstitutional.⁵⁵

This contagion anxiety is striking for its sharp contrast to the racially integrated use of bathing pools several decades earlier. Recreational pools typically included shower facilities and operated on the expectation that patrons would clean their bodies before immersing themselves in the water. Indeed, by the time that recreational pools came into widespread use, technology had caught up with the germ theory of disease to produce buffered chemical solutions that would help to keep pools sterile. The bathing pools of the late nineteenth and early twentieth century, in contrast, often had no showers—the point being to wash dirt and grime from the body directly into the pools—and the water in bathing pools often became visibly filthy from

⁵² See *id.* at 78–86, 167–80.

⁵³ See *id.* at 121–53.

⁵⁴ See *id.* at 146–53.

⁵⁵ See *id.* at 78–86, 121–80.

use. Yet Professor Wiltse gives no indication that a sensibility of cross-racial contamination played any role in the usage of the bathing pools during this earlier period. Rather, that particular form of anxiety over the body rose to the ascendant only after it became useful as a tactic for enforcing an ideology of racial separation that was already in place, and it arose despite—or, perhaps, precisely because of—its demonstrable lack of any grounding in fact.⁵⁶

To return to my earlier observation about erasure as a strategy around which antigay and anti-transgender policies are structured, the point of a mode of subordination is not to make arguments that are based in fact and describe a real state of the world that might be brought into being. The point, rather, is to encourage people to think and act in a fashion that will keep the disfavored group in a disempowered position, even when the factual predicates on which that way of thinking and acting rests are demonstrably false. Because ideology-based subordination invites a suspension of the analytical standards by which public policy is ordinarily developed, it may be easier to enforce a mode of subordination when it is wholly disconnected from evidence or proof.

If there were any truth underlying the claim that gender-identity protections would lead to sexual predation in public bathrooms, or that fully integrated swimming pools would lead to sexual assault and licentiousness, then the risk could be quantified and steps in mitigation could be proposed. Paradoxically, the claim becomes more powerful as a mode of subordination because it is hysterical and unconnected to competent proof, and thus not susceptible to reasoned analysis. The unspoken invitation to the audience to suspend evidence-based thinking altogether and to act instead from ideology becomes sharper and less equivocal as the distance from evidence-based thinking becomes greater. Hence, contamination and contagion of the body arose as urgent explanations for racial segregation in swimming pools only after the actual threat to public health that was present during the early era of the public pool had been minimized, operating synergistically with the overdetermined narrative of Black predatory sexuality to reinforce Jim Crow. In both cases, arguments deployed in support of discrimination acquire more power, not less, when purged of fact and distilled to the purity of ideology.

*B. Physical Pain and the Atmosphere of Injury on
Segregated American Trains*

Pain and physical trauma are at once universal as a feature of human experience and elusive as a basis for shared discourse—the paradox that Professor Scarry identifies in *The Body in Pain*.⁵⁷ Yet the role of injury and pain as motivating forces in the perpetuation of discrimination has not received careful attention. In this section, I explore the proposition that the

⁵⁶ See *id.* at 8–30.

⁵⁷ See SCARRY, *supra* note 31, at 3–23.

threat of physical pain can intensify the incentive to claim the prerogatives of a superior class or caste because of their capacity to provide comfort in response to anxiety. When antagonists describe transgender people in physically mutilating terms, they exploit a human tendency to respond to pain, real or imagined, by seeking reassurance through hierarchy.

To illustrate this phenomenon, I turn to the history of racial segregation and gender relations on trains during the rise of the nation's transcontinental railroad system in the late nineteenth and early twentieth centuries. In *Recasting American Liberty*,⁵⁸ Professor Barbara Young Welke provides an indispensable examination of the early years of railroad travel in America, highlighting the central role that physical injury, the threat of injury, and the attendant anxiety of the body played in defining the passenger's experience. Professor Welke explores in depth the impact of this atmosphere of injury upon the definition of gender roles and gender hierarchy during the period. At the same time, she demonstrates the role that injury and danger played in creating greater urgency around the enforcement of racial status distinctions.

The physical experience of riding a train in the early era of American rail travel was dramatically different from the safe and restful mode of transport that modern riders take for granted. The potential for injury was a constant companion on railroads during this period. For starters, trains blew up and crashed, a lot. The coal-fired boilers that powered steam engines were unstable and tended to explode or catch fire with deadly results for passengers, particularly those riding near the front of the train. And accidents were frequent and deadly. The lack of regular train schedules, to say nothing of coordination at the national or even regional level, made collisions unavoidable, with mortality rates exacerbated by the volatile boilers.⁵⁹

More shocking still are the injury, mutilation, and death produced by the operational norms and practices of the time. Trains did not always stop when male passengers wanted to exit. Rather, some trains would merely slow down at a station, particularly the small and remote, and the passenger would be expected to alight by timing a jump off the still-moving car. Men also practiced this custom when they accidentally departed with a train when helping female companions to board. (For the reader who has not read Professor Welke's book or otherwise encountered this history before, I feel the need to add, "No, seriously.") This practice produced serious injuries. Getting onto trains was also perilous. Many station platforms were not elevated, requiring embarking passengers to climb up to the car on steep and treacherous stairs, often while carrying children or packages, as women frequently did when traveling. And the lack of precise departure times, along with a lack of straightforward safety features like a conductor always checking to see whether anyone was still embarking before the train got underway, caused passengers to be thrown from the steps midstride as trains would

⁵⁸ BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920* (2001).

⁵⁹ *See id.* at 14–31.

lurch forward. Unlucky victims fell underneath the wheels of the moving train, which lacked barriers or other safety features, with mutilating or fatal results.⁶⁰

The atmosphere of the train itself was physically challenging, as well. A miasma of thick smoke would pour from the coal-fired boiler and fill the first few cars of the train. Passengers experienced disorientation from the unfamiliar experience of watching scenery pass at thirty miles per hour. Seating was often crowded and uncomfortable and the behavior of male passengers in the lower-fare “smoking” cars was often boisterous. As a consequence, many passengers were constantly on edge during travel by rail. Anxiety around the safety and physical integrity of the body, coupled with the ever-present danger of pain, serious injury, or death, was the norm in early rail travel.⁶¹

Professor Welke explores in detail the involved relationship between this atmosphere of injury and the specification and performance of gender roles. Most visibly, gender difference was reflected in the physical arrangement of the cars themselves. The smoking cars (where White women would not ride, though Black women were sometimes forced there by racial segregation) were placed at the front of the train, while the ladies’ cars (where White women would ride, sometimes joined by White male companions, but where Black women were only occasionally permitted) were at the rear.⁶² The reason for the arrangement was the different relationship that men and women were expected to have with the threat of injury:

The positioning of the ladies’ car—generally at the rear of the train—spatially reflected men’s obligation to protect women’s physical safety. In head-on collisions—an all-too-common occurrence in nineteenth-century rail travel—those most often sacrificed were in the cars immediately behind the engines, which slid one into another like a giant telescope slammed shut. The distance of the ladies’ car from the engine also meant that it had the cleanest air. The smoke and ash which poured into the cars immediately behind the engine had generally risen and dissipated before it reached the ladies’ car.⁶³

These gendered expectations also translated to the manner of alighting: men often jumped from moving trains, as noted above, but women never did. The standards for women’s dress, with clothes that constricted and confined, made such feats more impractical for them. But the gender roles that gave rise to the difference in behaviors went deeper. Professor Welke paints a picture of men who were expected to confront the physical peril of a rolling disembarkation with stoic unconcern, so much so that they would have admitted weakness to insist that the conductor bring the train to a complete

⁶⁰ *See id.* at 45–52.

⁶¹ *See id.* at 3–42, 45–48.

⁶² *See id.* at 254–59.

⁶³ *Id.* at 254–55.

stop. Women were not expected to engage in this type of conspicuous embrace of physical danger.⁶⁴

These gendered expectations, which spoke not merely to the presumed physical capacities of men and women but also to normative judgments about their proper relationship with the threat of injury, came to be incorporated into the law of negligence. Although most courts refused to recognize any formal distinction between the level of care required of men and of women in a negligence claim, the enforceability of legal rights nonetheless took shape around gender roles. Thus, railroads were held liable for failing to offer assistance to passengers who suffered injury when disembarking from a train that suddenly lurched forward—and such passengers were always women, since men would not seek assistance.⁶⁵ But courts refused to hold railroads liable for creating conditions that led passengers to jump from moving trains—and such passengers were always men, since women did not leap from moving trains.⁶⁶ Some courts incorporated stereotypes and gendered expectations more explicitly into legal doctrines, finding that women had inferior capacities of physical coordination that required men to exercise a greater degree of preemptive care when circumstances brought them together in the public sphere,⁶⁷ or that women could not be counted upon to exercise the mature judgment of a man when making choices about their own physical safety.⁶⁸ (Since men were hurling themselves from moving trains in the performance of a social convention, one wonders at the response elicited by these assertions of women's inferior judgment. A silent, knowing irony among the women, one imagines.)

The early railroads were a crucible for the formation of gender expectations and gender identity. The individual reactions of men and women to the threat of injury, the widely shared expectations of passengers concerning how men and women should confront or be shielded from danger, and the manner in which judges and juries incorporated these gendered expectations into the law of negligence reflected, and then intensified, how men and women understood the impact of their gender on their relationship with the world around them. The atmosphere of injury that pervaded early rail travel, where physical anxiety and the threat of injury and pain were regular features, made the crucible searing.

The enforcement of racial hierarchy was intimately bound up with these gender politics. The segregation of Black and White passengers overlapped the creation of male and female spaces on trains, reinforcing the subordination of Black women by denying them the prerogatives of ladies (such as assistance in disembarking from a train) and reinforcing the subordination of Black men by absolutely excluding them from the ladies' car so as to keep them separate from White women. The limited geography of trains could

⁶⁴ *See id.* at 45–48, 53–59.

⁶⁵ *See id.* at 89–96.

⁶⁶ *See id.* at 97–100.

⁶⁷ *See id.* at 90–91 (discussing cases from Michigan and New Hampshire).

⁶⁸ *See id.* at 84–85, 89 (discussing the *Hazzard* case from Illinois).

make it difficult to satisfy all the demands of these respective norms. Black women were often required by segregation to ride in the smoking car—apparent interlopers in a male space—and even when they were permitted into the ladies' car, they could not be accompanied by male travel companions, creating tension with the expectations of their gender. Likewise, while some trains would create a Jim Crow section for Black passengers by dropping a partition in the front car of the train, Black men also rode in the smoking car, creating tension with White men who felt deprived of the status benefit of segregation. Once again, bad as *Plessy v. Ferguson* was, it did require state Jim Crow laws to provide some form of accommodation for Black patrons, and there is only so much separation that one can achieve when the limited space on a train must also take into account the demands of gender.⁶⁹

Professor Welke emphasizes the greater degree of concern around status and racial identity that Jim Crow laws produced when they formalized racial segregation, forcing White as well as Black citizens to abide by lines of racial separation and defining those lines more rigidly as legal mandates than they had been as cultural practices. She demonstrates, for example, that White rail passengers began bringing lawsuits of a new kind during this period, requesting compensation for emotional and status injury when they were forced to share space with Black patrons—a type of claim that was apparently unknown before the advent of Jim Crow laws. And she explains that Jim Crow segregation resulted in the discomfiture of White rail passengers, who sometimes had to be moved to make room for Black passengers, imposing limitations upon their freedom of movement and compromising the prerogatives to which they thought their race entitled them.⁷⁰ Summing up the broader point, Professor Welke writes:

Whiteness itself was at stake. The law of segregation imposed on railroad and streetcar conductors the duty and gave them the power to assign passengers to the correct racial space. In an earlier era of face-to-face familiarity, an era in which class, race, and status were mutually reinforcing, an era in which whites and blacks each knew their place, such power might not have been particularly threatening. It also would have been unnecessary. The laws themselves were adopted in part because the old rules no longer worked. In the chaotic world of late nineteenth-century America, south and north, identity was not clear. Railroads were both site and cause of the slippage.⁷¹

An explicit focus on feelings of anxiety around the body—physical vulnerability, fear of pain or injury—provides an additional dimension along which to understand this intensification of racial status claims under Jim Crow. Superior status confers a sense of safety, a reassurance that one's

⁶⁹ See *id.* at 254–59.

⁷⁰ See *id.* at 306–09.

⁷¹ *Id.* at 312.

needs will be addressed, and a confirmation of belonging. In an atmosphere of injury and physical anxiety, those virtues can provide repose. One will be more inclined to seek out, insist upon, and strictly enforce the markers of superior status, I posit, when confronted with anxiety from the threat of physical harm. And one who enjoys superior status will experience a violation of status lines as an even greater wrong when the violation occurs within an atmosphere of injury.

Consider Professor Welke's account of a typical case brought by one passenger who sued for emotional and status harms after being housed on an overnight Pullman train in a berth abutting another that was occupied by three Black ministers.⁷² The plaintiff, a White woman named Pearl Morris, claimed to have suffered debilitating anxiety from being placed in close proximity to the men, whom she experienced as a sexually menacing presence because of their race and sex. Professor Welke describes Morris's testimony, which secured her a \$15,000 damages award from a jury of White men:

As Morris would later explain, she found herself overwhelmed with fear. She demanded that the conductor put the black men off the coach. When he "rudely" refused, she pleaded to have her sleeping berth assignment changed. The conductor, in her memory, took his time about complying, finally offered her number 16, saying that was the best he could do. When it came time to sleep, Morris, afraid even to undress, spent a fitful night fully clothed behind the curtains of her berth. She explained that by the time she arrived in New York City she was a shambles. In the nights that followed she found her sleep disturbed; she would wake suddenly in the night fearing for the safety of her person.⁷³

The injury that Morris was claiming—emotional distress so severe that it produced chronic sleeplessness or other physical pathologies—was of a piece with contemporaneous developments in the law of "nervous shock," which had come to define the claims of many railroad plaintiffs who demanded compensation following accidents or other traumatic incidents on trains. Even in the absence of demonstrable physical injury, plaintiffs prevailed in nervous shock suits against railroads as "American courts came to a new understanding of the interdependence of mind and body, of the ways modern life increased individual vulnerability, and of the duties that those responsible should bear."⁷⁴ As Professor Welke observes in describing the

⁷² Pullman trains operated under different rules when they traveled in interstate commerce during Jim Crow, such that Black and White passengers sometimes traveled together, though not without resistance by local ticket agents and other officials. *See id.* at 273–74 (describing struggle of Black passengers to travel on Pullman trains); Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 279–83 (2000) (recounting treatment of Pullman trains under Commerce Clause doctrine and economic incentives that railroads had to permit some integrated travel).

⁷³ *See* WELKE, *supra* note 58, at 315.

⁷⁴ *Id.* at 203.

arguments that Pearl Morris's lawyer made to the jury in support of her claim, "Change the context and he could have been talking to a jury in a nervous-shock case."⁷⁵ The presentation of women in these cases as vulnerable and in need of male protection reinforced a set of gender roles that diminished women and reduced their capacity to exercise equal agency.

But another truth was also present. Women were, in fact, vulnerable on trains. So were men. Train travel was dangerous, injuries from getting on and off trains were always to be guarded against, and a passenger would not have been overly sensitive to feel a constant underlying menace at the threat of collision, fire, or accident. Railroad travel layered a real atmosphere of injury on top of the other sources of anxiety that characterized the battles over status, race, and gender playing out in the United States at this time. Although Professor Welke does not draw the connection explicitly, it seems likely that the relationship between the status harm that women like Pearl Morris claimed and the law of nervous shock goes deeper than parallels in rhetoric and shared roots in norms of male supremacy. The atmosphere of injury on early trains intensified the harm that White railroad passengers experienced when they believed that they were being deprived of their superior status. White passengers were primed to experience a status injury, and to experience that injury more deeply, by the pervasive threat of physical harm.

Recall now the obsessive focus of anti-transgender antagonists on the surgical and genital alterations involved in gender transition, reducing transgender people to a synecdochic caricature of physical mutilation. The device is not merely a rhetorical flourish. These antagonists are drawing upon the dynamic described above, albeit on a smaller scale, capitalizing upon the intensification of status distinctions in an atmosphere of physical injury. Crass references to transgender women "cutting their dicks off" or transgender men "slicing off their breasts" provoke in the audience an echo of sympathetic physical injury. That vicarious reaction primes the audience to seek the safety, confirmation, and constancy that comes from a reaffirmation of superior status—here, the superior status of one who satisfies, rather than confounds, people's expectations concerning gender identity and expression.

This dynamic is less prominent than the appeals to sexual and gender panic that largely define anti-transgender discrimination. Just so, the desperate reaction of Pearl Morris to the mere presence of three Black ministers likely had its primary source in the sexual panic that was such an overdetermined component of relations between Black men and White women at the time. But the physical anxiety produced by fear of injury is a part of the constellation of anxieties of the body at work in both cases. In contemporary debates over gender identity, antagonists have drawn upon that physical anxiety to justify and perpetuate the abuse and subordination of the transgender people around them.

⁷⁵ *Id.* at 317.

C. *Exposure of the Body and Military Showers Under the Antigay Policy*

The Western norms that associate exposure of the naked body with shame and vulnerability require no elaboration. The association lies at the heart of the creation myth in the Abrahamic religions.⁷⁶ When confronted with circumstances that expose the body and produce these threatening forms of anxiety, the psychically vulnerable individual sometimes turns to discrimination against a subordinate population, projecting shame onto the hated group in the hope that excluding the group will eliminate the shame. When antagonists employ the rhetoric and imagery of the bathroom in debates over gender-identity protections, they exploit these anxieties, capitalizing upon the widespread human discomfort with the sensations and processes of the body that lay bare its animal nature.⁷⁷

This species of bodily anxiety was used for years to defend and justify the U.S. military's antigay personnel policies. The strategy found its voice through the device of the shower. Under the Don't Ask, Don't Tell statute⁷⁸ and the blanket ban on gay servicemembers that preceded it, the argument that showering bodies would be subjected to unwanted sexual scrutiny helped to erase the reality of gay military personnel from public policy debate.

The life of the antigay military policy during the near-century of its official existence was characterized by a shifting series of justifications that encompass much of the history of antigay oppression. The policy originated amidst broad assertions about the disordered quality of same-sex attractions and the degeneracy of people who acted upon them, moved through arguments about the inferior masculine capacities of gay men and their inability to be effective war fighters, then to the alleged duplicity and untrustworthiness of gay people, then to the supposed association of gay people with disease and lack of cleanliness, and finally to claims about the inherent social disruption that homosexuality generates and its impact upon unit cohesion. The remarkable 2010 report of the Pentagon Working Group on Don't Ask, Don't Tell examined and debunked these hidebound arguments, sweeping away much of the remaining political resistance to the successful repeal of the policy by Congress in December of that year.⁷⁹

Throughout the policy's long history, arguments about the anxiety of straight men at having their bodies exposed to gay scrutiny served to intensify the urgency of each successive justification. The place where proponents most frequently situated this anxiety was the shower. Although these

⁷⁶ *Genesis* 1–3.

⁷⁷ See NUSSBAUM, *supra* note 26, at 107–15 (discussing the dynamic of “projective disgust” by which human beings project feelings of disgust around the animalistic qualities of the body onto a hated group in order to distance themselves further from the source of anxiety).

⁷⁸ 10 U.S.C. § 654 (2010) (repealed 2010).

⁷⁹ See U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON'T ASK, DON'T TELL” (2010), available at http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130%28secure-hires%29.pdf.

arguments were occasionally deployed around straight women and the theoretical attention of rapacious lesbians, it was the image of men stripping down and washing themselves side by side in open-bay showers, and the insistence that gay and bisexual men be banished from that vulnerable sanctum along with all possibility of same-sex attraction or attention, that became the rhetorical staple among defenders of the antigay policy.⁸⁰

When subjected to close analysis, the shower argument exhibits many problems. The most notable is the desired state of affairs upon which the entire argument depends: the absence of gay or bisexual men from open-bay showers and other shared spaces of physical exposure. Under the blanket ban on gay service that preceded Don't Ask, Don't Tell, it was theoretically the case that gay people were not supposed to be in the military. Reality was far different: gay people were a constant presence within the military, often in hiding but sometimes accepted or unofficially tolerated.⁸¹ Still, under the blanket ban, arguments about privacy and the shower could claim that the complete exclusion of gay and bisexual people from military spaces was the goal, however imperfectly realized. But Don't Ask, Don't Tell expressly permitted gay people to serve, provided that they erased their identities, eradicated physical intimacy from their lives, and inflicted a self-damaging dishonesty upon themselves. These dehumanizing requirements were so totalitarian in scope that actual enforcement practices under the policy were often indistinguishable from a blanket ban, with gay servicemembers allowed no safe haven except in arbitrary pockets of acceptance or toleration. Nonetheless, under the widely understood terms of Don't Ask, Don't Tell, gay people were allowed to serve in the military provided that they did so invisibly. Indeed, in one of the great ironies of the policy, gay people's very invisibility made them more ubiquitous. Precisely because they were an acknowledged presence and yet forbidden from identifying themselves honestly, lesbian, gay, and bisexual servicemembers were everywhere and nowhere.

If one accepts at face value the concern that lay at the heart of the shower argument—the unwanted exposure of the naked heterosexual body to rapacious gay eyes—this state of affairs would seem to have made the open-bay shower an even more anxious experience. By preventing servicemembers from knowing who their gay comrades might be, the policy did not spare them from unwanted exposure of the body. Instead, it prevented them from knowing where all the unwanted attention might be coming from. The device of the shower depended upon what I have elsewhere called “the widespread, consensual hallucination that [gay, lesbian, and bisexual] soldiers will simply disappear when they are compelled to si-

⁸⁰ See, e.g., Elaine Donnelly, Op-Ed., *The Problem of 'Forced Intimacy' and Gays in the Military*, CHI. TRIB., Aug. 17, 2008, at 19.

⁸¹ See generally RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* (1994) (offering an interview-based account of the experience of gay, lesbian, and bisexual servicemembers under the blanket ban throughout the twentieth century).

lence”⁸²—the dynamic of erasure so characteristic of antigay subordination. The privacy rationale made sense only if straight servicemembers who were anxious about sexual attention could behave as though the gay comrades whom the policy permitted to serve in their midst would be erased, not merely in appearance but in fact.

The same is true of the “unit cohesion” rationale, the very heart of the policy, which insisted that straight servicemembers would only be able to form bonds of trust with other straight comrades and not with gay comrades, despite the policy’s concurrent acknowledgment that lesbian, gay, and bisexual troops were an invisible presence within the Force.⁸³ Gay servicemembers were required to live a lie and pretend to be straight as the cost of their service,⁸⁴ while straight servicemembers were invited—indeed, counted upon—to act as if the total exclusion of gay identity from the Force resulted in the total exclusion of gay people.

Prior to the repeal of Don’t Ask, Don’t Tell, there were at least some straight servicemembers who harbored genuine concern about having their bodies made the object of same-sex attention, whatever basis in reality that concern did or did not have.⁸⁵ The report of the Pentagon Working Group makes that clear. It is also clear that the narrative surrounding this anxiety of involuntary exposure was a powerful force in discussions of the policy, both at the time Don’t Ask, Don’t Tell was enacted and in subsequent efforts to defend it. In both modes—fact and narrative—anxiety over exposure of the body served to solidify the investment of straight servicemembers in the fantasy that their gay and bisexual comrades disappeared altogether when compelled to silence.

In this respect, the antigay military policy echoes Jim Crow policies in municipal swimming pools. In addition to the supposed threats of sexual predation and bodily contagion discussed in the sections above, Professor Wiltse suggests that segregation in recreational pools was also undergirded by anxiety over exposure of the male body and the threat to their masculine gender identity that middle- and upper-class White men might experience if Black men were allowed to swim alongside them.⁸⁶

In keeping with their stereotyped image of sexual rapacity, Black men were often figured in the public imagination as possessing animalistic physical and sexual prowess. At the same time, the racial stratification of labor in the early twentieth century and the greater poverty of Black Americans likely meant that when the middle and upper classes began using swimming pools, the average Black patron was more muscular and less padded with fat than the average White patron. The recreational fitness movement of the

⁸² Wolff, *supra* note 23, at 1636.

⁸³ *See id.* at 1635–37.

⁸⁴ *See* Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141 (1997) (explaining the unavoidable requirement that gay and bisexual servicemembers lie about their identities in order to avoid violating DADT).

⁸⁵ U.S. DEP’T OF DEF., *supra* note 79, at 50–51.

⁸⁶ *See* WILTSE, *supra* note 48, at 124–25.

mid-twentieth century may have done much to eliminate any such disparity, but the norms of the Victorian period had prioritized the covering up of the body, rather than its athletic development. From his review of the archive, Professor Wiltse concludes that the anxiety of White men over the prospect of competing with Black men in establishing a masculine gender identity—born of the racist stereotype of Black sexual prowess and real differences in body types flowing from disparities in class and wealth—contributed to the segregation norm following the national shift to recreational swimming pools.⁸⁷

When anti-transgender antagonists invoke the fear of rampant voyeurism, they exploit this species of anxiety. Public bathrooms are the spaces in our daily lives most associated with exposure of the private regions of the body. Though bodies are not normally visible in public bathrooms, the physical barriers that provide shielding are not substantial and rely upon a social convention of cooperative modesty—people do not look over stalls to make conversation, and they are generally expected to keep their eyes to themselves. We are conscious of our bodies in a public bathroom. For some, the feelings of shame and vulnerability that accompany that heightened awareness are intense. That intensity is an exploitable resource for anti-transgender antagonists.

CONCLUSION

The dynamic of erasure characteristic of anti-LGBT advocacy reveals a basic human truth: people talk about the things that they need to talk about, even when they do so by vehemently placing themselves in opposition to their subject. When antagonists pronounce that same-sex intimacy is never to be discussed or insist that the transgender body must be banished from view, all the while devoting compulsive attention to their chosen bugbear, it is a clue that they find the subject compelling. This Article offers a set of tools to identify and analyze this repressive erasure. I conclude with an anecdote by writer and satirist David Rakoff that illustrates the need for such tools.

While conducting research for an essay about the Log Cabin Republicans, a gay conservative group, Rakoff interviewed the late Robert Knight, the antigay advocate most responsible for the 1999 California initiative that outlawed marriage for same-sex couples. As Rakoff tells it, Knight endlessly brought their conversation back to the topic of anal sex, speaking in detail about the mechanics of the act with a gusto that Rakoff, a gay man, had never encountered. After running through a litany of imagined health issues purportedly unique to gay men, Knight returned to the anus with an

⁸⁷ See *id.*

arresting image: “Older gays, y’know, have to wear diapers, because they’ve ruined the rectum.”⁸⁸ Rakoff continues:

All of these are the wages of the homosexual’s lifelong devotion to that one defining, until recently criminalized sexual act: sodomy. “Sodomy is their rallying cry,” [Knight] says. Well, it sure is *someone’s* rallying cry. A lot of our hour-long conversation is taken up with talking about anal sex. I have never spoken so much about anal sex in my life.⁸⁹

The talk of “ravaged, incontinent sphincters” continued, with Rakoff finding Knight “simultaneously mesmerized and sickened by the tumescent, pistoning images of [the mechanics of anal sex] that must loop through his head on a near-constant basis.”⁹⁰

Anti-transgender antagonists exhibit their own version of this paradoxical mindset, simultaneously mesmerized and sickened by the reality of the transgender body. The obsessive invocation of the bathroom in public policy debate is a product of this anxiety. As with same-sex intimacy, opponents of gender-identity protections structure their advocacy around the wholesale erasure of transgender people, framing arguments around the proposition that the transgender body must be eliminated altogether. In this respect, the fight for LGBT equality is distinctive: the aggressive dynamic of erasure is a hallmark of anti-LGBT subordination.

But the vernacular used to perpetuate LGBT inequality is universal. Anxiety over the body has given language, structure, and motivation to forces resisting civil rights reform throughout the history of the United States. Learning to recognize and describe the role of that phenomenon is the first step to blunting its effectiveness. The social convention that identified Black bodies with contagion and sexual voracity, the claim that straight bodies required protection from rapacious gay eyes within military showers, these and other idioms of anxiety over the body have ultimately given way before the principle of equal citizenship. The use of the bathroom by anti-transgender forces may not be far behind.

⁸⁸ DAVID RAKOFF, *Beat Me, Daddy: Singing the Log Cabin Blues, in* DON’T GET TOO COMFORTABLE 152, 163 (2006).

⁸⁹ *Id.* at 164.

⁹⁰ *Id.* at 164–65.