Reformulating the Trans/Gendered Legal Subject: Legal Protection and Legal Action through Radical Feminism and Queer Theory

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Abstract

This project takes up the ongoing philosophical and political tensions between radical feminism and queer and transgender theories, and centers them on the most recent iteration of the United States transgender bathroom access debate and the legal shifts in sex discrimination law from which it stems. I explore how their philosophical opposition is represented through the legal shifts in Title IX, while considering the implications of these changes for transgender and gender nonconforming people and cisgender women. I will argue that the translation of radical feminist and queer and transgender theories into law reduces them of their complexity and political potential. I will then more closely analyze how their philosophical tensions in two core areas of critique both underpin the contentions that arise in the bathroom problem and also reveal the role of the law in producing it. Part I of the project begins with an examination of the legal developments of Title IX, wherein I do a close reading of two legal documents that reformulate the statute's definition of "sex" and the basis of discrimination. Part II is thematically divided into two central issues to the bathroom and legal debate and to the theoretical camps: the construction and enforcement of social and legal categories and the negotiation of public and private space and rights.

Declaration of Original Research and the Word Count

I hereby declare that this thesis is the result of original research; it contains no materials accepted for any other degree in any other institution and no materials previously written and/or published by another person, except where appropriate acknowledgment is made in the form of bibliographical reference.

I further declare that the following word count for this thesis are accurate:

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Signed: Anna Menaker Daniszewski

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INTRODUCTION

If one does a quick survey of online articles on the "bathroom problem" in the United States, it would seem that every liberal or left-leaning media outlet describes the issue as so inarguably straightforward: when confronted with sex-segregated public bathrooms, people should be able to choose which facility to use based on the gender with which they most comfortably identify. These accounts posit this solution as the only reasonable one for a mundane practice that has been inflated into a debate and dramatized by prejudiced conservatives. This position, while certainly defensible, risks neutralizing the bathroom of its historical and political charge for marginalized segments of society. Slogans like "Just pee!" or assertions that it is sheer exaggeration to suggest that people use bathrooms for more than their intended purpose ("Kinky Boots," 2016; SeriouslyTV, 2016) can erase the many significances and ongoing struggles that bathrooms represent not just today for transgender people, but also for cisgender women, gay men, the elderly, people with disabilities, and the homeless, among others (Molotch, 2010, pp. 3-7, 12).[1] Furthermore, removing from the bathroom problem the complex relationship between sex, gender, and sex-segregation, underpinned by persistent oppression and violence, makes it seem like a non-issue with an easy fix.

However, when examined within the domains of queer and transgender theories and feminist theory, these complexities that inform the current bathroom debate become so layered that, far from being a straightforward problem, it appears to be an intractable dilemma. While in mainstream U.S. politics it seems that the competitors in this debate are conservatives and liberals, in the arena of feminist, queer, and transgender studies and politics, it is between radical feminists and queer and transgender theorists and advocates (see Jeffreys, 2014; Keegan, 2016; Sanders & Stryker, 2016). Although the bathroom problem for cisgender women

[1] This then positions someone who suggests the possibility of illicit activity occurring in bathrooms as over-exaggerating based on unfounded concerns.

and transgender or gender nonconforming people is not a new phenomenon (Penner, 2001; Halberstam, 1998), its current iteration is a flashpoint in a long-running philosophical and 'personal' tension between these two 'camps.' Radical feminists and queer and transgender theorists differ on some core philosophical positions, such as how they conceptualize the meaning and significance of biological sex and gender, as well as their approaches to the roots, operations, and perpetrators of oppression. They have also clashed outside of the sphere of theoretical debate, such as the often referenced case of the Michigan Womyn's Music Festival, a "womyn born womyn" gathering that in 1991 barred a transsexual woman, resulting then in activists setting up an adjacent "Camp Trans" nearby (Valentine, 2007, p. 180-181). More recently, radical feminists have argued that they are being denied platforms from which they can participate in contemporary debates on gender, blaming in part "gender theory" and "queer activism" ("Forbidden Discourse," 2013, p. 1). In 2013, prominent figures in this wing of feminism, Carol Hanisch, Kathy Scarbrough, Ti-Grace Atkinson, and Kathie Sarachild, made an open statement to voice their "alarm" that theorists, conference organizers, and bookstores are being threatened and attacked for making radical feminist critiques, inviting speakers who hold these views, and distributing their work ("Forbidden Discourse," 2013, p. 1). Sara Ahmed, a feminist, queer, critical race scholar, responded to this claim by arguing that it obscures transgender people's unequal position of power within this debate (Ahmed, 2016).

This ongoing tension now lands on the current bathroom debate. The bathroom debate revolves around the issue of if and how transgender people should use public restroom facilities. However, this issue is actually just a focal point of the recent push to incorporate transgender identity and gender nonconformity into U.S. anti-discrimination law, specifically in Title IX, which addresses sex discrimination in education. In 2016, the Department of Justice and Department of Education under President Obama's administration released a "Dear Colleague Letter," which was said to function only as a clarification of existing law and explained that

"gender identity" is within the scope of Title IX and, thus, legally applies to transgender students (OCR, 2016, p. 2). While this move to grant transgender people legal protections from discrimination may seem obviously necessary, in order to make this claim, the agencies had to seriously rework the meaning of "sex" in the written statute. Radical feminists take issue with this change to Title IX, contending that it puts women at greater risk of harassment and violence from men that is already pervasive in bathrooms, and that the reformulation of the legal category of "sex" undermines their existing protections and recourses for their oppression (Jeffreys, 2014, p. 48; WoLF, 2017). However, those who advocate for these legal changes demand to be included in anti-discrimination protections, citing the high degree of harassment and violence that transgender people also face in schools and elsewhere (U.S. Transgender Survey, 2016).

The stakes in this debate around transgender bathroom access and Title IX run high for both radical feminist and queer and transgender 'camps' because it strikes at the heart of their own philosophical, political, and deeply personal concerns, as well as revives a difficult history of conflict between them. Because the debate is so fraught at each of these levels, it seems almost impossible to navigate. However, perhaps it is in this moment of an apparent impasse between these two key players that we should turn our attention to the one that is lingering in the background: the law. The opposition between these theories is being played out in the legal shifts in Title IX, which moves from sex to gender identity, and from sex-based harms to harms based in social norms and stereotypes. What is the law's place in this opposition? How might the liberal legal system, which relies on defined categories in order to create protected classes, contribute to this antagonism? Why is it that advocates for legal protection on the basis of sex or for transgender people have to vie against one another? What does it say about the U.S. legal system that we seem to be left with an either/or between them?

It is not the task of this project to adjudicate the bathroom debate between radical feminism and queer and transgender theories. Instead, I will ask how their philosophical oppositions are represented through the legal shifts in Title IX, and explore the implications of these changes for their politics and for transgender and gender nonconforming people and cisgender women. I will argue that the translation of radical feminist and queer and transgender theories into law reduces them of their complexity and political potential. I will then consider how their philosophical tensions in two core areas of critique both underpin the contentions that arise in the bathroom problem and also reveal the role of the law in producing it. I will do this first through an examination of the legal developments of Title IX in Part I, wherein I will do a close reading of two documents that reformulate the statute's definition of "sex" and the basis of discrimination. Then, in Part II, I will thematically divide two central issues to the debate and to the theoretical camps: the construction and enforcement of social and legal categories in Chapter 2, and the negotiation of public and private space and rights in Chapter 3.

PART I

Chapter One:
The Case: Redefining Title IX

In recent years, the United States government has sought to reformulate the grounds on which sex discrimination law in education can be deployed in an effort to extend its protective coverage to transgender students. The Obama administration de-centered "sex" as the basis for discrimination, as it is written in the statute, and shifted toward an interpretation of "sex" as "gender identity." In theory, this could make discrimination law more pliable and able to more broadly address gender oppression for people of different genders, regardless of their cisgender or transgender status. If "sex" in the law is taken as one's sex at birth, and if this is the sole basis on which such discrimination is prohibited, it cannot account for those who experience discrimination unique from others of their "sex." For example, a transgender woman may experience discrimination because she has a transgender gender identity, but not because she is 'male,' i.e., born male. If the transgender woman cannot demonstrate how her 'maleness' directly led to her discrimination, which would be difficult to prove if other 'males,' i.e., *cisgender* men, are not similarly disadvantaged, discrimination law based on sex would not protect her.

This new legal turn to "gender" as that which encapsulates unjust differentiations of behaviors and norms mirrors the turn of third wave feminist and queer theory. These more recent theoretical movements depart from biological "sex" as the primary determinant of one's oppression, and rather seek to examine the production of gender as a regulatory and oppressive mechanism in various social and institutional arenas, as well as informed by discourses of race and sexuality, among others (Halley, 2009, p. 15). While I do not necessarily want to suggest a 'cause and effect' relationship between developments in social theory and developments in the law, we might speculate that there is some correspondence between the two contemporaneous

conceptual shifts. If the former had some effect on instigating the latter, whatever nuance and depth that these theorizations of gender offered, both intellectually and politically, have been strangely translated into the law. Where theory construes gender's oppressiveness as severe but complex and contingent, in the law it is reduced to the single totalizing conceptualization of "stereotypes." However, the concept of "gender stereotypes" does not sufficiently capture the many forms of harms that a theoretical shift toward "gender" may have intended to open up, while also actively excluding harms that cannot be reasonably or accurately explained as a stereotype, such as some sex-based harms.

In this chapter, I will lay out the central problem that is the basis for the question of my research. Preliminarily, how has the law adapted to or reflects new understandings of gender? Are they incorporated in a way that betters the law by making it answerable to those who have been marginalized by it? I argue that the law's draw toward gender reductively mischaracterizes constructions and discourses of gender and their relation to operations of power as nothing more than benign, nebulous "stereotypes." In so doing, "gender" as the legal basis for discrimination both fails to protect those for whom it was introduced *and* disenfranchises those whose oppression cannot be defined as based on a "stereotype."

I will argue these points through an analysis of the legal documents released by the U.S. Department of Justice (DOJ) and Department of Education (ED) under the Obama administration that both signal this shift and foreshadow the new problems and gaps that arise from it. First, I will provide an overview of the anti-sex discrimination law at hand, Title IX, and discuss how it has been engaged by the Departments during the Obama era. Next, I will discuss the documents that manifest the shift in the meaning of Title IX. Here, I will also give a brief timeline of the documents and statements released and their varying formats and significance. Then, I will represent this shift through a comparative close reading of an earlier document from 2010 and the last and most controversial one from 2016. These two documents

are called “Dear Colleagues Letters,” which are a type of document that more significantly and authoritatively defines policy than the other formats released. In addition to marking the shifts, my reading will also suggest their implications and inadequacies. Through this analysis, I hope to illustrate the problem of how the law badly translates what may have been useful conceptual tools for addressing the barriers that allow gender oppression to persist. Once this problem is established, it will allow us to investigate in the following chapters how the foundational critiques of radical feminist and queer and transgender theories can explain both Title IX’s shortcomings and the tensions that these produce.

I. The Creation, Reach, and Meaning-Making of Title IX

Title IX, the federal statute prohibiting sex discrimination in education, became law in 1972 (DOJ, 2015). The wording of Title IX is brief and has the potential to proscribe a wide range of disadvantaging practices: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (DOJ, 2015). Title IX is applied to almost every elementary, secondary, and higher educational institution in the United States since even private schools and universities still receive significant amounts of federal aid, especially through student loan programs (NCAA, n.d.). Historically, Title IX has largely been associated with ensuring equitable athletic offerings and teams in schools, although the statute is not specific to any particular aspect of education. Democratic Senator Birch Bayh of Indiana introduced Title IX to Congress while working on the Equal Rights Amendment, which would have installed into the U.S. Constitution an explicit legally-ensured statement of equality regardless of sex. At the time, Bayh described Title IX as only an “important first step” on the way to more profound legal equality for women, but not a “panacea” (Branham, 2017). In retrospect, these words exemplify an optimism that perhaps was not so certain. Because the

Equal Rights Amendment was never ratified, Title IX had to be sculpted to give it more weight and influence than it was apparently ever intended to have.

This is precisely what occurred during Obama's presidency, whose administration set out to mobilize Title IX to address two systemic issues: sexual assault[2] (especially on college campuses) and discrimination against homosexual and transgender or gender non-conforming students. While the latter agenda item may not have originally been foreseen in the future of Title IX or the Equal Rights Amendment, the Obama-era goal of advancing protections for sexual orientation and gender identity was also formulated with the belief that Title IX could evolve to encompass these. From the steps taken by Obama's DOJ and ED, one can glean their strategy for accomplishing these two objectives: elaborate what could be included in the broad language of Title IX. This was clear in the approach to the first of the administration's two goals. For the first time, it was explained that harassment, which was already prohibited by Title IX, also referred to sexual assault and rape.[3] Sexual violence was now clearly defined as a form of discrimination apart from solely a criminal violation. For the second, the definition of "sex" in Title IX had to be gradually shifted in order to extend its coverage to discrimination on the basis of sexual orientation and gender nonconformity.

[2] When I was in college, Title IX was well-known as the mechanism by which our administration was required to respond to claims of sexual violence. I was surprised to learn that the statute had any connection to sports. In retrospect, it is evident that our association of Title IX with campus rape was only a recent consequence of the developments that were occurring at the federal level. With the guidance released in 2011—the year I began college—universities were suddenly held at a much higher level of accountability and had to update its policies and resources. The fact that changes on my campus related to Title IX were occurring with some frequency, such as the hiring of a dedicated Title IX coordinator independent from other sectors of the College, reflected this Obama-era re-signification of a well-established statute.

[3] While it may seem obvious that sexual violence is sex- or gender-based, and can have the discriminatory effect of seriously disrupting one's education, it had to be distinguished from the mere ill-intent of a single individual (i.e., a criminal issue) to hold the schools themselves liable for allowing that violence (i.e., a violation of civil law).

Depending on one's politics, this strategy can be viewed either as unauthorized legislating by a federal agency, or as merely interpretive and informative of the standards for enforcement. Some argue that these are substantive changes that extend, expand, and redefine law, and are made improperly by circumventing Congress as well as rulemaking procedures. However, if you consider gender identity and sexual orientation as related to one's sex, they only make explicit the mandate for equality already entailed in a prohibition of sex discrimination. Obama's DOJ and ED's Office for Civil Rights (OCR) insist on the latter argument. This is evidenced by the kinds of documents produced and released by the DOJ and the OCR between 2010 and 2016, which they describe as simply clarifications of existing law and guidance for schools and universities on how to fulfill their legal obligations. Some of these communications are of a less forceful nature, such as publicized resolution agreements with schools alleged to have offended Title IX, open letters written in support of individual student complainants or to levy pressure on state politicians who are at risk of violating Title IX, and 'Question and Answer' bulletins on how to uphold previous guidances. The more authoritative type of document is called a Dear Colleague Letter, which is a guidance addressed to all federal aid recipient institutions that explains who is covered under Title IX, the behaviors and practices that are considered discriminatory, and the policies and procedures educational institutions must adopt in order to meet the regulation's requirements. Even if one accepts that these documents are only explanatory, they still prescribe in great detail legal obligations beyond what one might assume of Title IX and, should these be neglected or disobeyed, are used as the rubric for institutional accountability.

The DOJ and ED must typically adhere to a particular rulemaking procedure called "notice-and-comment," in which "a proposed rule" must be made open for public deliberation ("Notice-and-Comment Rulemaking," 2015). However, the DOJ and ED are exempt from these procedures when they adjust their rules of "agency organization, procedure or practice," or are

"general statements of policy" or merely "interpretive rules" ("Notice-and-Comment Rulemaking," 2015). Thus, the validity of these Dear Colleague Letters depends completely on how well they can be justified as not substantively new or different, but merely reiterations of existing laws or insignificant organizational or procedural notices. Unsurprisingly, this has been the main target of legal attack, both when challenged publicly and in court. For instance, Republican Senator James Lankford of Oklahoma wrote a letter in January 2016 to the OCR asking for the legal justification of their proclaimed authority to make the changes released in two Dear Colleague Letters from 2010 and 2011. Catherine Lhamon, the Department of Education's Assistant Secretary for Civil Rights, replied openly in February 2016 citing a Supreme Court decision that upheld the aforementioned exemption as determining whether the OCR was required to undergo such a rulemaking procedure. Lhamon then firmly stated: "The Department does not view such guidance to have the force and effect of law. Instead, OCR's guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces" (Lhamon, 2016, p. 12). This was echoed in the pivotal 2016 Dear Colleague Letter on Transgender Students that I will examine in the next section, which states that "this guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate … [compliance] with their legal obligations" (OCR, 2016, p. 1).

II. The Documents that Resignified Title IX

a. A Brief Timeline

For most of Obama's tenure, the DOJ and the OCR addressed Title IX's relation to gender identity, transgender status, and gender nonconformity fairly circuitously by incorporating it into the less significant documents or by discussing it indirectly in Dear

Colleague Letters of a different subject. This occurred first in a 2010 Dear Colleague Letter which, through the main discussion of bullying, states that Title IX also protects transgender and gender nonconforming students. Then, between 2011 and 2015, a number of resolution agreements involving individual students' claims of their schools' discrimination on the basis of gender identity or transgender status were disseminated publicly, each of which were intended to demonstrate how Title IX could be deployed in such cases elsewhere. One such resolution with Arcadia Unified School District in California in 2013 was particularly significant for two reasons. First, it established that Title IX could follow the definition of sex discrimination in the corresponding statute for employment, Title VII[4], which includes discrimination on the basis of gender stereotypes, and (2) it was the first time the bathroom problem specifically was acknowledged at the federal level and by the OCR (Geidner, 2013; New York Times Editorial Board, 2015;.[5] Next, in 2014, the OCR circulated a document entitled "Questions and Answers on Title IX and Sexual Violence," which addressed the controversial Dear Colleague Letter of 2011 that strengthened Title IX's mandate for schools to protect students from and be responsive to sexual assault. When they posed the question, "Does Title IX protect all students from sexual violence?", the OCR firmly answered "Yes," and then listed transgender students among those covered, once more setting precedent for the inclusion of gender identity under the purview of Title IX (OCR, 2014, p. 5). Thus, either through related but separate issues or by setting an example in local cases, the DOJ and the OCR incorporated discrimination on the basis of gender identity and gender nonconformity into the sex-based discrimination statute.

[4] Title VII is the anti-discrimination law for sex in the context of employment. *Hopkins v. Price Waterhouse* (1989) established that "gender stereotypes" are incorporated into sex discrimination.

[5] According to the same NYT articles ^, those "rules were repealed in a settlement between the school district and the government"

b. Close Readings of the 2010 and 2016 Dear Colleague Letters

"Dear Colleague Letter: Harassment and Bullying" (2010)

The 2010 Dear Colleague Letter highlights how a guidance on a separate issue, such as bullying, can also have the function of amending the meaning of Title IX itself. The Letter begins by acknowledging the recent efforts undertaken to tackle bullying, but then informs schools that policies must be adopted since this behavior can also be a form of discriminatory harassment on the basis of a protected characteristic, and thus they are liable for it under law (OCR, 2010, p. 1). The Letter first details what constitutes bullying and harassment, and then includes several hypothetical examples and recommendations for how to respond to each. The OCR gives scenarios for three different anti-discrimination statutes related to education: Title VI, which protects on the basis of race, color, or national origin, Title IX for sex, and Title II and Section 504 for disability. The section on Title IX is divided into two headings, "Sexual Harassment" and "Gender-Based Harassment," and provides a different example for each (OCR, 2010, pp. 6-7). While these two examples are likely not intended to be representative of all instances of harassment prohibited by Title IX, their codification suggests that harassment will fall into one of these two broad categories, and thus are representative of OCR's understanding of the types of harassment that exist. I will next analyze how the distinction between these two types reshapes Title IX by detaching "sex" from the prohibition of sex-based discrimination and, instead, emphasizes discrimination as only either sexual in nature or based in gender stereotypes.

The example of sexual harassment tells the hypothetical story of a "female student" who, after breaking up with a non-gender specific partner, is "hazed" (because apparently she is also a new student) with "sexually charged names" and "rumors about her sexual behavior"

(OCR, 2010, p. 6). While Title IX does certainly prohibit sexual harassment, it does so because it would not have occurred 'but for' one's sex. However, this example, despite involving a female student, gives no mention of why this sexual harassment is a consequence of her female sex. Furthermore, her femaleness is not only made irrelevant as the cause of the discrimination, but is even removed from the manifestations of it, such as the kinds of names used—e.g., 'slut'—or the derogatory descriptions of her sexuality—e.g., 'she's easy.' While these specific verbal assaults are not provided in the Letter's example, I insert them here in order to evoke what we readily hear when reading such descriptions, which is their inherently gendered connotations. Because they can be so easily inferred from this archetypical story of a teenage girl, this also signals why the authors may not have felt that they needed to write them explicitly.[6] However, the omission is evidence of the production of a problematic distinction in the Letter: the separation and elimination of gender from sexual harassment. Even if we do not know whether the OCR purposefully excluded these, it is telling that the element of the story that would show how gendered norms are so clearly intertwined with "sexual harassment" was not viewed as central to the purpose of the hypothetical case. Thus, the Letter makes a clear differentiation between harassment that is merely *sexual* but unrelated to a person's sex, and, in what comes in the next case, harassment based on gender. This also works to weigh "gender" with what appears to be the much more serious, deep-seated societal ills than what is portrayed in comparison as merely petty sexual inappropriateness. Insofar as the purpose of the Letter is to act as a clarification, the clear absence of "sex" as a recognizable factor in sexual harassment further alienates it as a ground on which the statute operates.

[6] I also infer this language from the Letter's scenario because it resembles a clichéd story of the bullying of female students that is both lived and depicted in countless high school movies. This is another reason I expect (and I think the authors would also expect) the language would be recognizable to most U.S. readers, and therefore, making it explicit could be avoided.

We can already start to see the implications for separating "sex," "sexual harassment," and "gender-based harassment." How is one to establish sexual harassment as sex-based discrimination if the basis for the harm—one's sex (or even gender)—is not even causally connected by the explanation of the prohibition? This is further evidenced by the definition of "sexual harassment" that follows the scenario. After each example, the Letter outlines the OCR's recommendations for how schools should handle the conflict in compliance with Title IX. In this portion for the first scenario, "sexual harassment" is immediately defined only as "unwelcome conduct of a sexual nature" (OCR, 2010, p. 6). The discriminatory behavior is defined so literally it is almost a redundancy, and thus also fails to justify its prohibition as a form of sex-based discrimination. If the harassment is only about sexual aggression as a behavior and *not* a person's sex as the reason for that behavior to be inflicted, how can it qualify as discrimination? Discrimination is distinguished from an individual, localized crime because it occurs on certain, identifiable grounds for which institutions are accountable. By the same token, without any mention of the sex of the hypothetical student's ex-partner, Title IX is further divorced from any suggestion of the hetero-patriarchal power imbalance that it ostensibly seeks to remedy. While this detail is not essential to establish a violation of Title IX, without the context of gender oppression, "sexual harassment" is reduced of its severity or its perception as truly detrimental for women's lives and collective futures, which was the impetus for creating the statute in the first place. The document that is intended to clarify legal duties according to Title IX is not only obscuring how sex discrimination functions, but seems to be also actively distancing itself from "sex" as a category or as a site of discrimination.

We may be able to understand the reason for this distancing as a decision to move toward "gender" as the basis for discrimination. This is evidenced in the Letter's second example of bullying as a form of "Gender-Based Harassment." This case is about a "gay high school student" whose gender or sex is nowhere directly specified as the student's in the prior

example (i.e., “female”), but hinted at with male pronouns and what is said to have prompted his harassment: diverging from normative expectations of being a “teenage boy” (OCR, 2010, p. 7). This is manifested by his “effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices,” which resulted in being “physically assaulted, threatened, and ridiculed” (OCR, 2010, p. 7). The omission of the hypothetical student’s sex or gender identity may be an oversight, or assumed to be evident from the details mentioned above. However, given that the issue at hand is gender identity, one could expect that the OCR would be conscious that pronouns do not necessarily reflect either one’s sex assigned at birth or, if preference is not explicitly stated, one’s self-identified gender. Furthermore, within this context, it is also doubtful that the OCR would assume that a student’s assigned or expected gender presentation, i.e., “boy,” would necessarily align with the gender with which one identifies. Thus, the OCR would likely not take for granted that its mention of normative boyhood would indicate that the student in question is in fact a boy. From this, we could speculate that the omission strategically distances the student’s sex and gender in order to more centrally focus on “stereotypes” as the basis for discrimination.

Through this scenario, the OCR intends to demonstrate how Title IX “also prohibits gender-based harassment … based on sex or sex stereotyping” (OCR, 2010, p. 7). The scenario describes a student who does not adhere to gendered expectations of masculinity, which are formulated through the stereotype of the “teenage boy,” and is, on that basis, discriminated against. The OCR’s explanation of the scenario is careful to point out that the discrimination is not based on the student’s self-identification as gay, which is not protected under Title IX, but rather on his various expressions of his gender that disobey norms of masculinity (OCR, 2010, p. 7). In this gesture, the OCR attaches discrimination not to a person’s sex, but to the assumption of a correlated gender, which is then characterized as nothing more than a stereotype. By not naming the student’s sex, it ceases to be relevant as the cause of the

discrimination. Instead, for sex discrimination to be established, one need only to show that a student was disadvantaged because he does not conform to and express the gender that is expected of him. Thus, on the surface, Title IX expands its purview. Regardless of a student's cisgender, transgender, or non-binary gender identity, discrimination can be proven as long as it can be shown that manifesting non-normative behaviors resulted in being disadvantaged.

However, Title IX also narrows its frame on what can constitute discrimination: stereotypes. This has implications not just for cisgender women who see their oppression as stemming from their female sex, but for transgender students as well. First, we might ask how, absent the acknowledgement of a student's sex at birth, one can establish what gender stereotype was expected and, thus, how the student deviated from it. Without establishing the "stereotype," it would be difficult to prove that a student's behavior constituted non-conformity. If a student's non-conforming gender identity cannot be shown as obviously perceivable and in conflict with the "stereotype," it would be impossible to argue that any harm a student endured was based on a discriminatory attitude toward those who reject said stereotype. Were "sex" to have remained in the picture of Title IX, these steps could justify DOJ's and OCR's link between "sex" in Title IX and "stereotypes"—one's sex is what determines the gendered expectations imposed on a student—and thus show why gender identity could be encompassed within the same discrimination statute. However, this might work against transgender protections because it maintains the predominance of "sex" as the root of discrimination. Thus, as evidenced by the two examples, the agencies have abstracted "sex" to the extent that it cannot be identified as the root cause of gender stereotypes and, thus, the basis for discrimination. The result is that discrimination claims then become reliant solely on nebulous "gender stereotypes," rather than any sense of where they might come from, sex or otherwise.

Furthermore, defining a stereotype could be a difficult if not counter-productive task in itself. It would by definition require a clear account of the behaviors, self-presentation, and

preferred activities or interests typical of a gender—the very components described by the OCR as constituting one's gender. Take the example at hand of the "teenage boy." If we attempt to describe the stereotype of a "teenage boy" as depicted, for example, in American popular cinema, we would likely be constructing the figure of a white, heterosexually driven young man with interests and professional aspirations that reflect those accessible and respectable for middle- or upper-middle class non-immigrant Americans. How could one not deviate from such an unattainable and minority—even if universalized—profile? And as such, how could this stereotype be a useful benchmark for judging whether discrimination occurred given its inapplicability and exclusion for most? However, one could refute this by saying that stereotypes could be defined as the normative beliefs about teenage boys within a particular community and informed by the local political, class, and racial makeup. But this then presumes that local stereotypes would be self-evident and explainable, and that this community would be homogenously unified on their idealization of a particular teenage boyhood. Even if that stereotype could be accurately articulated, the severity of its enforcement could be easily understated or refuted by virtue of being so locally contingent or non-universally normative that it is hardly rigid enough to provoke such a backlash against someone who neglects to conform. Either way, defining an enforced stereotype as the grounds for discrimination risks reifying it as such through its very construction as the norm. As such, it also essentializes the gender as it seeks to protect deviations from it.

Here, I will make a brief digression to discuss *Smith v. City of Salem*, a 2004 court case in which a transgender woman relied on the concept of gender stereotypes to argue her discrimination claim against her employer. This case perfectly exemplifies both the shortcomings of this concept as an adequate means for transgender legal protections, as well as how it reifies gender norms. Smith was a firefighter who argued that, upon transitioning from male to female, she was unjustly targeted by her supervisor and the fire chief when they

mandated "psychological testing," their intent being that she would simply rather resign than submit to it (Kirkland, 2006, p. 83-84). Smith was in fact successful in this case, but for reasons that negated her transgender identity and positioned her, rather, as simply a man deviating from male stereotypes (Kirkland, 2006, p. 95). This is because the case was decided on a previous precedent from the 1989 *Price Waterhouse v. Hopkins* case, in which the concept of gender stereotypes arose and was said to be encompassed within the prohibition of sex discrimination. However, this case concerned Ann Hopkins, a cisgender woman who was denied promotion on the grounds that, despite being "highly competent," she was unsuitable for the position because of her unfeminine speech, mannerisms, and appearance (Kirkland, 2006, p. 92). Thus, Hopkins won her claim on the ruling that she was discriminated against as a woman who failed to conform to feminine stereotypes.

When the concept of gender stereotypes was applied to Smith, it posited her as a man who deviated from stereotypical male norms by "[wearing] dresses and makeup" (Kirkland, 2006, p. 94). Even though Smith won her claim, the law was blind to her transgender identity, even though the discrimination was a direct result of notifying her supervisor and co-workers of her transition (Kirkland, 2006, p. 83). Although this characterization of Smith is problematic in itself, it is also an extremely precarious legal basis for transgender protections. This is because it leaves it to the courts to decide on discrimination claims only within the narrow framework of benign stereotype deviation, rather than something categorically distinct. If a transgender person contends that the discrimination occurred because she *is* transgender, she would not win the case under current law, and would too be victim to legal erasure. The problematic nature of this use of "gender stereotypes" is augmented by its standardization of male norms. According to Anna Kirkland, a gender and law scholar, this ruling suggests that "most men do not put on feminine accoutrements but that the few for whom that is not true should not be penalized" (Kirkland, 2006, p. 91). Thus, rather than target pervasive norms, this

conceptual shift in the basis for discrimination may actually re-inscribe them, thereby keeping transgender people at the legal margins.

Given the implications of *Smith v. City of Salem*, we might be a little more skeptical of what "gender stereotypes" offers to Title IX as a significant, lasting improvement to legal protections. While it was used successfully in this employment case and thus may be highly desirable to incorporate it into education statutes, in the spirit of taking a moment to pause, we might consider how "gender stereotypes" undermine transgender existences at the same moment as translating them into the law. In moving on to the final Dear Colleague Letter, I will further analyze how the law reconstructs "transgender" while also continuing to explore what is lost in "sex" as its own legal category.

"Dear Colleague Letter on Transgender Students" (2016)

The final Dear Colleague Letter released by the OCR and the DOJ during Obama's presidency is the first to directly address and articulate what Title IX means for gender identity and transgender students. The Letter communicates that Title IX "encompasses discrimination based on a student's gender identity" (OCR, 2016, p. 1), while also explaining that "The Departments treat a student's gender identity as the student's sex for purposes of Title IX" (OCR, 2016, p. 2). In the former statement, "gender identity" is added to Title IX's protections, presumably alongside "sex" but not as a replacement of it. However, in the latter statement and throughout the rest of the Letter, it is simply made equivalent to "sex," and thus functions more as a single, conflated classification. By 2016, the DOJ and the OCR have almost entirely lifted "sex" from Title IX as a distinct component of the statute, and positions gender instead as the primary basis on which discrimination claims are made. This is evidenced in the list of terminology and definitions provided, as well as the instructions for new standards of equality

and relevant procedures in various school functions, which will be the focus of the analysis in this section.

At the beginning of the letter, a list of four terms are provided and defined: "gender identity," "sex assigned at birth," "transgender," and "gender transition" (OCR, 2016, pp. 1-2). It is already telling that "sex" as a discrete concept is not included. The only definitional claim that refers to "sex" is "sex assigned at birth," by which they mean no more than "the sex designation recorded on an infant's birth certificate" (OCR, 2010, p. 1). While the determination of one's sex at birth is one facet of how oppression relates to sex, the definition denies any importance beyond that of bureaucratic, routinized recording. While one could argue that "sex" is not seen as relevant for the specific topic of this Letter, the word is used repeatedly throughout in a way that redefines its significance in relation to Title IX. Furthermore, without any clear definition of the term at the beginning alongside the others, its importance is diminished, in part because it becomes a vague, meaningless word that is at times used interchangeably with "gender."

One example of this unclear usage of "sex" is in the definition of "gender transition," where the meaning of sex is either fused with gender or ambiguous in itself. The Letter states that gender transition is "the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth" (OCR, 2016, p. 2). What does it mean to "assert" a sex? It might be assumed that this means undergoing medical treatments, such as hormone therapy or sex reassignment surgery, to transition one's sex characteristics. However, the OCR and the DOJ make clear that, per legal precedent, schools cannot require medical certificates to authenticate students' transitions so that this does not become the criteria for equal treatment (OCR, 2016, p. 2). Given this point, how is "asserting" a sex different from asserting a gender identity? This might be answered by framing the definition as an inversion of more common understandings of transitioning. Instead of

describing transitioning as expressing a gender that is *not* aligned with one's sex assigned at birth, it is understood as in fact aligning one's sex so that it expresses one's 'true' gender identity. This inversion has two implications. First, it diminishes the significance of "sex" as not one's 'true' self. To be clear, this is *not* to say that one's sex assigned at birth is necessarily one's 'true' self. I am not suggesting that transgender people's 'true' self is the sex with which they were born or designated. Rather, I argue that "sex" is reduced to something that cannot be 'true' or cannot have significant implications on one's life, sense of self, or experience of oppression. Instead, "sex" is only either an arbitrary classification on a birth certificate or something that is incidental in relation to one's 'true' self. This either serves to reduce "sex" to certain performances, which are later stated as changes in dress, names, and pronouns (OCR, 2016, p. 2), or to make "sex" and "gender identity" one and the same as something that is "asserted."

Second, the inversion bifurcates "sex" and "sex assigned at birth." The definition of the latter term suggests that sex is distinct from gender identity because it is designated at birth. However, within this definition, it is instead something that is "asserted." Given that the purpose of the document is to clarify, which is likely also seen as informing school administrators of current understandings of gender issues, the *lack* of clarity around the term "sex" evidenced by its puzzling and inconsistent uses suggests that it is not an important, relevant, or independent concept. This further dislodges "sex" as a discrete and real site of discrimination.

The overarching instruction given in the 2016 Letter is that schools must allow their students equal access and participation in the "sex-segregated activities and facilities" that 'matches' their gender identity, regardless of transgender status (OCR, 2016, p. 3). A main component of this is "[treating] students consistent with their gender identity," which must begin as soon as the student or the student's guardian "notifies the school administration that the student will assert a gender identity that differs from previous representations or records"

(OCR, 2016, p. 3). The procedures or mechanisms for this notification are not specified, except to prohibit requiring any externally attained certification or identification that would indicate the student is transgender or transitioning, such as the aforementioned medical documentation. However, when this notification happens, the school must begin using the student's new name and preferred pronouns, if the student adopts them. This is also important for the student's educational records, which should be "updated" accordingly (OCR, 2016, p. 5).

The underlying narrative of the Letter is not one of *being* transgender, but about *transitioning*. This is expressed through the emphasis on notification as a kind of definitive 'coming out,' and by determining that the appropriate and sensitive response of the school is to instantly 'switch' to placing transgender students in the activities and facilities correlated to their recently announced gender identity. While transgender students certainly deserve respectful acknowledgement of their gender identity when they come out, the Letter never recommends any measures to support the student as a *transgender* student. What is characterized as fair and inclusive accommodations are ways in which the school can recognize students legibly as their gender identity. The language of "correcting" is one of reclassifying, such as reassigning the student to the other athletics team or recoding their records (OCR, 2016, p. 5).

While mandating schools to adhere to these changes to Title IX may improve the treatment of transgender students, we should also be wary of how the Letter's replacement of "sex" with "gender identity" may be counter-productive for both. As already established in this analysis, eliminating "sex" as a relevant factor of students' lives and experiences in schools could severely undermine their legal protections when discrimination occurs on that basis. However, using "gender identity" instead and treating the concept as a way to simply reclassify students might also limit the intended advancements from the changes to Title IX. Just as maintaining some legal designation of a person's sex may be important for a cisgender person,

it may also be important to retain some acknowledgement that a student is not simply a new gender, but is transgender. If a transgender student is discriminated against, it is likely not simply because she is, for example, a girl, but because she is a transgender girl. Thus, if the Letter does not view transgender as a category in itself, but just a "status" which will ultimately lead to a different gender expression, the statute may fail to protect the student from discrimination on the basis of actually being transgender. Just as in *Smith v. City of Salem*, not allowing for legal acknowledgement of the specific oppressions incurred as a transgender person diminishes its purported progressiveness.

Finally, it is telling that the Letter prohibits schools from rejecting or not adequately adapting to students' stated gender identities and constitutes this as discrimination under Title IX, but makes no clear explanation of how discrimination might occur simply because a student is transgender or identifies as non-binary. In this sense, the Letter still treats gender as a binary, and thus constructs transgender people merely as transitioned people. This formulation also excludes people who do not identify as either a man or a woman. While this is problematic in itself, it is also revealing of the translation that one endures in order to become legally legible. We might then question what is being gained in this turn to "gender identity" beyond solely recognition—that is as long as one's gender is recognizable. To what extent does changing "sex" to "gender identity" in Title IX actually create new protections for transgender students? Without denying the historical significance of legal recognition, we should consider whether "gender identity" just reproduces a static binary, although now one based on nebulous stereotypes that, even if violently normative, are challenging to both verify and stake one's claims of discrimination.

PART II

Prelude:
From Law to Theory

The reformulation of Title IX in the Dear Colleague Letter from May 2016 was the spark for the most recent iteration of the bathroom debate. While the bathroom is certainly one of the targets in the Letter and an important site of contestation for this project, I have sought in the previous chapter to also show how the changes to Title IX affect feminist, queer, and trans politics and legal advocacy more broadly. This occurs through its determination of the legal subject as gendered, not sexed, and the basis of discrimination as gender stereotypes, not sex-based disadvantage. Determinations within the law of course do not entirely define feminist, queer, and trans politics since these do not exist solely in the legal realm or through legal expression. Nevertheless, this shift seems to reflect a larger philosophical judgment by the law on who is oppressed and the root of that oppression, which will dictate how oppression is articulated before the law and, thus, who and what are articulated. Furthermore, both this shift in the law and the corresponding bathroom problem trigger and inflame issues that have been at the core of feminist, queer, and trans thought, experience, and politics, and indeed within the legal field itself. Perhaps what adds fuel to the contestation between feminists and queer and trans theorists is that the meanings ascribed to these issues differ, and thus the battles fought over them may, at times, counteract each other. Among these issues are two that strike at both the bathroom and Title IX case and these recurrent themes for critique: the public/private division and categorizations, legal and otherwise, that relate to policing and violence. As an introduction, I will briefly discuss how the significance of these themes for both the two theoretical camps and the law are elicited in the debate on the bathroom and Title IX.

The first issue is the perennial question of how the line is drawn between the public and private ‘spheres,’ which is very much evoked in this current case of the bathroom and the

changes to Title IX. The public and the private take on many layers of meaning here, and their separation is not unambiguous or uncontested. First, the 'spheres' immediately denote space, and the configuration of the bathroom, as at once a private space and in the public realm, poses an unusual dilemma for the classical division. Second, from the standpoint of the law as formulated through liberalism, the line between the public and the private also refers to the limits of governmental reach, and is traditionally thought of as a check on state authority and a protection against intrusions into individual autonomy (Barnett, 1998, p. 97). Although we may be dubious of this account of the liberal state, by its own application of the law to the bathroom, we should consider how it asserts itself into this space. How does the state claim and constitute its authority to redraw this line and designate the bathroom as a public or private space, thereby positioning itself as accountable to and/or managerial over those within it?

These manifestations of the public/private divide point to key problems for feminist and queer and trans theorists. Feminists have long contested the placement of this line in several arenas, and have examined the underlying reasons for it. This includes, for example, a critique of the law's refusal to respond to male violence suffered by women in the 'private sphere' of the home because it has been deemed beyond its purview (Rhode, 1991). Thus, within feminism, this issue recalls the ongoing problem of women's denied access to the public sphere and the rights that it would confer, such as a recognition of and accountability to women's concerns (Pateman, 1988; MacKinnon, 2000). Participation in public life is also a queer and trans concern, but in the present case, entry is *effectively* barred through the unavailability of or hostility in the basic facilities and services one requires to *be* in public (Halberstam, 1998). Additionally, theorists have analyzed how the control of those considered gender or sexual deviants has been constructed into the public in the name of the public *good*, interest, or safety (Bersani, 1987). Without suggesting that these manifestations of the public/private issue are experienced exclusively by either 'group,' these brief accounts allude to the significance of the

public/private issue for both groups, and how the meanings attached to the issue may differ for each as informed by how these oppressions have been experienced and theorized.[7]

The second issue I will explore in Part II is the relationship between categories, policing, and violence. The way that the issue of categorization emerges from the bathroom problem and in the defining of the legal subject in Title IX is perhaps obvious, but also has deep significance for both theoretical and political camps. Within queer and transgender thought, the two signs on the doors of the two public bathroom options are significant not merely as a representation of the gender binary, but more so as an embedded enforcement mechanism for 'fitting' within prescribed categories which simultaneously constitute the norms required to 'fit.' This is especially topical to some key concepts within the queer and transgender domain, such as 'passing,' legibility, and deviancy (Stone, 1987; Davis, 2009; Puar, 2005). While this issue may appear to be more familiar to queer and transgender theories, it also exists within feminist concerns, albeit perhaps in a different vocabulary. Whereas the localized dynamics that produce this widespread regulatory system may be the focus of queer and transgender theories, within radical feminism, these regulatory operations are understood as primarily directed at women and as reifying a sex-caste hierarchy. From a radical feminist perspective, their embeddedness, internalization, and violent enforcement is also a focus of analysis, but the primary objective is their abolishment as the mechanism for women's subordination (Jeffreys, 2014).

At the legal level, classification is deeply ingrained in the framework of anti-discrimination law. Individuals are organized into "protected classes," such as race, sex, religion, etc., and instances of discrimination are understood as existing solely within one of these classes (Fredman, 2012, p. 38).[8] Furthermore, as we have already seen in the previous

[7] I also do not want to suggest that these ways that the issue of the public/private divide arise are exhaustive. The public/private issue is a broad one, and thus manifest and are significant for the 'groups' in a multitude of ways.

[8] This is exemplified by the difficulty the law has in computing intersectional oppression (Fredman, 2012, p. 39).

chapter, the definition of these classes or what constitutes harm against them are not always straightforward or all-encompassing. Nevertheless, individuals must be able to conform to these definitions in order to be recognized as legal subjects, and be able to explain their experiences of oppression within the existing framework in order to be protected by the law. However, the problem is not solely *how* one exists within the law, but the violence one is vulnerable to when one does not or cannot. In this sense, the system of legal categorization also commands adherence and threatens violence should one deviate. However, apart from deviation, we should also question how people are *left out* of the law, why, and what prospects this offers for the state.

In what follows, I will explore these two themes independently in the two final chapters, which comprise Part II of this project. Within each chapter, I will draw out these themes at each level of this study: the case, the theoretical dispute, and the law. I will analyze how the bathroom problem and Title IX debate emblematize these themes and, thus, why it is so significant for radical feminism and queer and transgender theories. Simultaneously, I will investigate the law's negotiation of each theme in the current case in order to ask how the liberal state and legal system reformulates oppression, gender, and critique.

Chapter Two:
Categories, Legibility, Violence

As we have seen, the current debate over the public bathroom materializes out of the new legal interpretation of Title IX. The written law and its manifestation in the bathroom problem, which together comprise the case examined in this study, both involve a negotiation of gender through categories, although its presentation slightly differs. First, an important element of the bathroom problem is transgender people's confrontation and engagement of a social space that is organized by gender categories, and how they place themselves or are sorted into those categories. Second, the legal contention is fundamentally about the definition and deployment of the category of sex within Title IX, and more broadly how legal protections operate through a system of classification.

These two dilemmas of categorization intertwine around the question of legibility. As we will see in the forthcoming accounts, the scrutiny that one is subjected to in bathrooms revolves around the legibility of a person's gender on the basis of the criteria of that category. Similarly, access to and protection by the law is, at least in part, determined by how legible a person and her experiences are in the language and precedents of the law. Consequently, the impetus for changing Title IX stems from an advocacy for the legal recognition of transgender and gender nonconforming people that remedies their previous illegibility. It is clear then why the reformulation of the category of "sex" in Title IX is framed as an act of inclusion, rather than a redefinition, insofar as it seeks to broaden the legible scope of the law. Finally, the problem of categories is underpinned by the threat of violence, which has been a major focal point in the bathroom and legal debates for both camps. Transgender people have encountered much violent assault and ejection in bathrooms that is justified by improper adherence to gender categories (U.S. Transgender Survey, 2016), while radical feminists classify the violence inflicted on women as fundamentally male, and argue that the avoidance of naming—a process

necessarily involved in categorization—oppressors and oppression is itself an obscuring of and thus complicity with that violence.

In this chapter, I will analyze the relationship between categories and their legible representation, and the role of violence in the arrangement of this dynamic. I will begin with a deeper examination of how the bathroom problem and the legal case are characterized by this relationship. Next, I will explore why this issue is of significance for queer and transgender and radical feminist theorists. Finally, I will argue that the law plays an important role in constructing this relationship and, consequently, the debate itself. Further, I will evaluate the impacts of being made legible in the eyes of the law.

I. The Queer Bathroom Problem

Prominent queer theorist Jack Halberstam analyzes the bathroom problem in a section of his[9] influential book, *Female Masculinity*. Halberstam's recounting of one bathroom encounter will provide a narrative of this problem that is a useful starting point for understanding the dynamics of gender categories and policing at this site.[10] Halberstam describes and analyzes an episode from transgender activist Leslie Feinberg's novel, *Stone Butch Blues* (Halberstam, 1998, p. 22). In this scene, the masculine-presenting woman

[9] In a 2012 blog post, Halberstam explained that he did not have a strong preference for either male or female pronouns, and rather sees "floating gender pronouns" as a "refusal to resolve my gender ambiguity that has become a kind of identity for me" (Halberstam, 2012, para. 2). At first, I began using male pronouns to refer to Halberstam as he now publishes under the name Jack, rather than Judith (although in the same blog post he said he still uses both). Even since learning that Halberstam uses both, I still hesitate to use feminine pronouns because using pronouns correlated with a transgender person's birth sex is often considered highly problematic and negating of that person's identity.

[10] Although this account does not involve a self-identified transgender person, it deals directly with the question of gender legibility and its policing. However, it should be noted that radical feminists take issue with the disappearance of butch women into the category of transgender men (Valentine, 2007, p. 48).

protagonist, Jess Goldberg, enters a women's bathroom and is observed by two women patrons who are there doing their make-up. Once Jess is in the stall, the women playfully debate among themselves whether Jess is a woman or a man and one says, "We should call security to make sure" (Halberstam, 1998, p. 22). In Halberstam's analysis, the women's jocular tone with which they consider calling security suggests that they did not actually feel threatened by Jess' presence, particularly because if they really had, they would not have announced it in such a way (Halberstam, 1998, p. 22-3). Halberstam concludes that this "casualness … indicates that they know Jess is a woman but want to punish her for her inappropriate self-presentation" (p. 23).

This episode and Halberstam's analysis contain the common elements of the bathroom encounter that we might hear in a mainstream news report: normatively and non-normatively gendered characters, the potential threat, and recourse to an authoritative or policing entity. However, in this conceptualization, there is a particular orientation of the relations between these elements. The panic is not directed at Jess as a suspected violent intruder or the inappropriateness of her presence. Rather, the panic is Jess', who is made insecure both by being mocked for her gender display, and perhaps more disconcertingly, that she still cannot be completely certain that their "toying" means that the women are really only teasing about calling security (Halberstam, 1998, p. 22). If they were to report Jess to security, she fears the possibility of violence that can be expected from any policing entity just as, in a later reference, Halberstam describes another butch woman character who is "beaten by a bouncer" (Halberstam, 1998, p. 23). Thus, for a "gender deviant" (the term Halberstam uses), the bathroom problem is characterized by the observers' scrutinizing of Jess' gender, sparked by its illegibility, and Jess' anxiety about the potential forthcoming risks and harm that might come from a police encounter. However, the policing does not occur only with the potential arrival of security. Rather, Halberstam's reading of the women's audible deliberation as intended to

"punish" Jess is also evidence of policing. Thus, from a queer standpoint, informed also by Halberstam's own experiences, "the bathroom problem is much more than a glitch in the machinery of gender segregation and is better described in terms of of the violent enforcement of our current gender system" (Halberstam, 1998, p. 25). Bathrooms manifest a direct link between the ambiguity of an illegible gender and a violence that seeks to prevent it.

This relationship between gender categories, legibility, and violence is further illustrated in another narration of the bathroom encounter provided by Halberstam. Here, it is chronicled as a two-step process. First, the statement "You are in the wrong bathroom!" suggests the "gender-ambiguous person" is "not-woman" (Halberstam, 1998, p. 21). Then, the response, "'No, I am not,' spoken in a voice recognized as not-male" reveals something "even more scary": the ambiguity of being both "not-man and not-woman" (Halberstam, 1998, p. 21). Following this, Halberstam indicates that it is this ambiguity that marks this gender as "deviant" (Halberstam, 1998, p. 21).

In the first narration we can understand how the bathroom creates a confrontation with gender categories beyond the initial either/or represented in the signage, while in the second, we can more readily see its connection to the Title IX changes. In this account, the cause of the interrogative or potentially physical violence is the ambiguity of the gender nonconforming person. In neither narration is the person's gender or sex established. Now recall the example of "Gender-Based Harassment" from the 2011 Dear Colleague Letter discussed in Chapter 1. In this scenario, the student's sex or gender is also never specified or established. This is significant because it demonstrates the legal strategy behind the shift in Title IX. If the mutually-reinforcing objectives are to (a) pin discrimination claims on an imposed stereotype, and (b) make Title IX more broadly inclusive of people who do not conform to gender in a variety of ways, then it is necessary to minimize the relevance of the sex or gender of the person making the claim. If Title IX is to be used to win discrimination claims not directly based on

sex, it needs to be positioned as a prohibition on harmful gender-related stereotypes regardless of the plaintiff's sex. Similarly, by leaving the basis for the discrimination purposefully vague but "gender-based," it leaves open the cases to which Title IX can be applied and used as support. Thus, if Halberstam suggests that appearances and ambiguous gender expressions are at the heart of this harassment and violence, maybe stereotypes are a useful grounds for discrimination.

On the one hand, this shift presents an unconventional and potentially transformative approach to the current framework of discrimination law, which has mostly rested on the "but for" principle described in the first chapter. What could it mean to center discrimination cases on the harm, rather than the victim? Might the law's current imbalance of power be offset with a shift in who is subjected to interrogation and skepticism? Possibly. But on the other hand, this may not actually substitute the "who," but replace it with a "what," which may pose its own drawbacks. If a gender stereotype is the subject of such a case, is it not just a problematic cultural idea that is indicted and investigated, rather than its root or those who inflict or exploit it? While this idea of putting a stereotype on trial may still be an intriguing prospect, one has to be suspicious of who then evades questioning and accountability, and whether the current justice system could carry this out in good faith. These are the kinds of doubts that lie at the root of radical feminist philosophies that will be discussed next, and which help to explain why the stakes of this legal shift are high for them too.

II. Radical Feminism's Identification of Women as a Class

At the heart of radical feminism is a theorization of how the category of women is in a subordinate relation to men, both as women and through their collective construction as a category. An early example of this theorization is from philosopher Ti-Grace Atkinson, which

she wrote in 1969 as part of The Feminists, a radical feminist organization that had broken off from the more reformist National Organization of Women (NOW) (Ellis, 1992, p. 124, 137). While the relationship between sex and gender is not yet explicated here as it is for Jeffreys per my earlier discussion, from Atkinson's argumentation, we can glean how the problem of the woman category is foundational for radical feminist thought, and thus why it would bear significance in the current bathroom and Title IX debate.

Atkinson begins her critique with the statement, "There has never been a feminist analysis" (Atkinson, 2005 [1969], p. 82). She bases this claim on the observation that, despite women's acknowledgement of and actions against their subjugation that "have often implied that women form a class," there has never been an analysis of how this class comes to be, nor "the implications of this description to the system of political classes" (Atkinson, 2005 [1969], p. 82-3). Within this critique, Atkinson formulates the mandate that a class analysis of women is crucial if feminists are to have any grounding for their political advocacy. In fact, in this piece, which carries some weight of self-definition due to its title, "Radical Feminism," Atkinson defines these politics against a rights-based liberal feminism. She argues that liberal feminism's individual campaigns *for women* are inevitably undermined if they lack a justification *for women* as collectivized within a subordinated class. Atkinson argues that the lack of this sort of analysis manifests in the "dilemma of demanding equal treatment for unequal functions." Atkinson challenges this demand as flawed logic. "On what grounds" can these rights be claimed if the differentiation, inscribed by patriarchy, between men's existence and women's function are left intact (Atkinson, 2005 [1969], p. 83)? Atkinson argues that the irresolution of the counterparts of such a demand will persist absent an understanding of how the distinction of women as a class has been constructed. Thus, radical feminism comes out of an opposition to a more moderate political strategy of liberalism, and roots its own politics in a

philosophical position that argues for the necessity of acknowledging and understanding the larger sex-class system that underpins their discrete advocacies.

Therefore, from its origin, radical feminism stakes its own politics on the class problem of women. However, to be clear, the impetus to build this analysis is not to assert and unite over a shared identity, but rather to indicate and interrogate a shared oppression. In fact, this oppression is itself produced out of the classification of women. According to Atkinson, the common understanding of a "political class" is a group of people differentiated from others (Atkinson, 2005 [1969], p. 85). However, what is "omitted" from this understanding is that the distinctions that create such a class are "artificial":

> [Classes] define persons *with* certain capacities *by* that capacity, changing the contingent to the necessary, thereby appropriating the *capacity* of an individual as a *function* of society. … A "function" of society cannot be a free individual. (Atkinson, 2005 [1969], p. 85; emphasis in the original)

From a radical feminist perspective, the demarcation of a class serves to reduce women to a common and identifiable feature—the capacity to reproduce—which then becomes not only their primary purpose in society, but their *raison d'être*. Through this analysis, we can draw out the process of classifying as a self-reinforcing cyclical nature—women exist to be a function, and their existence as that function is necessitated by society, so women exist. Furthermore, Atkinson claims another defining principle of classification: "individuals [are] grouped together by other individuals" (Atkinson, 2005 [1969], p. 85). The artificiality of the "class" of women stems from its tautological constitution, as well as from its external assemblage as distinct from *non-classed*, and thus non-functionalized, individuals, and are thereby subordinate to them. In breaking down these operations of classification, Atkinson demonstrates how the class of women is produced from and contributes to their oppression.

Herein lies a tension or ambivalence for radical feminism in the concept of class. As we have just seen, for radical feminism, classification is a violent procedure. It is in the act of being classified that women are situated in a subordinate relationship to men. At the same time, radical

feminists insist on the necessity of naming the class in which they have been situated, for this is the reason for women's oppression. In other words, classification is part of the problem, but in order to have a radical feminist politics, we must be able to call out the problem of classification by locating women-as-class in society. While these are not actually contradictory—one can (and perhaps should) be able to identify that which one resists—there is a fine line between identifying a class and upholding it, and this is a nuance that seems to be often lost in understanding radical feminism.

Returning to the case at hand, we can now evaluate radical feminism's stakes in the legal category of "sex" through their philosophical position on the conceptual importance of "class." Radical feminism conceives of women's oppression as primarily based on the distinction of sex. It is thus a priority and a political prerequisite to be able to name women as a distinct, oppressed class of people. Therefore, it is evident why radical feminists view the changes to Title IX's "on the basis of sex"—a term which for them explicitly marks the premise of class oppression—fading away into the grounds of stereotypes, which is therein defined by amorphous social norms with an unclear connection to sex. Furthermore, insofar as radical feminists contest the naturalization of women as classed through their function in society, they are suspicious of occasions in which its explicit naming is obscured or portrayed as irrelevant. This is evident in the conspicuous absence of sex in the Dear Colleague Letters, and particularly so in the 2010 Letter which vacates a female's sex from sexual harassment.

This final point is reinforced by another claim Atkinson makes when asked the question of the source of women's oppression, and what we can understand as another important contribution of this critique to the case. Atkinson is self-critical of her response to this question: "society" oppresses women (Atkinson, 2005 [1969], p. 82). Atkinson critiques making society "synonymous" with "men," because it allows a deferral of direct confrontation with men as the problem through its obfuscation (Atkinson, 2005 [1969], p. 82). If we read the Title IX changes

through this critique, the concept of "stereotypes" functions similarly to "society." It displaces the oppressed subject with a potentially benign phenomenon. Stereotypes, while potentially harmful, are usually more closely associated with an individual's ignorance that can be easily remedied through polite correction, rather than deeply ingrained systemic oppression. The result is language that conceals, which, in Atkinson's terms, leads to "running blindly in the general direction of where [we] *guess* the last missile just hit," and thus a misguided and ineffective response to it (Atkinson, 2005 [1969], p. 84). Even if one is hesitant to place oppression solely on the matter of sex, as radical feminists do, an important question is posed here about who benefits strategically from certain political or legal language, especially when it originates from within the very institution we so often critique. Without asking this question, one risks using language that obscures, rather than protects or includes, and in so doing undermines their own political objectives.

III. Inclusion in the Legal Taxonomy

As we have seen, in current United States written law, civil rights statutes do not explicitly protect people from discrimination on the basis of "gender identity." Embedded in the executive pushes under the Obama administration and in legal scholarship on the matter is the belief that the already existing category of "sex" can be made more inclusive because the discriminations basically all revolve around "stereotypes about how men and women are 'supposed' to behave and about how male and female bodies are 'supposed' to appear" (Currah & Minter, 2000, p. 1-2). As such, Paisley Currah and Shannon Minter, two leading legal scholars in the area of transgender rights, argue that from a "doctrinal perspective," the "most logical course" to gain protections for transgender people would be within current statutes (Currah & Minter, 2000, p. 2). This conclusion is based on the assumption that sex-based and

transgender discrimination are essentially the same and that the fairly simplistic concept of "stereotypes" is able to encapsulate it. What is more problematic, however, it that this assumption reveals a logic that privileges progressive change through legibility within the existing classifications, regardless of how well it describes people's experiences or what might be lost in the process. Unsurprisingly, legal doctrine says that it is more sensible to work within its available channels rather than consider alternate paths, such as for example, the possibility of a new protected characteristic for gender identity, even if it risks unsettling the divisions in the taxonomy of the law.

It may be worthwhile to pause here and consider exactly what is happening with the two terms—"sex" and "gender identity"—and what this reflects about the law itself. Even if we believe infusing transgender protections into the sex discrimination statute to be more inclusive, by virtue of situating this inclusion in a single term, it also becomes a conflation. It is somewhat awkward to do so by essentially equating the two, i.e., by "treating gender identity as … sex for purposes of Title IX" (OCR, 2016, p. 2). Insofar as much of the tradition of gender, queer, and transgender theories has sought to complicate the relationship between sex and gender, the fact that the judicious move is to legally equate them reflects a significant gap between the law and its ability to respond to lived realities and developments in thought outside of its own framework. In order for the law to contrive transgender people into its own logic, gender identity had to be lifted from its social, political, and theoretical meanings.

How might the inventions of the law that make gender identity legible within its won vocabulary reflect back onto the transgender legal subject? This becomes apparent in the kind of language deployed when articulating the accomplishments and end goals of transgender legal protections. Currah and Minter mainly fault this dilemma of legal classification as the reason transgender people are not sufficiently protected under the law. However, Currah and Minter optimistically cite several jurisdictions that are negotiating this classification problem within

the established legal framework (Currah & Minter, 2000, p. 5). For the authors, clarifying the classification is significant because:

> In the words of a recent news story, 'the transgender community … appears to be gaining acceptance as a bona fide minority group.' For the first time, transgender people are forging a shared political identity and coalescing into a visible and increasingly significant political movement. (Currah & Minter, 2000, p. 5)

Here, Currah and Minter are creating a progression from classification to visibility to rights and equality. Once the problem of locating transgender people within the legal taxonomy is resolved, they can be shaped into an identifiable, contained group. It is somewhat telling that the legal and societal "acceptance" of the "transgender community" is premised is on their ability to be named and given the status of "minority group." This is evidenced by the assertion that "for the first time" is a "shared political identity" being formed, as if a political identity not only exists, but can only be associated with collectively insofar as it has achieved legal recognition. It is then logical that the legibility of a group and "political movement" is privileged within the legal logic of classification.

To be clear, I do not want to suggest that transgender activists should halt seeking protections in the law or, consequently, belittle the impacts of not having that protection. Nor do I want to imply that working within this system would necessarily be politically disingenuous. That said, I do want to call into question how individuals' lives are framed and their motivations and personal goals narrated by this particular legal framework that prioritizes legibility. It seems that the will to situate people legibly within the law is cast as progress through visibility and recognition in ends of themselves, and even above a demand for the law to accurately reflect their identities and, thus, adequately protect those individuals.

Chapter Three:
Negotiating Public and Private

The separation of the "public" and the "private" has several layers of meaning when it comes to the state, the law and legal rights, and the marginalization and management of groups on the basis of sex, gender, and sexuality, and certainly race and class as well. The first is when the division is applied as an adjective to space, such as the private domestic space of the home versus the public spaces that are openly accessible or settings where public services are offered, such as schools, post offices, or transportation services. A second layer of meaning is when it is a descriptor of action, such as a person's private preferences or behaviors that are meant to have no consequence for, and thus are not liable to, others, i.e., the public. A third layer, and the inverse of the previous one, is how this division delimits state reach, meaning which types of actions are within the state's jurisdiction and are of public concern, and which are secured against state or legal interference. Finally, we can also think of the public as mobilized as a noun, i.e., 'for the good of the public,' or 'the general public.' Similarly, the private can also refer to private interests, such as pursuits of capital or private property.

This list of the different meanings ascribed to the thematic concept of the public/private reflects a somewhat unproblematized account of a particular liberal, legal, and capitalist paradigm and arrangement of society. However, each layer of meaning has been theorized in radical feminist and queer and transgender scholarship and activism, and has been especially significant in some central critiques, such as those on the inadequate legal responses to sexual violence or on the pretexts employed for social control of 'deviant' segments of society (MacKinnon, 2000; Bersani, 1987). Furthermore, within each meaning, the division itself has been contested as artificial or arbitrary, such as, in keeping with these examples, the differentiation between marital violence as private and rape as public, or the partitioning of the interests of people considered 'deviant' from people whose interests align with particular ideas of public good.

As I will show in this chapter, the theme of public versus private has been of great importance to both the critiques and advocacies of radical feminism and queer and transgender theories. Thus, it is foreseeable that both 'groups' would be invested in the bathroom debate as it touches on so many of these central concerns, and especially so since, underlying the issue of legal rights and access to the public sphere, there resides a skepticism of how the legal concept is used to further marginalize particular groups. While radical feminism and queer and transgender theories may share this concern, there are times when they both seem to enact opposing ends of public or private advocacies. For instance, although radical feminists critique the ways the public has been foreclosed for women, they have also insisted on women's privacy and spaces safe from men's violence (Pateman, 1988; Jeffreys, 2014). Similarly, while queer and transgender theorists and advocates have critiqued the extension of the public as a mechanism of state control, they have also sought visibility and interrogated the concealment and repression of otherized genders and sexualities (Bersani, 1987, p. 201; Stone, 1987, p. 14). All in all, this mere sampling of arguments from either side further demonstrates the complex meanings attached to public and private, and also suggests how their different advocacies may foreground either one based on this issue. Nevertheless, this entanglement of arguments and their conflicts, both internally within each 'camp' and between each other, are all relevant to the case at hand. This chapter will begin to tease out these arguments with the aim of suggesting how the prominence of this problem in the law may actually contribute to the alienation of one group from the other.

I. The Liminal Space of the Public/Private Bathroom

Once again, Halberstam offers a useful account from which the very notion of a public bathroom already complicates the principle of separate spheres. In his discussion of the

bathroom problem, Halberstam compares the differences between the social meanings ascribed to (as well as the "perils" that await in) women's versus men's public bathrooms, both of which depend on the spaces' overlap of public and private (Halberstam, 1998, p. 25). In this reading, men's bathrooms are more embedded with "sexual codes," whereas women's are "primarily gender codes" (Halberstam, 1998, p. 25). Referencing Lee Edelman's analysis of men's public bathrooms, Halberstam argues that in these spaces, the public dimension connotes "homosocial interaction" and the private dimension, "homoerotic interaction" (Halberstam, 1998, p. 25). While Halberstam does not explicitly state why it is not the same case in women's bathrooms, we may glean a reason from his claim that, "The men's bathroom signifies as the extension of the public nature of masculinity" (Halberstam, 1998, p. 25). Insofar as men have almost exclusively dominated liberalism's formulation of the public sphere and the social exchanges that occur there, it is logical that, for men, the association of the public with homosociality would also apply to their public restrooms. In this sense, even contemporary segregated bathrooms draw on traditional ideology of men's and women's separate spheres. At the same time, it seems that the projection of privacy in the public bathroom may contest rules of homosocial engagement that maintain appropriate boundaries in men's interactions.

Halberstam continues then to argue the different inflection of the public/private divide when applied to the liminality of women's public bathrooms:

> Sex-segregated bathrooms continue to be necessary to protect women from male predations but also produce and extend a rather outdated notion of a public-private split between male and female society. The bathroom is a domestic space beyond the home that comes to represent domestic order, or a parody of it, out in the world. The women's bathroom accordingly becomes a sanctuary of enhanced femininity, a "little girl's room" to which one retreats to powder one's nose or fix one's hair. (Halberstam, 1998, p. 24).

Whereas the social meaning of men's bathrooms is, at least in part, defined by their dominance in and claim to the public, Halberstam's analysis suggests that women's rooms are characterized by their historical isolation from it. We can read Halberstam's interpretation of

women's bathrooms as domestic as indicating a need for these spaces to reproduce domesticity outside the home. This refers to the belief that the domain of women is the home, and alludes to ideas of modesty and fragility that would therefore necessitate the creation of this discreet refuge in the public realm. While this certainly is representative of an "outmoded" separation of public and private as Halberstam argues, it is worth noting the source of the ascription of this meaning. According to Barbara Penner's analysis of campaigns for public restrooms for women in Victoria-era London, which will be further discussed later, the "production of an ideology of separate spheres" was itself a strategy to relegate women to the domestic sphere (Penner, 2001, p. 46). Thus, while the homosociality of men's bathrooms reflect their power in determining their sole occupation of the public, so too do the associations that Halberstam makes with women's bathrooms. In other words, describing women's bathrooms as "an arena for the enforcement of gender conformity" is evidence of a normative meaning-making that sought to solidify the attribution of inferior qualities to women. Thus, spaces such as public bathrooms, which do not comfortably sit on either side of the public/private divide, reflect the strategic application of the differential meanings of this concept that manifest still in contemporary accounts.

II. Public Hostilities

Where does this retracing of these social meanings produced out of a tradition of public/private division leave us in understanding the contemporary sex-segregated bathroom? According to Penner, it was only with the "modern industrial" era introduction of a "rigid ideology of gender," which included the heightened moral values of "privacy" and restrictive "bodily display," that bathrooms became segregated (Penner, 2001, p. 36-37). If the segregation of bathrooms by sex is rooted in an oppressive separate spheres ideology, does that in itself

mean it should be undone? While the practice itself may be rooted in women's subordination, it also bespeaks the hostility toward women in the public sphere more broadly. Given how the current debate casts women's discomforts, it might be assumed that campaigns for public bathrooms divided by sex was a response to their previous communality and rooted in a conservative sentiment. However, they were in fact advocated for by women, and especially working women, in response to the total exclusion of women from public facilities (Penner, 2001, p. 39). When public restrooms in London were constructed, they were designated as male, causing women either not to venture into the public or leaving women, especially those who had to be in the public to work, to use alley ways (Penner, 2001, p. 38). Furthermore, as women were advocating for and building these facilities at the turn of the 19th century in London, men of all rank and occupations deliberately ran their vehicles into one such structure 45 times, later arguing against its construction because it obstructed traffic (Penner, 2001, p. 35). Today, this hostility against women in public persists at the site of the bathroom, such as through the invasive practice of secretly recording women using the toilet (Jeffreys, 2014, p. 48). Thus, even if the sex-segregation of these spaces stem from an unequal separation of men and women, might we still consider whether the hostility toward women that underlies it is a reason in itself to maintain the exclusion of cisgender men from these spaces?

This question may actually pose an unnecessary disjunction. It implies an advocacy for the total de-gendering of currently segregated bathrooms. While this has certainly been advocated for in the United States, especially by students in universities such as my own undergraduate institution (Banchiri, 2016), it is not actually specified as a requirement in the changes to Title IX. Rather, the 2016 Dear Colleague Letter states that transgender students must be allowed access to the sex-segregated space or activity that corresponds to their gender identity (OCR, 2016, p. 3). Therefore, we should question whether these legal changes, which do not mandate that all bathrooms become completely open but only to those who "notify" their

schools administrations that they have a different gender identity, pose a threat to cisgender women (OCR, 2016, p. 2). This is heavily disputed by transgender advocates and radical feminists alike. Transgender advocates insist that the bathroom threat is a complete "myth" used to incite transphobic panics (Maza & Brinker, 2014), while radical feminists have tracked the countless cases in which women have been harassed in public bathrooms, including by individuals who have claimed access to women's spaces on the basis of transgender anti-discrimination provisions (Jeffreys, 2014, p. 49). On the one hand, transgender advocacies have at times carried on the tradition of trivializing women's concerns about men's sexual aggressions as mere discomforts, while, on the other hand, some radical feminists have pathologized or discredited transgender experiences, in part by suggesting that those who have taken advantage of these access provisions for their own gratification are representative of all transgender women (Transgender Law Center, 2005, p.5; Jeffreys, 2014, p. 49).

My intent in this project is not to arbitrate this debate. It is of an incredibly sensitive and contentious nature because it challenges people's ability to move freely and safely in the public realm, and strikes at the incredible amount of violence that both cisgender women and transgender men, women, and non-conforming individuals face in their attempts to do so. To make any adjudication on which 'group's' concerns or experiences of violence supersede the other's is, from my standpoint, a profoundly unhelpful task that has taken up too much space in this debate, and which perpetuates the mutual feelings of negation and marginalization. However, I raise this issue and the issue of public hostilities in order to propose that by making 'space' the central focus of public/private concerns, we may be missing the larger problem of how implicit endorsements of the public actually contribute to the sidelining of some concerns over others. Furthermore, we might question how these implicit endorsements of the public as a 'space' supplant the aforementioned dimension of the public as state accountability. In other words, do these contestations over public 'space' in fact reveal that the state has not been

accountable to all individuals insofar as there is a *limit* to the 'space' available for marginalized people to claim almost the same rights? While this is a rather big question that gets at the very organization of the liberal state and law, I will attempt to begin unravelling it in the next section, which will examine how claims to the public may function to simply redraw the line between public and private, and the partitioning of relevant and irrelevant people and concerns.

III. Redrawing the Periphery

When describing what constitutes the public and the private, it is important to remember that despite the discourse of the 'right' to the public described above, rights, as well as their infringement, certainly fall on either side of this line. For instance, public existence can mean both participation in representational politics as well as being forced under the management of public institutions. By the same token, private existence can mean both the prohibition of state regulation of personal behaviors and choices, such as certain sexual activities, or can mean zero legal recourse as a victim of domestic or sexual abuse. The flexibility of these meanings with regard to a person's oppression or empowerment further indicates their arbitrary application. I raise this point because when it comes to campaigning for rights, it seems as though the side on which one situates one's advocacy has more to do with strategy than with a claim to that specific realm. Regardless of where a group stakes their claim to either public or private right, they are still involved in a redrawing of the line that divides the two and, thus, repositioning who resides at the margin.

I raise this point because here I will discuss another case in the United States in which transgender people sought inclusion in legal non-discrimination that, in fact, alienated them on the side of the public. In David Valentine's political analysis of the category of "transgender," grounded in his ethnographic research, he describes how the public/private distinction aligned

with some rights advocacies over others. Valentine analyzes the debates surrounding the Employment Non-Discrimination Act (ENDA)—a federal legislation that would have prohibited workplace discrimination on the basis of sexual orientation—which began with its introduction in 1994, peaked in 2007, when his book went to press, and ended in 2013 when the final attempt at the passing the bill failed (O'Keefe, 2013; Valentine, 2007, p. 258, n. 9). These debates pivoted on the inclusion of "gender identity or expression" in the legislation, which, similar to today's case, would have instilled transgender protections into the proposed law (Valentine, 2007, p. 9). However, there was resistance on the part of some mainstream gay and lesbian activism, namely the leading Human Rights Campaign, to incorporating this language out of fear that it would make ENDA more controversial and even less likely to pass (Valentine, 2007, p. 8-9).

Valentine reads this legal and political debate alongside the subtle distinctions that were also being made between the categories of sexuality and transgender identity. While language of inclusion also dominated the activism of gay, lesbian, and transgender people, it also created categorical differences between sexual orientation for gays and lesbians and gender identity for transgender people, and thus established distinct yet "analogous" political tracks (Valentine, 2007, p. 194). Therefore, this act of "inclusion" in a larger political LGBT movement also laid down the justification for the "exclusion" from ENDA as merely a different and more specific political project (Valentine, 2007, p. 194).

The reason that this case is relevant here is that these distinctions were organized along a public/private divide, and at times this division was explicitly invoked to support rights solely for gays and lesbians. First, the 2003 Supreme Court case that rejected state sodomy laws as unconstitutional, *Lawrence v. Texas*, was won in favor of gay rights because it was determined that sexuality is a private matter for a private citizen (Valentine, 2007, p. 63). This decision reflects the historically active push in gay politics to minimize the more visible and more public

displays of male homosexuality, conveyed through the "overtness" and "flamboyance" of gender transgression (Valentine, 2007, p. 43). Thus, advocacy for gay rights was made more palatable to the larger society, both in the 20th century and again in the ENDA debates, by separating and downplaying the public aspects of homosexuality, i.e., gender deviance. From Valentine's analysis, it is evident how in this case, the group of male homosexuals who were able to normalize their sexualities within the legal framework of privacy, were able to advance their arguments in contradistinction to the less agreeable public and visibly gendered lives of transgender people.

Furthermore, Valentine analyzes the class and racial distinctions also built into the public/private delineation. Referencing Gayle Rubin, Valentine indicates how inconspicuousness was a marker of a gay person's class since the opposite was "not compatible with middle-class employment" (Valentine, 2007, p. 43). Additionally, Valentine pulls out various markers of the 'publicness' of transgender or gender non-comforimity, from the occupation of space, the visibility of non-normative gender expressions, and engagement with public authorities, that also signal racial and class-based hierarchies. These includes "assumptions about criminality, drug use, and excessive sexuality" associated with "nonwhite racial identification" that, concurrent with New York's (ongoing) gentrification, meant greater interaction with police and public institutions (Valentine, 2007, p. 110-111). Moreover, the 'unappealing' publicness of "sex work" and "street life" that is linked with poor people and people of color also coincide with representations of transgender people (Valentine, 2007, p. 201).

Thus, various racial and class-based divisions went into distancing transgender people from gay rights advocacies, which can be viewed as falling on either side of the public and private. On the one hand, mainstream gay rights activists could press on with their claims as long as they were couched in the respectable, discreet nature of white, middle-class, gender-

conforming existence associated with privacy and private choices. On the other hand, various discourses set this opposition to transgender people by couching them as public 'problems' in need of public regulation, associated with poverty or nonwhite 'street life,' as well as drawing literal public attention as excessively sexual and unusual gender displays. Regardless of whether such a dramatic separation was a purposeful strategy, in invoking the private realm and its correlated characteristics, the political priorities of those cast on the other side of the line in the public, namely transgender or gender deviant people, were undermined. We should therefore interrogate how the liberal organization of rights along public and private dictate a repositioning of the line that divides them and evidently re-marginalizes some.

To return to the Title IX case and the bathroom problem, both cisgender women and transgender people are making competing claims to the public sphere. These advocacies attempt to work against restricted access to and mobility in the public caused by institutional barriers and threats of violence. However, rather than solely contest the persistence of these obstructions to the public, which are partially attributed to either camp's insistence on their claim, should we not refocus on the lack of the state's accountability in ensuring that the public is actually hospitable to those traditionally excluded from it? By centering our attention not solely on the issue of 'space,' but also on how the demarcations of public and private determine accountability, we can perhaps challenge the underlying legal logic that characterizes certain concerns as legitimate and actionable and others not. In other words, instead of reusing the political strategy of negotiating the placement of the line between public and private, perhaps we can challenge why advocacies are staked within the framework of either one. We might then be able to better understand how the liberal state and legal system is able to formulate goals and concerns through this separation of the public and private realms, while simultaneously avoiding being challenged as to why they are necessarily in contest at all.

CONCLUSION

It is at the site of the bathroom problem and the reformulated Title IX statute that radical feminism and queer and transgender theories clash yet again. For these 'camps,' this debate reasserts their foundational critiques and reignites the tensions between them. The ongoing political and philosophical conflicts are further inflamed by the fact that these changes in the law carry such high stakes. For transgender people, it appears that anti-discrimination law may finally become answerable to their oppressions by moving beyond "sex" as the sole determinant for these claims. However, radical feminists argue that this change would be truly detrimental to women because it allows the category of sex to disappear into gender identity, thereby obscuring the fundamental basis on which women are oppressed. This dynamic is even more contentious insofar as choosing either one of these would have significant implications for their available legal recourses.

However, even if we fundamentally believe that the law should be reformulated in order to include transgender people, the present analysis reveals some serious flaws in the legal solution adopted in the Obama-era Dear Colleague Letters. First, the concept of gender stereotypes is an inadequate legal basis on which to make discrimination claims. In order to win such claims, one has the challenging task of proving the existence, rigidity, and deviance from a stereotype. Second, the concept cannot fully encapsulate manifestations of discrimination if it is unable to be contrived to fit its definition, including those that are primarily rooted in one's sexual biology. Third, gender stereotypes do not actually recognize "transgender" as a legal category or as a basis on which one can be discriminated. Instead, through its reconstruction of existing gender stereotypes, it positions those who do not conform at the margins of the law, fated always as 'special cases' under legal examination. Despite all of these inadequacies, it is hard to deny the sense of urgency to at least begin to shift the law to

recognize transgender people. How can I criticize the installment of legal protections for those who are not even recognized by the law currently?

This reason provides yet another justification for why it is critical to turn our attention to the framework and operations of the law. Why is it that the solution offered for transgender discrimination reproduces some of the very harms its advocates seem to remedy? And why, even in doing so, does it also cost another marginalized segment of people adequate legal protections as well? Despite the intensity and urgency of this debate, the intention of this investigation was to function as a pause on the demand for legal change in order to reflect on the implications of moving forward with the solution offered by the liberal institution of the law. In this project, I have sought to examine how the philosophical and political disputes between radical feminists and queer and transgender theorists play out in the legal debate. Through an analysis of their central philosophical positions on (1) sex, gender, and their relations to oppression, (2) the construction and enforcement of social and legal categories, and (3) claims to the public and private spheres, this project begins to trace how particular legal logics and strategy maneuver these issues and foster contestation between the theoretical camps.

The concern at the heart of this investigation is how the competition between these two players—radical feminism and queer and transgender theory—may divert our critical scrutiny away from another key figure: the liberal legal system. By this, I do not mean to suggest that the debates that occur between these two critical theories are not worthy endeavors or are nothing more than a curtain that conceals a larger, more problematic entity. Rather, in light of philosophical impasses that remain between radical feminism and queer and transgender theories, the contribution of this project is to reorient our focus onto the liberal legal system and to interrogate its role in producing competition between those already marginalized and shaping the legal options and political strategies available.

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