Arguing with the Building Inspector About Gender-Neutral Bathrooms

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**Citation Information**

Jennifer S. Hendricks, Arguing with the Building Inspector About Gender-Neutral Bathrooms, 113 Nw. U. L. Rev. Online 77 (2018), [https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1266&context=nulr_online](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1266&context=nulr_online), available at [https://scholar.law.colorado.edu/articles/1203/](https://scholar.law.colorado.edu/articles/1203/).

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ARGUING WITH THE BUILDING INSPECTOR
ABOUT GENDER-NEUTRAL BATHROOMS

Jennifer S. Hendricks

ABSTRACT—Conventional interpretations of building codes are among the greatest barriers to building the gender-neutral bathrooms of the future. Focusing on the example of schools, this Essay argues for a reinterpretation of the International Building Code in light of its policy goals: safe, private, and equitable access to public bathrooms. Under this reinterpretation, the Code allows all public bathrooms to be gender-neutral.

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INTRODUCTION

Public bathrooms have played a surprisingly prominent role in civil rights struggles. The late nineteenth century saw the first legal demands for public bathrooms for women, the prevalence of whites-only bathrooms restricted travel for African-Americans up until at least the 1960s, and the need for bathroom access was a key aspect of the fight for the Americans with Disabilities Act.\(^1\) In recent years, bathrooms have been in the news in relation to the fight over transgender access.

People face gendered choices when using any public bathroom, but schools have been flashpoints for this fight: a child is likely to make their bathroom choice in front of peers or authority figures who know the child’s assigned sex, and issues of children’s sexuality and gender identity are especially incendiary. In 2016, the U.S. Departments of Justice and Education told schools to allow every student to use the bathroom

corresponding to their gender identity. That federal guidance has since been rescinded, but the substance of it remains the law or policy of many jurisdictions.

For example, my local school district in Boulder, Colorado, is a national leader in addressing the needs of transgender students and staff. Current statewide policy allows every student to use the bathroom consistent with their gender identity, as determined by the student. However, this policy still requires each student to identify as a single, fixed gender, either female or male. It ignores students who do not identify with either category or do not do so persistently over time. It is also a policy that sparks fierce opposition in many parts of the country, as seen by the federal rollback and by legislation in North Carolina and elsewhere.

Some schools are ready to address these shortcomings by taking the next step: gender-neutral bathrooms. Gender-neutral bathrooms not only better meet the needs of gender non-conforming students but also better accommodate the stated concerns of those who are opposed to transgender bathroom access.

2 Joint “Dear Colleague” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice, to Title IX Coordinators (May 13, 2016) [https://perma.cc/NPL4-3F8C].


5 3 COLO. CODE REGS. § 708-1:81.9 (2014).

As with any new idea in such an intimate realm, proposals for gender-neutral bathrooms often encounter opposition. In my district—as in other places around the country trying to build the gender-neutral bathrooms of the future—the decisive opposition came in a surprising form: not the protest of outraged parents nor the grandstanding of politicians, but the unyieldingly bureaucratic denial of a building permit by the state plumbing board.7

The International Building Code (IBC) governs “minimum plumbing facilities,” meaning the number of “plumbing fixtures” that must be installed in all types of buildings, from private homes to schools to sports arenas.8 In the course of calculating the number of toilets and sinks that will be needed in a building, the IBC sometimes distinguishes between the number needed for women and the number needed for men.9 For all but the smallest buildings, the IBC also states that “separate facilities shall be provided for each sex.”10 Builders and inspectors conventionally interpret these rules to require the familiar public bathroom design that we know today: entirely separate rooms for women and men, each containing some number of toilets (and/or urinals for men) and some number of sinks.

This familiar degree of separation, however, is not mandated by the text of the IBC. The conventional interpretation should be rejected in favor of an interpretation that provides adequate privacy while promoting better and more equal access to bathrooms for all people. This new interpretation would allow schools and other buildings to follow emerging best practices for gender-neutral bathrooms.

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7 See, e.g., Gershenson, supra note 1, at 204 (describing a university administrator’s first response to a push for gender-neutral bathrooms, which was to cite the restrictions of the building code); Harvey Molotch, On Not Making History: What NYU Did with the Toilet and What it Means for the World, in TOILET, supra note 1, at 255, 260–61 (describing denial of a request for a variance to allow gender-neutral bathrooms); see also Mary Anne Case, Why Not Abolish Laws of Urinary Segregation?, in TOILET, supra note 1, at 211 (citing a Texas statute that regulates businesses that serve alcohol). See generally Elizabeth Nolan Brown, The Biggest Obstacle to Gender Neutral Bathrooms? Building Codes., REASON (Apr. 11, 2014), https://reason.com/archives/2014/04/11/gender-neutral-bathrooms [https://perma.cc/D3M3-55LS].

8 INT’L BLDG. CODE § 2902 (2018). Like the Uniform Commercial Code and other uniform acts, the IBC is published by a private body and is not itself law. It is, however, almost universally adopted by jurisdictions at all levels that regulate building construction, typically with minimal alterations to address local geographic variations. See Veeck v. S. Bldg. Code Cong. Int’l, Inc., 293 F.3d 791, 793–94 (5th Cir. 2002) (en banc) (describing the process by which model building codes are developed and holding that private body could not claim copyright in enacted law).

9 INT’L BLDG. CODE § 2902.1 (2018). In addition to toilets and sinks, the IBC specifies numbers of drinking fountains, bathtubs or showers, and service sinks.

10 Id. at § 2902.2.
I. THE GENDER-NEUTRAL BATHROOMS OF THE FUTURE

The “best practice” designs for bathrooms of the future will be gender-neutral. This could mean that existing bathrooms are simply re-designated as gender-neutral, as several schools in Los Angeles have done—


11 See generally Case, supra note 7; Ruth Colker, Public Restrooms: Flipping the Default Rules, 78 OHIO ST. L.J. 145, 152 (2017) (proposing that communal bathrooms be for all genders, with a few single-stall bathrooms available for those seeking greater separation); Terry S. Kogan, Public Restrooms and the Distorting of Transgender Identity, 95 N.C. L. REV. 1205, 1234 (2017) (describing the “all-gender, multi-user public restroom of the future”).

—or it could mean new kinds of designs. One emerging format is to combine a shared bank of sinks with sturdier, gender-neutral toilet stalls:

Other new designs strike different balances between privacy, surveillance, and the use of space. Some seek to preserve the efficiency of urinals (and perhaps accommodate male resistance to sitting to pee). For example, Harvey Molotch and Laura Norén offer these designs, acknowledging that each has an implicit “female side” and “male side” while allowing for spillover according to need and user preference.
Designs for a small office setting and a larger public bathroom

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17 Id. at 266–67 (images used with permission).
At the other end of the spectrum, some new designs call for each private stall to have both a toilet and a sink, which can be useful when people need assistance or prefer to use the sink privately (such as for accidents, ritual cleansing, or medical needs):

All of these designs make bathrooms more accessible for people who are gender-nonconforming. They also better serve other bathroom users, such as those who may need assistance in the bathroom: A person with a disability may be accompanied by a different-sex assistant who is needed in the bathroom, and a child who is “too old” to use a different-sex bathroom may nonetheless need help from a different-sex parent.\(^\text{19}\)

Regardless of the design details, all of these options must grapple with the IBC’s requirement for “separate facilities . . . for each sex.”\(^\text{20}\) Most readers of the IBC interpret it against the backdrop of current practice and conclude that it requires

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\(^\text{19}\) See Colker, supra note 11, at 147–48 (discussing the application of the ADA to single-sex bathrooms when an opposite-sex assistant is needed); David Serlin, Pissing Without Pity: Disability, Gender, and the Public Toilet, in TOILET, supra note 1, at 167, 173, 181 (noting ways in which accessible and unisex bathrooms fulfill the principle of universal accommodation/universal design); see also Case, supra note 7, at 218–19 (same).

entirely separate bathrooms on the basis of gender.\textsuperscript{21} That reading, however, is not a necessary one.

II. THE TEXT AND CONVENTIONAL INTERPRETATION OF THE IBC

Section 2902.1 of the IBC requires a building to have a minimum number of bathroom fixtures, calculated according to the building’s “occupant load.”\textsuperscript{22} For schools, the IBC requires one “water closet” (toilet) and one “lavatory” (sink) for every 50 occupants. For some other kinds of buildings (like sports stadiums and theaters), the required number of fixtures varies according to the sex of the occupants. For example, in theaters, the IBC requires one toilet for every 65 women and one for every 125 men; for some kinds of stadiums, it requires more sinks, as well as more toilets, to accommodate the female occupant load. Unless there is statistical evidence to the contrary, the occupant load is presumed to be half female and half male.\textsuperscript{23}

Table: Some IBC Requirements for “Minimum Plumbing Facilities”\textsuperscript{24}

<table>
<thead>
<tr>
<th>Type of Building</th>
<th>Water Closets</th>
<th>Lavatories</th>
<th>Bathtubs/Shower</th>
<th>Drinking Fountains</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>Theater</td>
<td>1 per 125</td>
<td>1 per 65</td>
<td>1 per 200</td>
<td>--</td>
</tr>
<tr>
<td>Restaurant</td>
<td>1 per 75</td>
<td>1 per 75</td>
<td>1 per 200</td>
<td>--</td>
</tr>
<tr>
<td>Stadium</td>
<td>1 per 75</td>
<td>1 per 40</td>
<td>1 per 200</td>
<td>1 per 150</td>
</tr>
<tr>
<td>Office Building</td>
<td>1 per 25</td>
<td>1 per 40</td>
<td>--</td>
<td>1 per 100</td>
</tr>
<tr>
<td>School</td>
<td>1 per 50</td>
<td>1 per 50</td>
<td>--</td>
<td>1 per 100</td>
</tr>
<tr>
<td>Prison</td>
<td>1 per cell</td>
<td>1 per cell</td>
<td>1 per 15</td>
<td>1 per 100</td>
</tr>
<tr>
<td>Day Care</td>
<td>1 per 15</td>
<td>1 per 15</td>
<td>1</td>
<td>1 per 100</td>
</tr>
</tbody>
</table>

\textsuperscript{21} See, e.g., Colker, supra note 11, at 160–61.
\textsuperscript{22} INT’L BLDG. CODE §§ 2902.1, 2902.1.1 (2018).
\textsuperscript{23} Id. at § 2902.1.1.
\textsuperscript{24} Id. at § 2902.1. Numbers given for stadiums and office buildings are for relatively small buildings of those kinds.
Section 2902.1 could be satisfied with entirely gender-neutral facilities. For example, at a school with 200 students and staff, four gender-neutral toilets would suffice. At a theater with 200 occupants, one would assume that the occupants are half female and half male, so the theater would need three toilets. Although the calculation of the required number of fixtures requires us to consider the sex-make-up of the occupant load, nothing in § 2902.1 requires that the actual fixtures be designated for one sex or the other.

However, § 2902.2 states, with some exceptions not applicable here, “[w]here plumbing fixtures are required, separate facilities shall be provided for each sex.” Interpretation of this provision is thus the key to determining whether and to what degree the IBC requires sex-segregated bathrooms.

Section 2902.2 is usually implemented by calculating the required number of toilets “per sex” and construing the “separate facilities” rule to require that all fixtures numerically required by § 2902.1 be designated as exclusively female or male. That is, gender-neutral toilets “don’t count” toward the required minimum number of fixtures. Moreover, the “separate facilities” rule is construed to apply to sinks as well as toilets, since the number of required sinks also varies by the sex of the occupant load. (When my school district sought a waiver of the sink rule, a member of Colorado’s plumbing board explained that separate sinks in separate rooms are necessary because the sexes have different “cleanliness habits.”) Hence, the typical public bathroom: separate rooms for women and men, each with the code-specified number of toilets and sinks for that sex. Only “extra” facilities, or single-stall bathrooms for families and people with disabilities, can be gender-neutral.

This conventional interpretation of § 2902.2 is not the only possible one. Before proposing an alternative reading of the text, however, a few observations are in order about the policy goals that should drive the choice among competing interpretations.

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25 If there must be one toilet for every 65 women, 100 women need two toilets; if there must be one toilet for every 125 men, 100 men need one toilet; for a total of three toilets.
26 See INT’L BLDG. CODE § 2902.2 (2018). The exceptions are for homes, sleeping areas, and buildings with low numbers of occupants.
27 See Gershenson, supra note 1, at 205 (reporting that in the eyes of the administrators who enforced the building code, “a bathroom without a gender mark was no bathroom at all.”).
28 Conversation with Rob Price, Executive Director of Bond Planning & Engineering, Boulder Valley School District, in Boulder, Colo. (Sept. 6, 2016).
29 As of 2018, the IBC allows gender-neutral, single-stall bathrooms to count toward the total, but under the conventional interpretation, multi-stall, gender-neutral bathrooms still will not count toward the required minimum facilities. INT’L BLDG. CODE § 2902.1.2 (2018).
III. PRINCIPLES OF INTERPRETATION

In the annals of gender-based regulation of America’s public bathrooms, three issues have been key: access, equality, and privacy. In the early twentieth century, many public spaces did not provide toilets for women, which limited women’s movement in public; the “bladder’s leash” kept women close to home.30 Women’s access to public toilets thus offers insight into women’s progress in society. For example, the U.S. House of Representatives installed its first women’s bathroom for Members in 2011.31 Since at least the 1970s, the issue of “potty parity” has also bedeviled code drafters, local governments, and women facing long lines in public bathrooms.32 The IBC’s sex-based calculations are an attempt to give women fair and equal access to toilets, or at least ameliorate the worst disparities.33 At the same time, bathroom regulations and their implementation have been undergirded by stereotypical assumptions about the sexes, especially their need for privacy.

The text of the IBC should continue to be interpreted in light of the underlying policy goals of access, equality, and privacy. While those three principles have always been at the forefront of bathroom regulation, their application has shifted as society has changed. Today, those goals are best served by gender-neutral bathrooms.

A. Access

Gender-neutral bathrooms improve access in two ways. First, they accommodate users who do not identify as female or male, such as those who are gender-expansive, non-binary, or transitioning. Second, gender-neutral bathrooms eliminate the “potty parity” problem; everyone waits in a single line for the next available toilet.34

30 Clara Greed, Creating a Nonsexist Restroom, in TOILET, supra note 1, at 117, 120–21.
32 See generally Case, supra note 7, at 212–15 (describing the history of potty parity and the debate over whether equality should be measured in square footage, number of facilities, or average waiting time); Colker, supra note 11, at 149, 152–57 (discussing potty parity laws); Greed, supra note 30, at 118–19, 133–34 (discussing the challenges and details of sex-equitable bathroom design).
33 The revisions to the IBC and other model codes were part of a wave of “potty parity” legislation beginning in the late 1980s. See Kathryn H. Anthony & Meghan Dufresne, Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms, 21 J. PLAN. LITERATURE 267, 277–80 (2007).
34 Case, supra note 7, at 218 (noting that “basic queueing theory” makes clear that gender-neutral bathrooms would be most efficient and would equalize waiting times).
B. Equality

Access is closely related to equality. First, current policies that allow transgender students to choose a bathroom based on their female or male identity are a step in the right direction, but those policies implicitly assume that all students identify as a single gender, female or male, and that this identification is persistent over time. As Terry Kogan explains, this rigid binary framework is inconsistent with many transgender people’s gender identities.35 In schools, segregated bathrooms put unnecessary pressure on young people to choose one of two gender identities on demand, potentially under urgent circumstances.

Second, by eliminating the “potty parity” problem, gender-neutral bathrooms create equal access to available toilets, regardless of sex or gender. This is especially important as society changes over time, resulting in more women in spaces that were previously male-dominated (like the U.S. House of Representatives) and vice versa.36

Relatedly, gender-neutral bathrooms avoid the need to classify people on the basis of sex or gender. Any such classification runs the risk of reinforcing stereotypes and other biases. Sex-segregated bathrooms promote the ideology that certain kinds of contact with the opposite sex are contaminating.37 To put it in grade-school terms, schools (and other public entities) should be undermining, not reinforcing, children’s (and grown-ups’) belief in girl cooties and boy cooties.

C. Privacy and Safety

While privacy concerns have historically driven bathroom design, today safety concerns are at least as prominent. Opponents of transgender bathroom access have expressed concerns about the safety of women’s bathrooms. In addition, in schools in particular, bathrooms can be prime locations for bullying and other misbehavior.38 Gender-neutral bathrooms

35 Kogan, supra note 11, at 1208, 1224.
36 Early potty parity rules, as well as the current IBC, stress the importance of anticipating the likely gender ratio of the users of a particular building. See INT’L BLDG. CODE § 2902.1.1 (2018); Case, supra note 7, at 212 (describing the first potty parity law).
37 Women often object to gender-neutral bathrooms on the grounds that men and their bathrooms are unhygienic. But the fear of contamination can run in the other direction, too. See Case, supra note 7, at 222–23 (describing men’s allusions to blood-based contamination in explaining their discomfort with sharing bathroom facilities with women).
allow for designs that address privacy and safety concerns as well as, or better than, sex-segregated bathrooms.

Gender-neutral bathrooms can be designed to accommodate nearly any desired level of privacy. Many designers choose to make the stalls in gender-neutral bathrooms more private than typical bathroom stalls today: the walls may run from floor to ceiling, with a regular door and doorknob for entry. This greater privacy in the individual stalls can translate into more safety in the bathroom as a whole. With more private stalls, there is less need for the entire bathroom to be insulated—in terms of both sound and sight lines—from the hallway or room outside the bathroom. In a school, for example, the entry from the hall to the bathroom can have an open plan, perhaps with windows, allowing for easy observation of the shared sink area, while still allowing for maximum privacy in the individual stalls.39 For young children, this design allows them to call for help from a teacher more easily, regardless of sex, and to be instructed in proper hand-washing.40

This combination of privacy and safety also addresses the concerns of those who object to allowing segregated bathrooms to be accessible according to gender identity.41 The most commonly articulated objection to such a policy is that it provides an opportunity for men to improperly enter women’s restrooms for the purpose of assaulting women and girls. In its more rational form, this concern is not directed at transgender women.42 The fear is that cisgender men will use the policy as cover for entering women’s rooms with criminal intent.

39 See id. ("[O]ne of the biggest advancements in washroom design has been to introduce more open plan spaces . . . . This enables passive supervision, ultimately making students feel safer using the toilet facilities.").

40 See Angela Watson, Tips for Teaching Bathroom and Water Fountain Procedures, CORNERSTONE FOR TEACHERS, https://thecornerstoneforteachers.com/bathroom-hall-water/ (https://perma.cc/35XK-83E6) (“Talk about [correct procedures] at the front of the classroom, miming each action as you do it, then actually model it (go into the bathroom, flush the toilet, and come right back out while the whole class watches, talking them through the process (‘Okay, I got my soap. Now what? Count with me . . . 1 . . . 2 . . . ’)).")

41 Some objectors to the current policy are motivated by hostility, per se, to gender nonconformity. See Kogan, supra note 11, at 1230 (describing the “Victorian melodrama” constructed by opponents of the current policy, “in which the transwoman plays the central role as the evil villain”). I do not advocate accommodation of that hostility. However, I believe that some objectors have sincere concerns that fall under the rubrics of safety and privacy. Happily, gender-neutral bathrooms are a best practice that not only accommodates users of all genders but also addresses these concerns.

42 Id. at 1233–34 ("[T]he suggestion that transwomen are a threat to women and girls in public restrooms is a red herring unsupported by evidence. In fact, all credible surveys reveal that transpeople are common victims of restroom violence, facing threats of verbal and physical assault in their attempt to find safe and accessible public restrooms.") (citing Jody L. Herman, Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives, 19 J. PUB. MGMT. & SOC. POL’Y 65, 75 (2013)).
This objection constructs the women’s room as a uniquely vulnerable space; it suggests we should be worried about letting men into women’s rooms, even though we allow men into other public spaces where women are present. Women’s bathrooms appear to be uniquely vulnerable for three reasons. First, bathrooms are designed for privacy rather than security. Second, women partially undress in bathroom stalls in order to use the toilet. And third, women are alone in bathrooms—whether that means that an individual woman is literally alone, or perhaps that women in the bathroom are “alone” in the sense of being without male protection.

As already discussed, gender-neutral bathrooms can increase security because the bathroom can be more integrated with outside spaces and thus more supervised. At the same time, the option to build sturdier, more room-like stalls provides greater privacy, reducing the user’s subjective sense of exposure and closeness to others while on the toilet. Sturdier stalls can also lock from the inside like proper doors, providing more actual and perceived security than the rarely functional “locks” found on typical bathroom stalls today. Outside these more private and secure individual stalls, the people in the common area—using the sinks and generally having “eyes on” the bathroom area—are of both sexes. To the extent that women are considered uniquely vulnerable to assault in bathrooms because of the absence of protective men, this concern is eliminated.43

On the question of users’ subjective sense of privacy, the fact remains that current practices have trained many of us to be uncomfortable going to the bathroom in proximity to the opposite sex. Again, the option to build sturdier stalls can go a long way toward ameliorating that discomfort. Moreover, my proposal here is that the IBC should be interpreted to allow schools and other buildings to provide gender-neutral bathrooms and to “count” those toilets toward the required IBC minimums. Designers would still have lots of options for meeting the anticipated needs of their building’s users, including older users who are still adapting to a new practice. For example, one could, as Ruth Colker suggests, “flip the default rule” by marking the larger, multi-user bathrooms gender-neutral but still providing

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43 Cf. Case, supra note 7, at 221 (noting that the “potential expected presence of both sexes” increases safety); Colker, supra note 11, at 176 (“It is possible that men might be less likely to assault women in a restroom if they thought another man might enter that space.”); Molotch, On Not Making History, supra note 7, at 270 (invoking the “eyes on the street” principle to argue that a shared and thus more heavily used bathroom is safer). Colker also notes that gender-neutral bathrooms are safer for children. Colker, supra note 11, at 175 (“[S]ex-based segregation sometimes causes parents to allow their young children to enter a restroom by themselves when they are really too young to do so safely.”).
individual or even sex-specific alternatives for people who are strongly averse to the gender-neutral facility.\textsuperscript{44}

Gender-neutral bathrooms are a win-win solution: they accommodate gender-nonconforming students, eliminate unnecessary sex stereotyping, and increase safety for all users, while the option of more private individual stalls ameliorates the lingering discomfort that current bathroom designs have engrained in many users.

\textit{D. Constitutional Avoidance}

In addition to providing more access, equality, privacy, and safety, gender-neutral bathrooms may also be constitutionally required. Or, to be more precise, government-mandated sex segregation of bathrooms may be unconstitutional. Ruth Colker and others have laid out the constitutional arguments elsewhere: in brief, mandatory separation of women’s and men’s bathrooms is a sex classification that reinforces sex stereotypes; the privacy and safety rationales are largely pretextual,\textsuperscript{45} and the historical origin of sex-segregated bathrooms is demonstrably rooted in sexist, Victorian morality.\textsuperscript{46} For purposes of applying the IBC, the possibility of unconstitutionality, along with strong policy arguments favoring gender-neutral bathrooms, suggests we should be favorably inclined toward reinterpretation.

\textbf{IV. “Separate Facilities” Means That Gender-Neutral Bathrooms Must Have Adequate Privacy for Individuals}

If mandatory separation is bad policy and may be unconstitutional, what can be done with § 2902.2’s requirement that “separate facilities shall be provided for each sex?” The best reading of § 2902.2, in light of the principles of access, equality, privacy, and safety, is that gender-neutral

\begin{itemize}
\item \textsuperscript{44}Colker, \textit{supra} note 11, at 177.
\item \textsuperscript{45}Id. at 163, 166–67 (“The real explanation for sex segregation of restrooms flows from the racial, ethnic, class, and gender stereotypes underlying the rules and policies governing restrooms . . . . [E]ven as some people might argue that sex segregation is utterly harmless, others are lined up arguing for stark sex segregation out of recognition of the role that sex-segregated restrooms play in the socialization of gender.”).
\item \textsuperscript{46}See generally Kogan, \textit{supra} note 11, at 1214 (describing the Victorian penchant for sex segregation not only in bathrooms but in libraries, railroad cars, photography studios, hotels, banks, and department stores). Women’s rooms often offer more privacy than men’s rooms do, perpetuating stereotypes about women’s greater need for privacy. Colker, \textit{supra} note 11, at 173 (“The evocation of ‘privacy’ . . . has an implicit gendered assumption—that it is acceptable for restrooms to traditionally offer girls and women complete shielding from others seeing their ‘private parts’ while not offering boys and men the same degree of privacy.”). Lack of privacy in men’s rooms may sometimes also stem from intentional efforts to suppress sexual activity. See Bryan Reynolds, \textit{Rest Stop: Erotics at Harvard, in Toilet}, \textit{supra} note 1, at 43, 45 (arguing that the removal of the doors from the men’s room stalls in a university building, combined with the layout of the room, increased the homoerotic tension already implicit in men’s room interactions).
\end{itemize}
bathrooms must have adequate privacy for individuals, not that entire rooms of toilets must be permanently dedicated to a single sex. The gender-neutral designs pictured at the beginning of this Essay all provide that level of privacy. With these designs, people of all genders can use the toilet separately and privately, which is sufficient to satisfy the IBC’s underlying concern with separateness.

The word separate can have a variety of meanings, depending on context. For most people today, the phrase “separate bathrooms” probably evokes the fully sex-segregated public bathrooms with which we are familiar. Consider, however, the different meaning evoked by the phrase “separate drinking fountains,” which brings to mind images like this one, from a time when toilets and sinks were similarly separated:


The separation required here was largely psychological, a pure instantiation of white supremacy.

You might be surprised to learn that drinking fountains, just like sinks and toilets, are governed by § 2902.1 and § 2902.2, the same provisions conventionally interpreted to require separation of toilets and sinks by sex. If the conventional interpretation were applied consistently, drinking
fountains would also have to be separated—physically separated, into separate rooms, labeled by sex. Nonetheless, the IBC is universally interpreted to allow women and men not only to drink from the same fountains but to do so within sight of each other. When it comes to drinking fountains, it seems that “separate” can just mean taking turns. That, of course, is entirely sensible. It is a clue, however, that the current practice of separating toilets and sinks by sex is rooted not so much in the text of the IBC as in cultural assumptions about gender.

The only textual difference between the IBC’s treatment of drinking fountains and its treatment of sinks and toilets is that there is no sex distinction in § 2902.1’s calculation of the number of required drinking fountains. In the judgment of the IBC, women sometimes need more toilets and sinks than men, but they always need the same amount of drinking water. Seeking to justify the conventional interpretation, then, one might argue that the need for sex separation is implied by the separate, sex-based calculations of how many of each fixture are required. That is, in the Table on page 85, the IBC makes no sex distinction with regard to drinking fountains, implying that gender-neutrality is allowed. But for sinks and toilets, the IBC specifies “female” and “male” numbers, perhaps suggesting the need for a greater degree of physical separation as well.

However, this attempted rationalization founders on the issue of bathtubs and showers. Bathtubs and showers are also “plumbing fixtures” whose numbers are specified in the Table. There are no sex designations in the “bathtubs/showers” part of the Table; despite needing different numbers of sinks, the sexes apparently need the same number of baths. If the sex designations in the table were a textual justification for the conventional interpretation of the IBC, consistency would require either that drinking fountains be separate by sex or, even more absurdly, that sinks and toilets be separate, while bathtubs, showers, and drinking fountains could be communal.

In short, the conventional interpretation of the IBC incorrectly extrapolates from a sex distinction in the calculation of occupant load for toilets and sinks to an untenable degree of sex-based separation in facilities. The text of the IBC is at best ambiguous and at worst self-contradictory regarding the meaning of the word separate in the context of sinks and toilets.

What drives the conventional interpretation, then, is not the text of the IBC but a particular theory of gender and privacy, a theory that says women’s modesty and vulnerability require them to be separated from men while using the toilet and even while washing their hands. That theory, however,
is inconsistent with today’s understandings of gender identity and sex equality, and it is in substantial tension with the goals of efficient, safe, and equal access to public bathrooms. In light of this inherent tension in the IBC’s text, along with the history of resolving that tension with reference to social norms and policy goals, it is time to reevaluate the conventional interpretation in light of current policy needs and constitutional values.

Nothing inherent in the phrase “separate facilities” requires that a particular toilet only be used by one sex over the course of its useful life. For example, under current practice, it is permissible to change the sex-designation of a particular toilet; the fact that it was once used by men does not forever bar it from being used by women. The requirement to “provide” separate facilities can be met by ensuring that the sexes are able to use the toilet “separately” without permanently dedicating any particular toilet to a particular sex. Thus, a toilet could be designated “for all genders” with the understanding that only one person would use it at a time.

What, then, is the function of § 2902.2’s requirement of “separate facilities . . . for each sex?” Is it superfluous? Historically, it seems to have functioned to remind builders to provide an appropriate degree of bathroom privacy, especially for women, whose needs they tended to neglect. But the determination of appropriate privacy has been driven not by the text of the IBC but by social policy and norms. That should continue in the era of gender-neutral bathrooms. For example, we will likely continue to prohibit the mixing of genders in bathrooms that provide no privacy at all on the toilet. That means that the arrangements in these photos would be permissible in a men-only room or a women-only room, but not in an all-gender bathroom:

\[\text{infra, text accompanying and following note 50.}\]
Designs like these were once common, including in private homes.\footnote{Colker, \textit{supra} note 11, at 153 (“Even in middle-class homes . . . it was common to find two-seat privies with men and women comfortable with relieving themselves in the view of others.”).} While many people today would prefer to avoid them even in a single-sex bathroom, the IBC allows them.\footnote{\texttt{INT’L BLDG. CODE} § 2902.2 (2018). In Indiana, the code specifically authorizes up to two toilets in a single stall in a separate-sex bathroom, while unisex stalls may contain only one toilet. \texttt{675 INDIANA ADMIN. CODE} 13-2.6-29(e) (2018).} The “separate facilities” rule could easily be construed to limit the use of bathrooms like these to single-sex facilities while allowing for gender-neutrality when more privacy is available.

Finally, this reading is consistent with the fact that the language of the current IBC is less restrictive than older laws that required more rigorous
separation. For example, one of the first laws mandating separate bathrooms required:

[A] sufficient number of separate and distinct water-closets or privies shall be provided for the use of each sex, which shall be plainly so designated and no person shall be allowed to use any water-closet or privy assigned to persons of the other sex.  

Compare that language to the modern IBC, which states only:

[S]eparate facilities shall be provided for each sex.

The modern language contains two important omissions, as compared to the Victorian version. The old statute requires that the facilities be “separate and distinct,” while the new statute requires only that they be “separate.” This supports the argument that while members of different sexes should be screened from each other while using the toilet, a particular toilet need not be “distinctively” for women only or men only. Similarly, the modern language omits the prohibition on cross-use.

The modern IBC is plainly more permissive than the original codes that required entirely separate rooms for men’s and women’s facilities, but the tradition has nonetheless persisted in the face of an ambiguous text. It is time for that tradition to yield to current demands for access, equality, privacy, and safety.

CONCLUSION

The IBC’s requirement of “separate facilities . . . for each sex” is ambiguous and has long been applied not according to its text but according to a policy judgment involving gendered norms about privacy and modesty. While the conventional interpretation was plausible in light of the prevailing norms of the past, it is not required by the text and it is inconsistent with today’s norms of equality for people of all gender identities. Today, the IBC should be construed to require “minimum plumbing facilities” that provide adequate privacy, meaning visual separation while using the toilet, but not to require that toilets or sinks—any more than drinking fountains—be confined to sex-specific spaces.

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50 Kogan, supra note 11, at 1217–18 (quoting a California law enacted in 1889); see also id. at 1214 n. 35 (quoting nearly identical language from Massachusetts).
51 INT’L BLDG. CODE § 2902.2.