

## LAVATORIES OF DEMOCRACY: RECOGNIZING A RIGHT TO PUBLIC TOILETS THROUGH INTERNATIONAL HUMAN RIGHTS AND STATE CONSTITUTIONAL LAW

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*The United States is a public toilet nightmare. Truly public toilets are a rarity, while the restrooms provided by private businesses are inconsistently available via “customer only” policies and the discriminatory actions of owners and their employees. Some jurisdictions have made tepid attempts at providing more bathrooms, but all have failed. The result: an accumulation of entirely preventable public health harms, including outbreaks of infectious disease, illness, and dignitary harms.*

*This Article is the first to provide a comprehensive review of U.S. toilet law—the laws and policies that determine where bathrooms are provided and who has access to them—and diagnose its failings. Despite municipal, state, and federal actors’ efforts to expand availability, members of the public are too often forced to rely on the private provision of bathrooms. It is clear that the status quo has failed to address this most basic human biological necessity.*

*This Article makes the case that recognizing a state constitutional right to public bathrooms is the best way to address this problem. Drawing from recent developments in international human rights, it sets forth the basis on which courts could recognize a right to public toilets as part of a state constitution’s public health provision.*

### INTRODUCTION

Teddy Siegel is famous. Perhaps she’s not the kind of famous she imagined given her training and background in opera, vocal performance,

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and dance,<sup>1</sup> but she's definitely TikTok famous<sup>2</sup>—*toilet* TikTok famous.<sup>3</sup> In July 2021, Ms. Siegel, a student at the Mannes School of Music at the New School, was shopping with her sister in Times Square when all of a sudden she faced a problem: she had to pee.<sup>4</sup> The store she was visiting at the time turned her away when she inquired if there was a bathroom she could use, and so did several other businesses after that who said their bathrooms were for employees only.<sup>5</sup> Desperate for relief, she found her way to a McDonald's where a security guard informed her that she needed to purchase an item to use the bathroom.<sup>6</sup> Ms. Siegel complied by purchasing a bottle of water, and then rushed to the bathroom, only to find that the restroom didn't require a code or any special permission to enter; she could have simply walked in without buying anything.<sup>7</sup>

Siegel's close call became a passion project. Following her toilet troubles in Times Square, she started the TikTok account Got2GoNYC, where she posts videos about the location and availability of New York City's publicly available bathrooms.<sup>8</sup> The account also serves as a venue for Siegel's

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<sup>1</sup> THEODORA SIEGEL, <https://www.theodorasiegel.com> (last visited Nov. 24, 2022).

<sup>2</sup> Teddy Siegel (@teddysiegel), TIKTOK, <https://www.tiktok.com/@teddysiegel?lang=en> [<https://perma.cc/4SYQ-GZ3W>] (last visited Nov. 24, 2022). Ms. Siegel's personal account has approximately 66,700 followers on her account, with 3.1 million likes. I use the term famous relatively, given the public attention Teddy Siegel has received over the last year and her advocacy work on public toilets. See, e.g., Zoe Sottile, *This New Yorker is Using TikTok to Document the Best Public Bathrooms in the City*, CNN (Apr. 9, 2022), <https://www.cnn.com/travel/article/got2gonyc-public-bathrooms-tiktok-trnd/index.html> [[perma.cc/QYG6-ZCKD](https://perma.cc/QYG6-ZCKD)]; The Brian Lehrer Show, *NYC's Dearth of Public Bathrooms*, WNYC (July 5, 2022), <https://www.wnyc.org/story/nycs-dearth-public-bathrooms/> [<https://perma.cc/X59G-ERKE>]; Got2GoNYC, *Teddy Siegel's (@got2gonyc) Speech on the Lack of Bathrooms in NYC*, YOUTUBE (July 5, 2022), <https://youtu.be/GiQL8dBD6HY> [<https://perma.cc/W8T5-UVVR>].

<sup>3</sup> Got2GoNYC (@got2gonyc), TIKTOK, <https://www.tiktok.com/@got2gonyc?lang=en> [<https://perma.cc/W674-JHML>] (last visited Dec. 8, 2022). The account, started and run by Ms. Siegel, presently has approximately 154,300 followers with 3 million likes.

<sup>4</sup> Valeria Ricciulli, *Teddy Siegel Runs Got2GoNYC, a TikTok Account Mapping NYC's Public Toilets*, TEEN VOGUE (Apr. 29, 2022), <https://www.teenvogue.com/story/teddy-siegel-tiktok-bathrooms> [].

<sup>5</sup> *Id.*; Emma Grillo, *Need to Find a Bathroom in New York City? Try TikTok*, N.Y. TIMES (June 18, 2022), <https://www.nytimes.com/2022/06/17/nyregion/public-bathrooms-nyc-tiktok.html?smid=url-share> [<https://perma.cc/W9WN-23RC>].

<sup>6</sup> Ricciulli, *supra* note 4.

<sup>7</sup> Andrew Lloyd, *Meet the bathroom influencer: How a woman turned a distressing hunt for a public restroom into a city crusade*, BUS. INSIDER (Sept. 18, 2023, 9:49 AM), [https://www.insider.com/bathroom-influencer-teddy-siegel-interview-2023-9?utm\\_source=copy-link&utm\\_medium=referral&utm\\_content=topbar](https://www.insider.com/bathroom-influencer-teddy-siegel-interview-2023-9?utm_source=copy-link&utm_medium=referral&utm_content=topbar) [<https://perma.cc/4DBB-8LBZ>] ("It turned out the door was unlocked so Siegel could have gone in anyway, but the whole incident frustrated her, and she wished there was some sort of service that could have saved her the hassle of running around in full-bladder panic in search of a usable restroom.").

<sup>8</sup> Grillo, *supra* note 5.

followers to share bathroom locations they have found throughout New York, including the bathroom codes for businesses that restrict restroom access with door locks. Siegel herself posts a bevy of other tips, tricks, and testimonials on all things public bathroom related.<sup>9</sup>

Got2GoNYC has attracted an incredible amount of attention from well over one hundred thousand followers and received millions of likes from those who share her frustrations about the lack of public bathrooms in the city. It has also garnered the attention of media outlets and politicians concerned about public bathrooms, leading to Teddy Siegel testifying before New York City’s City Council about the dire need for “public, sanitary, AND accessible bathrooms for all in NYC.”<sup>10</sup> To Siegel and many others, it is clear that this is “a public health and equity crisis.”<sup>11</sup>

The United States is a public toilet nightmare.<sup>12</sup> To simply find a bathroom while outside the home can be a herculean feat in and of itself, but to also find a sanitary and hygienic restroom is its own separate gamble. For some, finding an available and accessible restroom is no problem; their professional and personal lives afford them the ability to locate and access familiar bathrooms with ease and dignity. For millions of others, however, trying to hunt down and use a public bathroom in the United States can be inconvenient, injurious, and even deadly.<sup>13</sup>

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<sup>9</sup> Sottile, *supra* note 2; *see e.g.*, Got2GoNYC (@got2gonyc), TIKTOK (Dec. 2, 2022), [https://www.tiktok.com/@got2gonyc/video/7172742509372902702?is\\_from\\_webapp=1&sender\\_device=pc&web\\_id=7167225248555566638](https://www.tiktok.com/@got2gonyc/video/7172742509372902702?is_from_webapp=1&sender_device=pc&web_id=7167225248555566638) [<https://perma.cc/6CN6-8E25>] (describing the general availability of publicly available restrooms at West Elm stores); *see also* Got2GoNYC (@got2gonyc), TIKTOK, (Dec. 2, 2022), <https://www.tiktok.com/@got2gonyc/video/7172712057979194670> [<https://perma.cc/6CDH-4B94>] (ranking the “Top 5 Free Bathrooms in NYC,” including Ralph Lauren, St. Patrick’s Cathedral, Bryant Park, Saks 5th Avenue, and Starbucks Reserve Roastery).

<sup>10</sup> Got2GoNYC (@got2gonyc) TIKTOK, (Aug. 14, 2022), [https://www.tiktok.com/@got2gonyc/video/7131919506477206826?is\\_from\\_webapp=1&sender\\_device=pc&web\\_id=7167225248555566638](https://www.tiktok.com/@got2gonyc/video/7131919506477206826?is_from_webapp=1&sender_device=pc&web_id=7167225248555566638) [<https://perma.cc/EXG9-W6CF>] (“[M]e showing up to the New York City Council to demand that NYC gets more public bathrooms.”).

<sup>11</sup> Sottile, *supra* note 2.

<sup>12</sup> This Article argues that the lack of public toilets in the United States is a social fact, meaning that it is an “idea, force, or ‘thing’ that influences the ways individuals act and the kinds of attitudes people hold.” *See* PATRICIA SNELL HERZOG, *Social Fact*, in *THE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 1* (George Ritzer & Chris Rojek eds., 2018). As this Article will show, because of the ever-decreasing number of public and publicly available toilets, Americans have come to expect that toilets will be difficult to locate and access, and, as a result, have structured their lives and behaviors accordingly. *See* Nicholas Kristof, *America Is Not Made for People Who Pee*, N.Y. TIMES (Mar. 6, 2021), <https://www.nytimes.com/2021/03/06/opinion/sunday/public-toilets-united-states.html?smid=url-share> [<https://perma.cc/5DZA-DNPV>].

<sup>13</sup> *See* discussion *infra* Part II. A–C.

A lack of public toilets throughout the country has unleashed a torrent of problems for many communities, ranging from outbreaks of infectious diseases to the defiling of streets and other public spaces with urine and feces.<sup>14</sup> The United States' toilet desert has fostered a web of public health risks that threaten the wellbeing and dignity of the public. It has simultaneously eroded civic pride and urban livability. Regardless of race, class, gender, ability, and age, everyone requires a bathroom when outside the home. To improve the health and wellbeing of the public, aggressive steps need to be taken in both law and policy to address this long-neglected component of basic sanitation and hygiene.

This Article is the first of its kind to propose recognizing state constitutional rights to public bathrooms as a comprehensive first step towards addressing the United States' public bathroom crisis.<sup>15</sup> For years, states and cities have taken tentative, piecemeal approaches to delivering restrooms to their residents, but these efforts have frequently stalled or proven ineffective. The current patchwork of laws and policies that govern restrooms are insufficient and often unenforced. And it is a tattered system that has required too many people to be at the mercy of a private sector that doles out inconsistent decisions about who is worthy of the dignity to urinate and defecate in safe and clean surroundings.

Bathrooms currently raise myriad legal issues in areas including, but not limited to, disability law, health law, sex, race, and gender discrimination, and even criminal law. Recognizing a right to public toilets would provide individuals with baseline access and, in doing so, help ameliorate many of these issues. Such a right should be based within existing state constitutional provisions dedicated to public health. These provisions obligate legislatures to protect the health of their respective communities, and state courts should look to the influence of international human rights, specifically the human right to sanitation, to guide their recognition of this right.

Part I of this Article provides a historical account of the rise and fall of public toilets in the United States, including the introduction and legal prohibition of pay toilets. Part II offers a survey of the laws and regulations that define where public bathrooms can be offered and who can access them.

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<sup>14</sup> See discussion *infra* Part II. D.

<sup>15</sup> This Article builds off the superb work of scholars who have examined how a lack of public bathrooms infringes upon the rights of those experiencing homelessness, and, more broadly, allows for discrimination to flourish in the United States. See, e.g., Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205 (2020); Taunya Lovell Banks, *The Disappearing Public Toilet*, 50 SETON HALL L. REV. 1061 (2020).

It then describes how existing laws have failed to provide an adequate supply of available and accessible bathrooms. This Part also details the public health and health harms that have and can arise because of these failures of law. Part III begins laying the foundation for a right to public bathrooms by looking outside the United States where the human right to sanitation has gained power and been officially recognized in some nations. Part IV argues for courts to establish a right to public restrooms grounded in state constitutional public health provisions. Although the recognition of positive economic, social, and cultural rights has been met with great resistance by federal courts, state constitutions are a font of positive rights and state courts often look to transnational law for interpreting state matters that come before them. This Part describes what a right to public toilets should entail, and how state courts could draw upon international perspectives on the human right to sanitation when recognizing a similar domestic right to bathrooms. This Article concludes by briefly laying out an agenda for moving the right to public toilets forward and addressing uncomfortable but important public health issues in the future.

#### I. THE RISE & FALL OF THE AMERICAN PUBLIC TOILET

Our nation's toilet problem has been decades in the making. Public toilets emerged in the United States during the social and economic transformations of the late nineteenth century. Urban areas were caked with filth like litter, animal waste, and human waste, and outbreaks of infectious diseases were common. Despite the then-limited understanding of the medical and public health sciences, social and urban reformers sought out solutions to "clean" both the streets and the people, and one such instrument for helping to achieve that goal was the public toilet. Jurisdictions installed collections of urinals, stalls, and basins in aptly named comfort stations to better serve the biological needs of their citizens. Meanwhile, the private market offered plush sanitary amenities to those who could afford (or pretend) to frequent hotels, department stores, and travel depots. Soon, too, would come the pay toilet, and it would compete for space along those facilities provided by the government and commercial businesses.

This Part describes the history of the American public toilet and provides the necessary background for understanding why so many people are now faced with so few bathrooms options. It demonstrates that public restrooms were once comparatively available amenities, but when set against the forces of the private market, their days were numbered.

## A. COMFORT STATIONS

The public toilet made its appearance on the American stage for largely one simple reason: communities were filthy and awash in waste.<sup>16</sup> Amid changing economic, political, and social conditions throughout Europe during the latter half of the nineteenth century, a tidal wave of immigration flooded American cities with impoverished populations that urban areas were simply not prepared to handle.<sup>17</sup> With so many new arrivals, residents were crammed into deplorable tenement housing with substandard plumbing, and many continued to rely on shared privies (i.e., outhouses) for urination and defecation.<sup>18</sup> Privies were considered “fruitful sources of disease,”<sup>19</sup> and outbreaks of cholera, yellow fever, dysentery, diphtheria, and other contagions were associated with miasmatic vapors that emanated from privy vaults and cesspools.<sup>20</sup> While some wealthier Americans had the luxury of indoor plumbing or private privies located on their property, the poorest had none and disposed of their waste in alleyways or the street.<sup>21</sup>

Conditions in public were equally unpleasant. Men and women both were no strangers to relieving themselves in view of passersby, where their waste often joined with refuse and animal waste in the streets, forming an omnipresent and repulsive swill.<sup>22</sup> The historian Peter Baldwin notes that one nineteenth century New York sanitarian inspector complained that public urinals were desperately needed to subdue “the disgusting stench that is kept reeking at every alley-corner, yard, and warehouse wall.”<sup>23</sup>

The changing nature of the economy was also a factor in the push for public toilets. Industrialization radically shifted the economies of the United

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<sup>16</sup> Open air urinals appeared in Paris before their introduction in the United States, as did the public toilet system of London. Both served as inspirations for their American imitators. See Peter Baldwin, *Public Privacy: Restrooms in American Cities, 1869-1932*, 48 J. SOC. HIST. 264, 266 (2014); see also Katherine J. Wu, *How Paris' Open-Air Urinals Changed a City—and Helped Dismantle the Nazi Regime*, SMITHSONIAN MAG. (Dec. 6, 2019), <https://www.smithsonianmag.com/smart-news/how-paris-open-air-urinals-changed-city-and-helped-dismantle-nazi-regime-180973704/>; Bethan Bell, *London's long-term lav affair: A history of public toilets in the capital*, BBC NEWS (Jan. 17, 2022), <https://www.bbc.com/news/uk-england-london-59785477> [<https://perma.cc/46YK-SBSG>].

<sup>17</sup> GEORGE ROSEN, *A HISTORY OF PUBLIC HEALTH* 133 (rev. expanded ed. 2015).

<sup>18</sup> JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH 178-79* (1992).

<sup>19</sup> Robert W. de Forest, *A Brief History of the Housing Movement in America*, 51 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 15 (1914).

<sup>20</sup> Baldwin, *supra* note 16, at 267-68; DUFFY, *supra* note 18, at 178-79; ROSEN, *supra* note 17, at 135, 164-66.

<sup>21</sup> Baldwin, *supra* note 16, at 266-67.

<sup>22</sup> *Id.* at 266-67.

<sup>23</sup> *Id.* at 267.

Kingdom, Europe, and the United States from agrarian, domestic-based systems to ones focused on factory production and trade located in towns and urban centers.<sup>24</sup> And with this socioeconomic transformation, many men were forced to leave their homes and find work in near or far areas.<sup>25</sup> In other words, more people began to be away from home for longer periods of time, traveling to and from their employment, either for hours, days, weeks, or longer, and when they were not at home or work, they needed places to urinate and defecate. The toilet facilities that were available were often inadequate, and recreational spaces and opportunities aside from drinking were nonexistent.<sup>26</sup> For many men, excretory relief could be found in the saloon, which not only gave them an opportunity to socialize and imbibe, but also an opportunity “to go.”<sup>27</sup>

Standalone urinals were some of the first public toilets to make their appearance in the United States. A men’s urinal appeared in Boston Common as early as 1860, though it is questionable whether it was connected to a sewer.<sup>28</sup> By 1873, fifteen urinals were found across the city, and “women’s cottages” were built in the Common and the Public Garden in 1875.<sup>29</sup> In New York, despite the failure of the city’s government to heed requests for the creation of public toilets, the newly formed New York Metropolitan Board of Health sought the construction of two restrooms in high traffic areas of the city.<sup>30</sup> Only one was opened, however, at Astor Place and Eighth Avenue in 1869, and contained both men’s and women’s compartments.<sup>31</sup> An estimated 1,000 men and 25 women visited the restroom daily, yet it was largely unsupervised and cleaned only once a day.<sup>32</sup> Even with the overwhelming need for public urinals and other simple toilet

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24 See ROSEN, *supra* note 17, at 106–07; Freddie Wilkinson, *Industrialization, Labor, and Life*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/industrialization-labor-and-life> [https://perma.cc/RE5M-LP2B] (last updated Oct. 19, 2023).

25 Wilkinson, *supra* note 24.

26 ROSEN, *supra* note 17, at 133.

27 Baldwin, *supra* note 16, at 270 (“Saloons were cross-class institutions scattered throughout the city in places convenient to where men worked, walked home, or waited for streetcars...Saloons provided the only public toilets in industrial areas, waterfronts and residential neighborhoods, a service that saloonkeepers considered as effective as free lunches in attracting customers.”).

28 *Id.* at 269.

29 *Id.*

30 *Id.* at 268.

31 THE MAYOR’S COMMITTEE OF NEW YORK CITY, REPORT ON PUBLIC BATHS AND PUBLIC COMFORT STATIONS 143 (1897).

32 Baldwin, *supra* note 16, at 268 (“The facility opened in May, 1869, and drew daily attendance of nearly 1,000 men, though never more than 25 women. The cramped facility was largely unsupervised and was cleaned only once a day.”).

options, these structures were opposed by property owners who feared that having them located near their businesses would offend affluent customers.<sup>33</sup> Urinals were notoriously poorly maintained, and property owners were worried about disease-bearing miasmas and the stench and grime that came with these facilities.<sup>34</sup>

The push for improved, more dignified public toilets was a product of the American sanitation reform movement that “was promoted by the Puritan moral codes regarding social cleanliness and godliness.”<sup>35</sup> Numerous voluntary health associations were established during this period that were comprised of public officials, doctors, and laypeople. These associations sought to spread the word about the value of hygiene to the public, advocate for legal reform, and otherwise take actions to eliminate public health threats.<sup>36</sup> The associations, along with affluent citizens in support of reforms, believed that improving the urban environment would “teach poor people to reject squalor, immorality, and corrupt government” and “encourage a deeper commitment to American ideals.”<sup>37</sup> Therefore, according to this theoretical connection between health and virtue, public toilets not only had the power to cleanse a city, but they could also improve the public’s health and personal integrity.<sup>38</sup>

Comfort stations would serve as the primary product of these sanitary reform goals. Designed to accommodate the needs of both sexes, these large and typically underground structures were in public squares or near busy junctions in the city, and contained numerous stalls, urinals, and sinks intended for use by the public.<sup>39</sup> Many comfort stations were established and overseen by local governments, while others were financed by private philanthropists interested in urban renewal and improving the hygiene and human condition of the common man.<sup>40</sup>

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33 See ALEXANDER K. DAVIS, BATHROOM BATTLE GROUNDS: HOW PUBLIC RESTROOMS SHAPE THE GENDER ORDER 52–53 (2020) (discussing the opposition of some Baltimore businesses to the construction and operation of public comfort stations in the city).

34 Elizabeth Yuko, *Where Did All the Public Bathrooms Go?*, BLOOMBERG (Nov. 5, 2021, 8:00 AM), <https://www.bloomberg.com/news/features/2021-11-05/why-american-cities-lost-their-public-bathrooms> [https://perma.cc/Z3M9-5KQU].

35 DOROTHY PORTER, HEALTH, CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES 147 (1999).

36 ROSEN, *supra* note 17, at 135.

37 Baldwin, *supra* note 16, at 273.

38 *Id.*

39 *Id.* at 276.

40 DAVIS, *supra* note 33, at 32–33.



Previous toilet options were also largely focused on catering to the needs of men, but men and women were both served by comfort stations, often under different social justifications, however. Reformers pointed to the number of men that patronized saloons during this period, particularly given the deleterious effects and social ills alcohol was believed to have on families, the home environment, and the broader society.<sup>41</sup> And because men often went to saloons to use an establishment's urinals and stalls, more public restrooms meant more men could be dissuaded from visiting the saloon and, subsequently, achieve greater sobriety.<sup>42</sup> Women, on the other hand, were to be protected from the prying eyes of the public, and comfort stations were marketed to women as means to "relieve individual discomfort, promote health, and encourage personal modesty."<sup>43</sup> In fact, women's groups became active proponents of comfort stations and often led the lobbying efforts to have comfort stations constructed in their communities. For example, in Chicago, the Woman's City Club, the Chicago Woman's Club, the Chicago Woman's Aid, and the female-headed department of public welfare made the provision of public toilets a main priority.<sup>44</sup> Although some of the push for comfort stations by these groups included the justification of keeping men out of the saloons, "public toilets were just one aspect of their struggle to make the city provide socially needed facilities for all of its residents . . . ."<sup>45</sup> And often these efforts were successful. Across the United States during the 1900s and 1910s, large and medium-sized cities approved and constructed comfort stations in the central squares of their core business districts, and by 1919, "nearly one hundred cities were operating some sort of comfort station[.]"<sup>46</sup>

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41 Baldwin, *supra* note 16, at 270; see also Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 233–36 (2006) (writing about the history of the temperance movement in the United States during the early twentieth century and the driving forces that ultimately led to Prohibition).

42 See Baldwin, *supra* note 16, at 270 ("New York's scarcity of public urinals forced men into saloons, undermining private and public morality . . . ."); Jon M. Kingsdale, *The "Poor Man's Club": Social Functions of the Urban Working-Class Saloon*, 25 AM. Q. 472, 476 (1973) ("The workingman's saloon . . . performed a variety of functions, major and minor: furnishing the cities' only public toilets.").

43 Baldwin, *supra* note 16, at 266.

44 Maureen Flanagan, *Private needs, public space: public toilets provision in the Anglo-Atlantic patriarchal city: London, Dublin, Toronto and Chicago*, 41 URB. HIST. 265, 282 (2014).

45 *Id.* at 283.

46 Baldwin, *supra* note 16, at 276.

## B. MARKET COMPETITION

The comfort station would prove to be no match for the offerings of private business. As public toilets became more ubiquitous in the United States, department stores, hotels, and train depots would become known for their luxurious bathroom facilities and for providing things public toilets simply could not: privacy, personal services, and segregation.<sup>47</sup> Furthermore, some private businesses were the first to open bathrooms before cities themselves were able to address this need. In 1902, Marshall Field opened a store in Chicago with thirty-nine attended restrooms, but the city itself had yet to construct a comfort station in the downtown area.<sup>48</sup> Private businesses that catered to the wealthy “competed to impress customers with costly architecture, technological innovations and an air of luxury.”<sup>49</sup> Refined bathrooms and other spaces (e.g., lounges, waiting rooms) had separate entrances and dedicated staff, and were intended to, at times, mimic the feel of fashionable homes.<sup>50</sup> They were also designed to prevent genteel folk from interacting with those seen as being from lower classes or worse. For example, a manual from 1893 on how to build railroad stations recommended installing a large central hall in depots because “a large and undesirable element, such as depot loungers, laborers, hackmen, hotel porters, etc., and in Southern [States] the colored element . . .” would then be less likely to enter special waiting rooms (i.e., high end rooms).<sup>51</sup> Some businesses sought to attract less affluent customers and still provided nice bathrooms and amenities to these shoppers, yet the ability to separate prospective clientele across numerous social divisions was a key features of these services.<sup>52</sup>

Between the competition that comfort stations faced from private venues, and social and economic changes that would transform the nature of cities, the comfort station’s staying power was not durable. A key feature to the

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<sup>47</sup> *Id.* at 270.

<sup>48</sup> *Id.* at 272; Flanagan, *supra* note 44, at 283.

<sup>49</sup> Baldwin, *supra* note 16, at 271.

<sup>50</sup> *Id.* at 270–72; *see also* Elizabeth Yuko, *The Glamorous, Sexist History of the Women’s Restroom Lounge*, BLOOMBERG (Dec. 3, 2018), <https://www.bloomberg.com/news/features/2018-12-03/the-rise-and-fall-of-the-women-s-restroom-lounge> [<https://perma.cc/8HLLK-8HT7>] (emphasizing that women’s public restrooms were to “look and function like part of the home.”).

<sup>51</sup> WALTER G. BERG, BUILDINGS AND STRUCTURES OF AMERICAN RAILROADS 346 (1893).

<sup>52</sup> Baldwin, *supra* note 16, at 272.

success of any bathroom is its regular maintenance and cleaning,<sup>53</sup> and public facilities were never able to meet the standards set by private businesses.<sup>54</sup> Public toilets were prone to vandalism and unsafe behavior by virtue of their openness to the public, yet efforts to improve the surveillance and upkeep of these spaces encountered challenges. Members of the public, especially women, raised concerns about the inadequate privacy, safety, and cleanliness found in comfort stations, particularly as the private restrooms in department stores and other venues could provide them with the reassuring atmospheres they desired.<sup>55</sup> As early as the 1890s, comfort stations also became locations for men to meet other men for sexual encounters, and the facilities “began to develop a negative image as immoral and perhaps dangerous places.”<sup>56</sup> The costs of comfort stations—construction, attendance, maintenance—also discouraged their expansion. With the growing ubiquity of household indoor plumbing, decreased municipal investment in public works, and languishing political energy, the comfort station fell into disuse.<sup>57</sup> While the federal government invested in park restrooms and highway rest areas, the comfort station became an expensive liability and increasingly a target of vandalism, illicit behavior, and widespread public and political ire.<sup>58</sup> Beginning in the 1960s and carrying on into the 1980s, many public bathrooms were closed,

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53 See, e.g., W. Stuart Reynolds et al., *Women’s Perceptions of Public Restrooms and the Relationships with Toileting Behaviors and Bladder Symptoms: A Cross-Sectional Study*, 204 J. UROLOGY 310, 312 (2020) (“Among the 79% of women who reported as least occasionally limiting public restroom use, poor restroom quality was the most common reason (84%) . . . .”); Harvey Molotch, *On Not Making History: What NYU Did with the Toilet and What It Means for the World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 255, 255 (Harvey Molotch & Laura Norén eds., 2010) (commenting that when it comes to public toilets, “[p]eople do not want to know even that others have sat on the seat they occupy, much less visualize (or discuss) what those others have done or how to arrange for them to do it differently”).

54 Baldwin, *supra* note 16, at 279–80 (noting the inability of jurisdictions to cover the expense and effort for upkeep and maintenance of public comfort stations).

55 *Id.* at 278.

56 *Id.* Connoting public bathrooms with homosexual activity would continue well beyond this period, including into the present day. See DAVIS, *supra* note 33, at 41 (“Not only did police activity and crime reports related to vandalism, drug dealing, and sex work in or around public restrooms skyrocket in many American cities from the 1960s through the 1980s, but anxieties about public sexuality (and especially public homosexuality) from many decades before resurfaced with a vengeance . . . .”).

57 Baldwin, *supra* note 16, at 280–82.

58 *Id.* at 281; see also Yuko, *supra* note 34 (“Fears of crime and vandalism in the 1960s and ‘70s sped the mass extinction of many city-run facilities . . . a final blow came in the form of the terrorist attacks of September 11, 2001, prompting the closure of public restrooms across the country for security purposes.”).

and those that remained were often considered to be options of last resort.<sup>59</sup>

### C. PAY TOILETS

In 1893, the organizers of the Chicago World’s Fair created quite the stir with the appearance of pay toilets. “[I]n the matter of water closets and lavatories, provision ha[s] been made on a scale far greater than at any previous exposition, . . .” read *The Report for the President of the World’s Columbian Expedition*.<sup>60</sup> Paris’s World’s Fair had only provided 250 water closets, and the Philadelphia Centennial Expedition 900 facilities, but Chicago boasted of 2,221 water closets with wash basins in thirty-two locations throughout the fair grounds.<sup>61</sup>

Many attendees were outraged, however. Although approximately one-third of the toilets were free, the majority were operated by a for-profit private contractor that outfitted the pay toilets with expensive appliances, soap, towels, clothes, brushes, and attendants.<sup>62</sup> Newspapers decried “levying tribute on the necessities of nature,”<sup>63</sup> and fair attendees argued that “[s]igns are conspicuous directing the visitor to the pay toilet rooms, but you need a search warrant to find the free ones.”<sup>64</sup> And so began America’s troubled relationship with the practice of paying to pee and poop.

Just as comfort stations found their footing in the United States around the turn of the century, pay toilets, too, became an increasingly common feature of the sanitation and hygiene landscape. In fact, in many cities and towns that invested in comfort stations, it became common practice to install

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<sup>59</sup> Baldwin, *supra* note 16, at 281. See, e.g., Julie Chou et al., *The Need for Public Bathrooms in New York City*, URB. DESIGN F. (July 24, 2020), <https://urbandesignforum.org/the-need-for-public-bathrooms-in-new-york-city/> [<https://perma.cc/6DPN-WDRA>] (“The availability of public bathrooms has not increased significantly since the 1970s crisis . . . . Despite growth in the city’s population, economy, and tourism, public bathroom conditions have changed very little.”); Emily Hoerner, *Everybody needs access to bathrooms. Chicago doesn’t provide nearly enough of them*, CHI. TRIB. (Oct. 21, 2021, 5:00 AM), <https://www.chicagotribune.com/investigations/ct-chicago-bathroom-access-lacking-20211021-rftay5sxgjbkrqgvwfvlgvzmvm-htmlstory.html> [<https://perma.cc/AD76-8KEJ>] (“By 1987, public toilet issues had again drawn the attention of City Council. That year, 9th Ward Ald. Robert Shaw pushed unsuccessfully to require the [Chicago Transit Authority] to reopen its restroom facilities and to require gas stations to provide lavatories to the public.”).

<sup>60</sup> HARLOW N. HIGINBOTHAM, REPORT OF THE PRESIDENT TO THE BOARD OF DIRECTORS OF THE WORLD’S COLUMBIAN EXPOSITION 219 (1893).

<sup>61</sup> *Id.* at 219–20.

<sup>62</sup> *Id.* at 220.

<sup>63</sup> Katie Richards, “It is a Privilege to Pee”: *The Rise and Demise of the Pay Toilet in America*, 47 THE TEAN 5, 8 (2018) (citing *The Toilet Room Concession*, FREEBORN CNTY. STANDARD, Mar. 5, 1893).

<sup>64</sup> *Id.* (citing *The Concessionaire*, DEM. N.W. & HENRY CNTY. NEWS, May 5, 1893).

pay toilets alongside free facilities.<sup>65</sup> The provision of pay stalls was justified to “offset the costs of maintenance, generat[e] city revenue, and provid[e] safer and cleaner restroom facilities for the general public.”<sup>66</sup> And municipalities “capitalized on this revenue-making scheme . . . into a morally appropriate enterprise that would benefit both patron and collector.”<sup>67</sup>

Beginning in the 1950s and moving into the 1970s, politicians and activists set their sights on the pay toilet, arguing that the presence of the for-profit facilities discriminated against women and violated human rights by essentially taxing a biological necessity.<sup>68</sup> Perhaps the most famous assault on pay toilets came from March Fong Eu, a California assemblywoman who argued that because urinals were often free for men, women faced discrimination on the basis of sex because they typically had no other choice but to use pay stalls.<sup>69</sup> Eu made national headlines in 1969 when, on the steps of the California State Capitol, she took a sledgehammer to a porcelain toilet to protest pay toilets.<sup>70</sup> Assemblywoman’s Eu advocacy was so well known that one activist referred to her as “Joan of Johns.”<sup>71</sup> In 1974, her bill to prohibit pay toilets from public buildings narrowly passed the legislature, and was soon after signed into law by Governor Ronald Reagan.<sup>72</sup> Similarly, under the guise of feminist leanings, Chicago’s Mayor Daley signed a decree eliminating pay toilets from the city’s airports in 1973, declaring he “[d]id [i]t for [w]omen’s [l]ib;” the Chicago city council voted to prohibit pay toilets in all public buildings a few months after Daley’s unitary action.<sup>73</sup>

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<sup>65</sup> *Id.* at 10.

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

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

<sup>68</sup> Aaron Gordon, *Why Don't We Have Pay Toilets in America?*, PAC. STANDARD (Sept. 27, 2014), <https://psmag.com/economics/dont-pay-toilets-america-bathroom-restroom-free-market-90683> [<https://perma.cc/9GVD-5EM6>] (last updated June 14, 2017) (reporting on the student activist group, Committee to End Pay Toilets in America, and their work to end pay toilets).

<sup>69</sup> John Wildermuth, *March Fong Eu, who smashed toilets and barriers, dies at 95*, SFGATE (Dec. 22, 2017), <https://www.sfgate.com/bayarea/article/March-Fong-Eu-who-smashed-toilets-and-barriers-12451437.php> [<https://perma.cc/FA7J-UAAD>] (“Fong Eu’s signature issue, a statewide ban on pay toilets in public buildings, was also a matter of gender fairness, she said, ‘because women must pay twice as often as men.’”).

<sup>70</sup> John Hickey, *Sacramento to name state building after Berkeley’s March Fong Eu*, BERKELEY NEWS (Mar. 22, 2019), <https://news.berkeley.edu/2019/03/22/sacramento-to-name-state-building-after-berkeley-march-fong-eu> [<https://perma.cc/4BM4-97TV>] (“Eu gained some national notoriety after taking a sledgehammer to a toilet on the steps of the state capitol toward the end of her time in the assembly.”).

<sup>71</sup> *Pay Potties to Stay in Public Buildings*, SAN BERNADINO CNTY. SUN, Apr. 26, 1969.

<sup>72</sup> Richards, *supra* note 63, at 13.

<sup>73</sup> Gordon, *supra* note 68.

By the mid-70s, state and municipal anti-pay-toilet legislation began to find success, with jurisdictions either prohibiting the operation of pay stalls in public buildings or all buildings entirely.<sup>74</sup> Opponents contested these laws in the courts. In 1974, Greyhound Bus Lines and Nik-O-Lok, a toilet lock manufacturer, challenged Chicago's municipal ordinance banning pay toilets in all public building throughout the city. On appeal, Greyhound and Nik-O-Lok challenged a lower court's finding that the city law was constitutional, with the companies asserting that the ordinance was a taking of property without due process of law, and therefore, required the city to provide compensation.<sup>75</sup> The Appellate Court of Illinois found the ordinance to be wholly within the city's police powers, reasoning "[t]oilet facilities, no matter how sanitary or safe, are useless if they are not readily available to the public generally . . . . The city council could therefore have justifiably concluded that coin locks were an evil to be abolished and that this ordinance would accomplish this objective."<sup>76</sup> Because the prohibition on coins locks was pursuant to the city's valid exercise of its police powers, the court determined that no compensation was required under the Fourteenth Amendment.<sup>77</sup>

Nik-O-Lok also filed suit against New York state by challenging the constitutionality of its statewide prohibition of pay toilets. While the company did not contest the state's legal authority to take legislative action for promoting the public's health and welfare, it instead argued that the prohibition on pay toilets would have the opposite effect by closing more bathrooms, and overall, decreasing public bathroom availability.<sup>78</sup> Yet this held no sway, with the court reasoning that it was not the role of the courts to determine the wisdom of the legislatures pay toilet ban or whether Nik-O-Lok's prediction would come true.<sup>79</sup> In the end, across New York's Supreme Court, Appellate Division, and Court of Appeals, the decisions were affirmed each time: this was well within the state's powers.<sup>80</sup>

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<sup>74</sup> Richards, *supra* note 63, at 14–17.

<sup>75</sup> Greyhound Lines, Inc. v. City of Chicago, 321 N.E.2d 293 (Ill. App. Ct. 1974).

<sup>76</sup> *Id.* at 301.

<sup>77</sup> *Id.* at 306.

<sup>78</sup> Nik-O-Lok Co. v. Carey, 384 N.Y.S.2d 211, 214 (N.Y. App. Div. 1976).

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

<sup>80</sup> Nik-O-Lok Co. v. Carey, 378 N.Y.S.2d 936 (N.Y. Sup. Ct. 1976), *aff'd*, 384 N.Y.S.2d 211 (N.Y. App. Div. 1976), *aff'd*, 40 N.Y.2d 1089 (N.Y. 1977).

At the peak of pay toilet popularity, there were approximately 50,000 pay stalls around the country, but today, few remain.<sup>81</sup> Fifteen states banned the operation of pay toilet facilities within their borders, with most laws passed during the 1970s and 1980s.<sup>82</sup> Three other states (Connecticut, Indiana, Washington) explicitly permit their use, however, free toilets must be provided by the venue as well.<sup>83</sup> Some commentators have argued that we should at least consider returning to a system where pay toilets are available,<sup>84</sup> and that they are necessary options in a society where their prohibition only exacerbates the failures of an ineffective regulatory system.<sup>85</sup> But as I will show below, in many ways, we already live in a system where a financial transaction is required to access most restrooms in the United States.

## II. THE INSUFFICIENCY OF U.S. LAWS ADDRESSING TOILETS AND THE HARMS THAT RESULT

Bathrooms are shaped by laws and regulations at every level of government. Various laws and codes determine where a bathroom must be located and who should have access to it. That does not guarantee that these restrooms are open to the public, however. Because restrooms continue to remain largely in the hands of private businesses, only a handful of state and

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<sup>81</sup> Gordon, *supra* note 68 (“By 1970, America had over 50,000 pay toilets. By 1980, there were almost none.”).

<sup>82</sup> ALASKA STAT. ANN. § 18.35.200 (West 1982); ARIZ. REV. STAT. ANN. § 28-7058 (2008); CAL. HEALTH & SAFETY CODE § 118500 (West 1995); FLA. STAT. ANN. § 381.009 (West 1997); IOWA CODE ANN. § 135.21 (West 1979); KAN. STAT. ANN. § 65-1,110 (West 1976); MD. CODE ANN., HEALTH-GEN. § 24-208 (West 1988); MINN. STAT. § 145.425 (2001); NEV. REV. STAT. § 444.045 (1975); N.J. STAT. ANN. § 24:4B-1 (West 1979); N.Y. GEN. BUS. LAW § 399-a (McKinney 1975); OHIO REV. CODE ANN. § 3767.34 (West 1976); TENN. CODE ANN. § 39-17-105 (West 1989); WIS. STAT. § 146.085 (2011); WYO. STAT. ANN. § 6-9-103 (West 1977).

<sup>83</sup> CONN. GEN. STAT. ANN. § 19a-105 (West 1995) (“At least one-half of any additional toilets in each restroom shall be free.”); IND. CODE ANN. § 16-41-23-2 (West 1993) (“When coin lock controls are used in public restrooms . . . at least one-half (1/2) of the toilet units must be free of charge . . .”); WASH. REV. CODE ANN. § 70.54.160 (West 2003) (“When coin lock controls are used, the controls shall be so allocated as to allow for a proportionate equality of free toilet units available to women as compared with those units available to men, and at least one-half of the units in any restroom shall be free of charge.”).

<sup>84</sup> Sophie House, *Pay Toilets Are Illegal in Much of the U.S. They Shouldn't Be*, BLOOMBERG (Nov. 19, 2018), <https://www.bloomberg.com/news/articles/2018-11-19/why-the-u-s-should-give-pay-toilets-another-chance> [<https://perma.cc/2PBF-EZDU>].

<sup>85</sup> John H. Cochrane, *Why We Should Free the Market for Public Toilets*, CHI. BOOTH REV. (May 19, 2021), <https://www.chicagobooth.edu/review/why-we-should-free-market-public-toilets> [<https://perma.cc/5ZDQ-JZTK>].

local legal interventions have been pursued to offer some semblance of relief that is broadly accessible to those in need.

This Part begins laying the foundation for an argument that a right to public restrooms is needed. It surveys the law of toilets in the United States and argues that the existing legal framework overseeing toilet availability and accessibility is insufficient, and that the approaches taken in the past and present have largely done little. This Part also details the public health and health harms that have resulted because of these failures of law and policy.

### A. TOILET DEFINITIONS

Just how a bathroom is regulated depends almost entirely on who holds that property, be it the federal, state, or local government, or, conversely, a private property owner. Accordingly, before delving into the legal specifics of how bathrooms are overseen, it's necessary to define just what makes a public toilet truly public.

Many bathrooms are often referred to as “public bathrooms” in everyday conversation in ways that are not entirely accurate. For the purposes of this Article, a *public toilet* is defined as a permanent facility lavatory or restroom<sup>86</sup> that is open to members of the public regardless of any identifying characteristics, appearance, employment status, or commercial status (i.e., a customer). I emphasize the importance of a permanent facility because it communicates a jurisdiction's sustained commitment to sanitation and hygiene, unlike portable toilets which can be removed in a moment's notice.<sup>87</sup> Public toilets are typically provided by the government, open year-round, and do not require a fee for admission.<sup>88</sup> These facilities tend to be found in government buildings, parks, and other public spaces. The location and accessibility of public bathrooms are, by and large, overseen by the

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<sup>86</sup> Throughout this article, the terms toilet, restroom, bathroom, and lavatory are used interchangeably as they are used in common parlance in the United States and other high-income nations, and which refer to a space that contains a water flush toilet and a sink. *See, e.g., Lavatory*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/bathroom> [<https://perma.cc/48FN-XAB5>] (last visited Dec. 10, 2022) (“[A] room with conveniences for washing and usually with one or more toilets.”); INT’L CODE COUNCIL, 2018 INT’L PLUMBING CODE 15 (2017) (defining a toilet facility as “[a] room or space that contains not less than one water closet and one lavatory”).

<sup>87</sup> *See, e.g.,* Editorial, *L.A. shouldn't remove portable toilets from homeless encampments*, L.A. TIMES (July 25, 2021), <https://www.latimes.com/opinion/story/2021-07-25/editorial-los-angeles-homeless-bathrooms> [<https://perma.cc/AA7V-XMDJ>] (opposing the removal of 182 portable toilets and 363 handwashing stations near homeless communities across L.A.).

<sup>88</sup> Hochbaum, *supra* note 15, at 219 (“[P]ublic bathrooms’ refer to bathrooms operated and maintained by a government entity.”).



agency that controls the property where the toilet is located. For example, the bathrooms at the Lincoln Memorial in Washington, D.C. are managed by the National Park Service,<sup>89</sup> while the restrooms found in the public libraries of Seattle are overseen by the Seattle Public Library system.<sup>90</sup>

Restrooms located on private property are referred to in this Article as *publicly available bathrooms* or bathrooms available to the public. Publicly available toilets serve the same purpose and provide the same amenities as public toilets, but they are located in public-facing private businesses that often impose restrictions on who can and cannot access these facilities. Common restrictions include being a prospective customer, purchasing a good or service, or paying a fee to use the toilet.<sup>91</sup> The difference between a public bathroom and a publicly available bathroom may seem slight depending on one's circumstances and resources. Yet throughout the last century, the public toilet has fallen by the wayside as the publicly available toilet has become the primary facility Americans have come to rely on when they need a restroom. As will be discussed below, these toilets often *should* be open to the public, however, the determination of who may and may not use them is generally dictated by the terms set by the property owner or the momentary decisions of a business's employees.<sup>92</sup>

Starbucks has long served as the archetype of publicly available bathrooms for opening its restrooms to customers, neighborhoods residents,

<sup>89</sup> *Lincoln Memorial: Frequently Asked Question*, NAT'L PARK SERV., <https://www.nps.gov/linc/faqs.htm> [<https://perma.cc/PD65-XS5Q>] (lasted updated Apr. 10, 2015) ("Where is the nearest bathroom? The restroom is located in the lower lobby in the southeast corner of the building.").

<sup>90</sup> *Restroom Facilities*, THE SEATTLE PUB. LIB., <https://www.spl.org/using-the-library/plan-visit/restroom-facilities-map> [<https://perma.cc/JC5H-LP25>] (last visited Feb. 5, 2023).

<sup>91</sup> Hochbaum, *supra* note 15, at 219 ("Public bathrooms' located on private property are better described as 'bathrooms available to the public.'"); Banks, *supra* note 15, at 1063 ("Toilets in private office buildings, hotels, department stores, restaurants, and theaters have largely supplanted government operated public toilets.").

<sup>92</sup> *See, e.g.*, PEOPLE FOR FAIRNESS COAL., DOWNTOWN D.C. PUB. RESTROOM COMM., ACCESS TO RESTROOMS IN DOWNTOWN WASHINGTON DC THAT ARE CLEAN, SAFE, & AVAILABLE 24/7, 4–5, 8 (2015) [hereinafter PEOPLE FOR FAIRNESS COAL. 2015], <https://pffcdc.org/wp-content/uploads/2016/03/Restroom-Inventory-Full-Report.pdf> [<https://perma.cc/G3XQ-F54U>]; PEOPLE FOR FAIRNESS COAL., DOWNTOWN D.C. PUB. RESTROOM COMM., REVISITING, ONE YEAR LATER, PRIVATE FACILITIES IN DC THAT LET US USE THEIR RESTROOMS 2–3 (2017), <https://pffcdc.org/wp-content/uploads/2017/01/2016-follow-up-to-Restroom-Inventory-carried-out-in-2015-copy.pdf> [<https://perma.cc/ZNM9-BN2V>] [hereinafter PEOPLE FOR FAIRNESS COAL. 2017] ("Whether or not you are let in depends on the judgment of the restaurant staff member on duty."); Natalie Shure, *The Politics of Going to the Bathroom*, THE NATION (May 23, 2019), <https://www.thenation.com/article/toilet-urination-disability-access/> [<https://perma.cc/PZY4-L8R9>].

and the greater public; serving as a private solution to help fill a public void.<sup>93</sup> Separate from perceptions of their customers, politicians<sup>94</sup> and even the company itself have held out the coffee retailer as a reliable resource for restrooms regardless of customer status.<sup>95</sup> Nevertheless, like with many other private businesses, the true availability of their bathrooms is likely less generous, including the recent announcement by the company of its intention to limit restroom access in the future.<sup>96</sup>

Determinations about where a commercial business such as Starbucks is allowed to operate is naturally a matter of zoning.<sup>97</sup> Zoning, of course, deals with ordinances that control the size and bulk of buildings, their placement on lots, and how the buildings and supporting lands can be used.<sup>98</sup> Areas that receive approval for the development of commercial businesses will likely, by virtue of their customer-facing establishments, have some publicly

<sup>93</sup> See, e.g., BRYANT SIMON, EVERYTHING BUT THE COFFEE: LEARNING ABOUT AMERICA FROM STARBUCKS 90 (2009) (“Bathrooms represent another public void that Starbucks fills to its own private money-making advantage. They are, in many ways, an essential part of the company’s value proposition, especially for urban customers.”); Allison Morrow, *Don’t let Starbucks take away our public bathroom*, CNN BUS. (July 21, 2022), <https://www.cnn.com/2022/07/21/business/nightcap-starbucks-bathroom-netflix> [<https://perma.cc/5LZL-ZRW8>] (“One of the ultimate examples of ‘corporate solutions for government problems’ is the Starbucks bathroom. American cities are particularly lacking public toilets, and rather than deal with that directly, lawmakers have been content to let Starbucks and other chains take on the duty.”).

<sup>94</sup> *Subverting Starbucks*, NEWSWEEK (Oct. 27, 2002), <https://www.newsweek.com/subverting-starbucks-146749> [<https://perma.cc/3WYV-KNUJ>] (“That’s because the city’s mayor, Michael Bloomberg, is convinced we already have enough public toilets and don’t need more. Why? ‘There’s enough Starbucks that’ll let you use the bathroom,’ says he.”).

<sup>95</sup> Howard Schulz, the founder and CEO of Starbucks stated publicly:

We don’t want to become a public bathroom, but we’re going to make the right decision 100 percent of the time and give people the key, because we don’t want anyone at Starbucks to feel as if we are not giving access to you to the bathroom because you are less than. We want you to be more than.

*The Role and Responsibility of a Public Company*, ATLANTIC COUNCIL (May 10, 2018), <http://www.atlanticcouncil.org/news/transcripts/the-role-and-responsibility-of-a-global-company> [<https://perma.cc/B3VK-5T9D>].

<sup>96</sup> Lateshia Beachum, *Starbucks Says It Might Close Bathrooms to Non-Customers, for Safety*, WASH. POST (June 10, 2022), <https://www.washingtonpost.com/nation/2022/06/10/starbucks-bathrooms-schultz/> [<https://perma.cc/P5NZ-NAMR>].

<sup>97</sup> When it comes to toilets, the role of zoning is not surprising given the historical importance zoning has had in the advancement of public health and sanitation. See Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning*, 28 AM. J. PREVENTIVE MED. 96, 98 (2005). Reformers in the United States looked to zoning to address these harms. “By locating industrial uses in areas of the city away from homes and other residential uses, and establishing minimum standards for the place and design of structures . . . zoning offered a regulatory scheme to address public health problems caused by urbanization.” *Id.* at 99.

<sup>98</sup> LAND USE CONTROLS: CASES AND MATERIALS 84 (Robert C. Ellickson et al. eds., 4th ed. 2013).

available restrooms. These are the types of venues we expect to see in commercial areas, such as restaurants, coffee shops, grocery stores, and other shopping establishments which often have toilet facilities available to their customers, and, if they choose to do so, the broader public.

## B. REGULATING TOILETS

Restrooms are in every building, but they are typically not available to the public because they hinge on the policies of property owners, business owners, and their employees. And without some level of effective enforcement, members of the public who need a bathroom outside the home have little if any recourse.

There are two types of restrooms that can be provided by customer-facing business establishments: employee restrooms and customer restrooms. Most employers in the United States are required by law to supply their employees with a bathroom.<sup>99</sup> State and municipal laws also provide their own requirements beyond those mandated by the federal government.<sup>100</sup> According to the Occupational Safety and Health Administration's Restroom and Sanitation Requirements regulations, employers must "provide all workers with sanitary and immediately-available toilet facilities (restrooms)" to "ensure that workers do not suffer adverse health effects that can result if toilets are not sanitary and/or not available when needed."<sup>101</sup> The number of water closets that must be provided is dependent on the number of employees of each sex, and the formula for making this determination is explicitly laid out by the regulations.<sup>102</sup> When compared to employee restrooms, the delivery of customer restrooms is less consistent.

Customer bathrooms (i.e., publicly available bathrooms) are dictated by building and plumbing codes, and requirements can vary by jurisdiction.<sup>103</sup>

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<sup>99</sup> 29 C.F.R. § 1910.141(c)(1)(i) (2011); 29 C.F.R. § 1926.51(f)(3)(i) (2011); 29 C.F.R. § 1928.110(c)(2)(i) (2001).

<sup>100</sup> See, e.g., 820 ILL. COMP. STAT. 230 et seq. (1990) ("Employee Washroom Act").

<sup>101</sup> *Restrooms and Sanitation Requirements*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/restrooms-sanitation> [<https://perma.cc/WKA4-XVUY>] (last visited Dec. 13, 2022).

<sup>102</sup> 29 C.F.R. § 1910.141(c)(1)(i) (2011).

<sup>103</sup> Codes "provide a comprehensive set of minimum health, safety and energy standards for the design, construction and maintenance of . . . buildings, and major renovations. They set an understandable and reliable floor for construction practices that reduce our vulnerability to a wide range of hazards." ELLEN VAUGHAN & JIM TURNER, *THE VALUE AND IMPACT OF BUILDING CODES*, ENV'T & ENERGY STUDY INST. 3 (2013), <https://www.eesi.org/files/Value-and-Impact-of-Building-Codes.pdf> [<https://perma.cc/8HUW-YW9T>].

Building codes apply to the materials, dimensions, and standards for the construction process, while plumbing codes protect the public's health and safety by regulating the "design and installation of all pipes, valves, fixtures, and other appurtenances."<sup>104</sup> State legislatures adopt model codes by statute, such as the International Plumbing Code<sup>105</sup> and the Uniform Plumbing Code.<sup>106</sup> The power to establish and implement building, plumbing, and other codes has long resided with the states as a part of their plenary police powers to protect the public's health and welfare, as well as their primary legal authority over property law.<sup>107</sup> A state's codes are typically adopted either in part or in their entirety as model codes by the legislature, and their power to modify and enforce their standards is delegated to local authorities.<sup>108</sup> Distinctions exist across the various provisions of these codes, but there is uniformity in requiring businesses to provide toilets to customers. For example, the 2018 International Plumbing Code states:

For structures and tenant spaces intended for *public* utilization, customers, patrons and visitors shall be provided with *public* toilet facilities. . . . Employee toilet facilities shall be either separate or combined employee and *public* toilet facilities.<sup>109</sup> (emphasis original)

States also regularly modify these codes or establish their own codes.<sup>110</sup>

Building and plumbing codes establish norms to achieve specific policy goals; they are far from neutral documents.<sup>111</sup> Regarding bathrooms, the codes are meant to achieve the interwoven aims of accessibility, equality,

<sup>104</sup> Thomas E. Pape, *Plumbing Codes and Water Efficiency: What's a Water Utility To Do?*, 100 J. AM. WATER WORKS ASS'N 101, 101 (2008).

<sup>105</sup> INT'L CODE COUNCIL, INTERNATIONAL PLUMBING CODE, <https://www.iccsafe.org/content/international-plumbing-code-ipc-home-page/> [perma.cc/G3MT-G8V3] (last visited Feb. 5, 2023).

<sup>106</sup> INT'L ASSOC. PLUMBING & MECH. OFFS., 2021 UNIFORM PLUMBING CODE, <https://epubs.iapmo.org/2021/UPC/> [https://perma.cc/3XMT-X9AH] (last visited Feb. 5, 2023).

<sup>107</sup> *See, e.g.*, *State ex rel. Rhodes v. Cook*, 433 P.2d 677, 679 (Wash. 1967) (finding that a building code requirement was "reasonably related to the public health and safety" and that "[s]uch requirement is a valid exercise of the police power, and is not a violation of federal or state due process standards."); VAUGHAN & TURNER, *supra* note 103, at 8 ("Because our federalist system of government reserves property law for state and local authorities, thousands of state and local jurisdictions have the right to adopt their own sets of codes.").

<sup>108</sup> VAUGHAN & TURNER, *supra* note 103, at 7.

<sup>109</sup> INT'L PLUMBING CODE § 403.3 (2018).

<sup>110</sup> *See, e.g.*, ILL. ADMIN. CODE tit. 77, § 890.810 (2014); ILL. ADMIN. CODE tit. 77, § 890. Appendix A (2014).

<sup>111</sup> Sarah C. Bronin (née Galvan), Note, *Rehabilitating Rehab Through State Building Codes*, 115 YALE L.J. 1744, 1746 (2006).

privacy and safety, and public health.<sup>112</sup> Yet these norms are violated because of the absence of an enforcement mechanism to require or coax private businesses to open their bathrooms to the public.<sup>113</sup> Codes are enforced primarily during the permitting and inspection process, such as when an application for a permit is submitted to construct or remodel a building, and during various stages of construction when inspectors determine compliance with the applicable codes.<sup>114</sup> In other words, codes apply to the design and construction of the physical structure, not to how the physical space is then used, commercially and socially, once the location has been deemed safe for use. And even though codes indicate that the restrooms shall be provided to “customers, patrons and visitors,” there are few, if any, ways for states and cities to effectively enforce these rules in any meaningful way. Code violations can be reported and investigated by a jurisdiction’s respective building safety authorities. However, in recent years there have been shortages of building inspectors in many communities,<sup>115</sup> while in others areas, researchers have found inconsistencies in the ways inspectors assess

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<sup>112</sup> Jennifer S. Hendricks, *Arguing with the Building Inspector about Gender-Neutral Bathrooms*, 113 NW. U. L. REV. 77, 87–91 (2018); VAUGHAN & TURNER, *supra* note 103, at 1 (“Building codes address many of a society’s most important concerns, including public health and safety, and environmental protection.”).

<sup>113</sup> Mike Puccinelli, *Many Restaurants Ignore Rules for Public Restrooms*, CBS CHI. (Nov. 9, 2011), <https://www.cbsnews.com/chicago/news/many-restaurants-ignore-rules-for-public-restrooms/> [<https://perma.cc/9JGL-NSH6>] (investigating Chicago restaurants that do not provide restrooms to their customers); Steve Chapman, *Should private businesses have to open their bathrooms to the public?*, CHI. TRIB. (Apr. 28, 2017), <https://www.chicagotribune.com/columns/steve-chapman/ct-public-toilets-access-chicago-perspec-0430-20170428-column.html> [<https://perma.cc/8SRS-ABLL>]; John Byrne, *Alderman’s plan to make restaurants open their restrooms to non-customers stalls*, CHI. TRIB. (July 19, 2017), <https://www.chicagotribune.com/politics/ct-chicago-business-bathroom-public-access-met-20170719-story.html> [<https://perma.cc/ET55-268W>].

<sup>114</sup> Tara Lukasik, *Bring on building safety: Code enforcement explained*, BLDG. SAFETY J. (Apr. 30, 2018), <https://www.iccsafe.org/building-safety-journal/bsj-dives/bring-on-building-safety-code-enforcement-explained/#> [[perma.cc/VT8B-TBTU](https://perma.cc/VT8B-TBTU)].

<sup>115</sup> *See, e.g.*, Jake Blumgart, *The Building Code Profession Is Dying Out, and That’s a Problem*, BLOOMBERG (Feb. 8, 2017), [https://www.bloomberg.com/news/articles/2017-02-08/there-s-a-looming-shortage-of-building-safety-officials?utm\\_source=website&utm\\_medium=share&utm\\_campaign=copy](https://www.bloomberg.com/news/articles/2017-02-08/there-s-a-looming-shortage-of-building-safety-officials?utm_source=website&utm_medium=share&utm_campaign=copy) [<https://perma.cc/XA5R-9XKH>] (discussing the impending building inspector shortage in Utah due to aging out and a decreased interest in the profession); William Bender & Ryan W. Briggs, *A third of Philly’s building inspectors have quit since 2019. Critics say that threatens public safety.*, PHILA. INQUIRER (May 26, 2022), <https://www.inquirer.com/news/philadelphia-building-safety-staffing-shortages-inspections-20220526.html> [<https://perma.cc/WG2W-SU82>] (“Last year, the department did not hire a single new inspector, and scores of vacancies remain.”).

penalties.<sup>116</sup> Moreover, it is fair to assume that most business owners are unaware of what their respective codes say, and even fairer to assume that employees of a business have no knowledge of the law.

Between the increasing provision of toilets by private entities and the failure by governments to enforce applicable laws, businesses have come to adopt restroom policies that provide a shifting obstacle course of availability in most communities. Some businesses have conspicuously demonstrated their commitment to the public's use of their toilets.<sup>117</sup> This has been especially true when confronted by discriminatory acts against certain groups, such as the wave of state-level anti-transgender bathroom bills<sup>118</sup> and the arrest of two Black men at a Philadelphia Starbucks.<sup>119</sup> Other establishments have followed a much more common policy of restricting toilet access based on customer status or customer payment, while some businesses refuse to provide restrooms whatsoever.<sup>120</sup> Complicating all of these business-specific policies is the fact that the decisions are often left to

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<sup>116</sup> Henry Grabar, *Building Inspectors Are the Reverse Cops of Chicago*, SLATE (July 11, 2022), <https://slate.com/business/2022/07/chicago-building-insectors-code-violations.html> [<https://perma.cc/GA8X-EDPH>].

<sup>117</sup> For example, several businesses have recently joined with the Crohn's & Colitis Foundation to be a part of a new restroom finding app called We Can't Wait where companies have agreed to open their bathrooms to the public. Companies include The Home Depot, Good Year Auto Service, and Just Salad. *We Can't Wait: Restroom Finder App*, CROHN'S & COLITIS FOUND., <https://www.crohncolitisfoundation.org/wecantwait> [<https://perma.cc/3FJE-HRQD>] (last visited Jan. 7, 2023).

<sup>118</sup> See, e.g., Krystin Arneson, *These 70 Companies You Use Every Day Are Among Those Taking a Stand for Transgender Rights*, GLAMOUR (Apr. 26, 2016), <https://www.glamour.com/story/these-70-companies-you-use-every-day-are-among-those-taking-a-stand-for-transgender-rights>; Richard Gonzales, *Target Announces Expansion Of Bathroom Options Amid Transgender Debate*, NPR (Aug. 17, 2016), <https://www.npr.org/sections/thetwo-way/2016/08/17/490420043/target-announces-expansion-of-bathroom-options-in-u-s-stores> [<https://perma.cc/62CT-FFDW>].

<sup>119</sup> See, e.g., Jacey Fortin, *A New Policy at Starbucks: People Can Sit Without Buying Anything*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/2018/05/20/business/starbucks-customers-policy-restrooms.html?smid=url-share> [<https://perma.cc/5AT3-AVUA>] (“[T]he company announced that ‘any customer is welcome to use Starbucks spaces, including our restrooms, cafes and patios, regardless of whether they make a purchase.’”); but see Lauren Aratani, *Starbucks under pressure to keep restrooms open to public*, THE GUARDIAN (Nov. 18, 2022), <https://www.theguardian.com/business/2022/nov/18/starbucks-under-pressure-restrooms-open-public> [<https://perma.cc/L33B-EU2P>] (pointing to comments from Starbucks CEO Howard Schultz suggesting that the chain is now considering limiting access to its restrooms).

<sup>120</sup> Lawsuits have been filed against businesses alleging violations of the Americans with Disabilities Act for failing to offer publicly available bathrooms. However, courts have noted that just because a business may be a public accommodation, its bathrooms are not. See e.g., *Louie v. Ideal Cleaners*, Nos. C 99–1557 CRB, C 99–1814 CRB, WL 1269191, at \*3 (N.D. Cal. 1999) (“A plaintiff is not denied equal access to a restroom on account of his disability if non-disabled customers in the same position are denied access as well.”).

the discretion of individual employees, can vary by location, and even change based on the time of day.<sup>121</sup>

Some legal protections are afforded to customers in specific circumstances. When an establishment provides restroom facilities to patrons, federal, state, and even city public accommodation laws prohibit discrimination based on protected categories, including race, color, national origin, sex, and disability.<sup>122</sup> A clothing store that maintains a public restroom for customers cannot preclude individuals from using the facility based on a legally protected status. However, economic classifications—based on one’s class or ability to pay—have no protection under federal law<sup>123</sup> and may not be protected by city and state public accommodation laws.<sup>124</sup> And where customers have asserted that they have a right to use an employee restroom because of a disability or other characteristic, courts have often sided with businesses. Plaintiffs have filed suit against businesses claiming, for example, that they have been denied use of an employee restroom, thereby violating the American with Disabilities Act, but courts have found no violation if the business can demonstrate that it denies restroom access to *all* customers.<sup>125</sup>

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<sup>121</sup> See PEOPLE FOR FAIRNESS COAL. 2015, *supra* note 92, at 4–5, 8; PEOPLE FOR FAIRNESS COAL. 2017, *supra* note 92, at 2–3.

<sup>122</sup> Discrimination based on race, color, religion, and national origin is prohibited under the Civil Rights Act of 1964, Titles II and III. 42 U.S.C. § 2000a et seq; 42 U.S.C. § 2000b et seq. All states with public accommodation laws prohibit discrimination based on race, gender, ancestry, and religion. *State Public Accommodation Laws*, NAT’L CONF. STATE LEGS., <https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws> [<https://perma.cc/WEW6-BEPJ>] (last updated June 25, 2021).

<sup>123</sup> See generally Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283 (2018) (arguing for the enactment of discrimination statutes to protect against socioeconomic discrimination given the unwillingness of the federal courts to recognize poverty as a suspect class).

<sup>124</sup> Several states have enacted homeless bill of rights to afford some protections to those facing discrimination, including California, Hawaii, Illinois, Connecticut, Oregon, Puerto Rico, Rhode Island, Vermont, Missouri, and Massachusetts. See Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 384 (2015). Some states have laws that protect against forms of socioeconomic discrimination. See, e.g., MASS. GEN. LAWS ch. 151B, § 4(10) (2016) (barring discrimination to recipients of federal, state, or local public assistance in furnishing credit, services, or rental accommodations); MINN. STAT. ANN. § 363A.08 (2016) (prohibiting employment discrimination, in part, on the basis on receipt of public assistance); N.D. CENT. CODE ANN. § 14-02.4-14 (2017) (preventing and eliminating discrimination in public accommodations, amongst other areas, based on public assistance); 34 R.I. GEN. L. ANN. § 34-37.1-3 (2011) (“Homeless Bill of Rights”).

<sup>125</sup> See e.g., *Louie v. Ideal Cleaners*, Nos. C 99–1557 CRB, C 99–1814 CRB, WL 1269191 (N.D. Ca. 1999) (“[D]isabled and non-disabled are treated alike—they are not allowed to use the restroom so there is no disability discrimination.”).

## C. INSUFFICIENT PROGRESS

The paltry supply of public and publicly available bathrooms has been met with legislative efforts to address the needs of some. Yet these actions have done little to move the needle for providing more bathrooms to the broader public. What these laws have offered is commendable, but they cannot engender the radical change necessary to meet basic human biological demand.

1. *Potty Parity*

Women and girls have been excluded from the considerations of public restroom design for as long as public toilet facilities have existed.<sup>126</sup> Nothing communicates this built-in sexism more than the stereotypical long lines experienced by people waiting to use the ladies' room at a sporting event or concert.<sup>127</sup> As the preeminent toilet scholar Clara Greed has stated, "If you want to know the true position of women in society, look at the queue to the toilet."<sup>128</sup> Just as building and plumbing codes dictate the location and number of bathrooms, they also determine how restrooms are divided amongst the sexes.<sup>129</sup> Most toilets have traditionally been built and designed

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<sup>126</sup> See Gail Ramster, Clara Greed & Jo-Anne Bichard, *How Inclusion can Exclude: The Case of Public Toilet Provision for Women*, 44 BUILT ENV'T 52, (2017) (discussing the design of early public toilets in London, research "shows that the division of provision was biased towards men . . . male provision equated to twelve urinals and eight cubicles, whereas the women's toilets consisted of six cubicles meaning the aggregate provision for men is over three times that of women."); Clara Greed, *Taking women's bodily functions into account in urban planning and policy: Public toilets and menstruation*, 87 TOWN PLAN. REV. 505 (2016); Clara Greed, *Join the Queue: Including women's toilet needs in public space*, 67 SOCIO. REV. MONOGRAPHS 908 (2019); CLARA GREED, INCLUSIVE URBAN DESIGN: PUBLIC TOILETS 3–16 (2003). This Article does not delve in the important social and constitutional issues raised by sex-segregated bathrooms; however, several scholars have addressed this topic. See, e.g., Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1 (2007) ("This Article challenges the common assumption that legally mandated sex-separation of public restrooms is a benign recognition of natural anatomical differences between men and women."); Ruth Colker, *Public Restrooms: Flipping the Default Rule*, 78 OHIO ST. L.J. 145 (2017); Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J. L. & FEMINISM 465 (2018); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019).

<sup>127</sup> See Joe Pinsker, *The Long Lines for Women's Bathrooms Could Be Eliminated. Why Haven't They Been?*, THE ATLANTIC (Jan. 23, 2019), <https://www.theatlantic.com/family/archive/2019/01/women-men-bathroom-lines-wait/580993/> [<https://perma.cc/EYZ5-HE4W>].

<sup>128</sup> Southbank Centre, *Clara Greed on the importance of global public toilet provision*, YOUTUBE (Mar. 14, 2013), <https://youtu.be/wMxGqH5bcg> [<https://perma.cc/6ZFY-2MNA>].

<sup>129</sup> INT'L BLDG. CODE § 2902.1 (2018); INT'L PLUMBING CODE § 403.1 (2018).



with a one-to-one ratio for men's and women's toilets,<sup>130</sup> but this has overlooked the biological and social distinctions across gender when it comes to needing and using the restroom. Women and girls must handle all the biological necessities that men do and more, including addressing menstrual health and assisting children and family members with using the toilet, all the while navigating spaces predominately designed by men.<sup>131</sup> Despite this fact, in many building "[r]estrooms are the same size in most facilities, but urinals in men's rooms take less space."<sup>132</sup>

Potty parity legislation broadly calls for a "more equitable provision of separate toilet facilities for men and women,"<sup>133</sup> and typically requires that a higher ratio of restrooms be provided for women than men in places of public accommodation. For example, in Minnesota, "the ratio of water closets for women to the total of waters closets and urinals provided for men must be at least three to two, unless there are two or fewer fixtures for men."<sup>134</sup> Dozens of cities and states have adopted potty parity legislation which either mandates a certain number of restrooms be constructed depending on the occupancy limits of certain buildings (e.g., stadiums, movie theaters) or amends the building and plumbing codes of that particular jurisdiction.<sup>135</sup>

Potty parity laws have helped to decrease some of the inequities experienced by many people who rely on women's restrooms, however, these acts have by no means erased the pervasive disparities that still exist. Some experts note that to rectify nearly a century of ignoring and delegitimizing the public bathroom needs of women, more restrooms total and more restrooms catering explicitly to women must be constructed to begin filling this sanitary gap.<sup>136</sup> This could include providing more toilets than what is

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<sup>130</sup> Kathryn H. Anthony & Meghan Dufresne, *Potty Parity in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 J. PLAN. LITERATURE 267, 278 (2007) ("The nature of potty parity laws differs in various states. Most states require new ratios of two women's toilet stalls to one men's stall whereas others require a 3:2 or simply a 1:1 ratio."); ROYAL SOC. FOR PUB. HEALTH, TAKING THE P\*\*\*: THE DECLINE OF THE GREAT BRITISH PUBLIC TOILET 5 (2019) (commenting on potty parity legislation in the United States and Canada, while the standard in Great Britain "is still 1:1"), <https://www.rsph.org.uk/static/uploaded/459f4802-ae43-40b8-b5a006f6ead373e6.pdf> [<https://perma.cc/2XCQ-7W9C>].

<sup>131</sup> See Ramster, Greed & Bichard, *supra* note 127, at 60 (describing the physiological needs women must address in the bathroom and the gender norms they are expected to take on).

<sup>132</sup> Associated Press, "Potty Parity" Bill Wins 6-0 in State Senate, *Women Testify About Restrooms*, SAN JOSE MERCURY NEWS, Apr. 9, 1987, at 2E.

<sup>133</sup> Mary Anne Case, *Why not abolish the laws of urinary segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 212 (Harvey Molotch & Laura Norén eds., 2010).

<sup>134</sup> MINN. STAT. § 16B.615 (2007).

<sup>135</sup> Anthony & Dufresne, *supra* note 131, at 277–80.

<sup>136</sup> Ramster, Greed & Bichard, *supra* note 127, at 58–62; Southbank Centre, *supra* note 129128.

minimally required by state and local codes and working to revise the codes accordingly during the code development process, a system where women have historically been poorly represented.<sup>137</sup> But as one commentator has noted, “the laws governing women’s bathrooms seem to change only when men are inconvenienced.”<sup>138</sup>

*a. Restroom Access Acts*

A lack of available toilets has also eclipsed the needs of those living with chronic illness, particularly people with conditions that can necessitate immediate access to a bathroom. Restroom access acts (RAAs) have been enacted in nineteen states and the District of Columbia and grant emergency entrance to a business’s employee restrooms should there be no public restroom available in the vicinity.<sup>139</sup> However, these laws appear to be unfamiliar to both the public and the populations they are meant to support, and appear to be largely ineffective in terms of enforcement.

All RAAs follow a similar structure. A customer who is deemed to be lawfully on the premises of a retail establishment shall be allowed to use the retailer’s employee restroom facility during normal business hours if the toilet is reasonably safe and meets specific qualifications.<sup>140</sup> The customer must have an eligible medical condition, which typically is defined as “Crohn’s disease, ulcerative colitis, any other inflammatory bowel disease, irritable bowel syndrome, or any other medical condition that requires immediate access to a toilet facility,”<sup>141</sup> including conditions involving an ostomy device.<sup>142</sup> While most RAAs apply to bowel-related conditions, Texas and

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<sup>137</sup> Pinsker, *supra* note 128.

<sup>138</sup> Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Toilet Design*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 58 (Olga Gershenson & Barbara Penner eds., 2009).

<sup>139</sup> CAL. HEALTH & SAFETY CODE § 118700 (West 2023); COLO. REV. STAT. ANN. § 24-41-101 (West 2022); CONN. GEN. STAT. § 09-129 (2009); DEL. CODE ANN. tit. 16, § 3001H (West 2014); D.C. CODE § 7-2142 (2022); 410 ILL. COMP. STAT. 39/1 (2005); KY. REV. STAT. ANN. § 211.395 (West 2010); LA. STAT. ANN. § 40:1300.43 (2022); MASS. GEN. LAWS ANN. ch. 270, § 26 (West 2012); MD. CODE ANN., HEALTH-GEN. § 24-209 (West 2013); ME. REV. STAT. ANN. tit. 22, § 1672-B (2010); MICH. COMP. LAWS ANN. § 446.71 (West 2009); MINN. STAT. ANN. § 325E.60 (West 2007); N.Y. GEN. BUS. LAW § 492 (McKinney 2021); OHIO REV. CODE ANN. § 4173.01 (West 2008); TENN. CODE ANN. § 68-15-303 (West 2008); TEX. HEALTH & SAFETY CODE ANN. § 341.069 (West 2007); WASH. REV. CODE ANN. § 70.54.400 (2009); WIS. STAT. ANN. § 146.29 (West 2010).

<sup>140</sup> *See, e.g.*, 410 ILL. COMP. STAT. 39/5 (2005).

<sup>141</sup> *Id.*

<sup>142</sup> *See, e.g.*, 410 Ill. Comp. Stat. 39/20 (2005) (“A retail establishment or an employee of a retail establishment that violates Section 10 is guilty of a petty offense. The penalty is a fine of not more

Washington have broader eligibility for medical conditions that are “permanent or temporary,”<sup>143</sup> and Michigan’s law explicitly includes pregnancy as a qualifying condition.<sup>144</sup> To demonstrate eligibility, the law requires customers prove their condition via documentation issued by a licensed health care provider,<sup>145</sup> or, in some states, an identification card provided by the state or a national health organization.<sup>146</sup> A handful of states have no documentation requirements.<sup>147</sup>

RAAs apply uniformly to specific retail establishments and contexts. Covered businesses shall allow customers with demonstrated medical conditions to use their restrooms if (1) there are three or more employees on staff at the time, (2) the establishment does not normally make its employee restroom available to the public, (3) the toilet is located in a safe area, and (4) a public restroom is not immediately accessible.<sup>148</sup> By opening their employee restrooms to customers in an emergency, civil liability is waived for compliant establishments. Failure to comply with an RAA varies by state. In New York, Ohio, Maine, Kentucky, and Maryland no penalty is explicitly provided by statute.<sup>149</sup> For Delaware, Massachusetts, Minnesota, and Washington, first time violators are to be sent a warning letter by the city or county attorney in the jurisdiction where the offense occurred, while subsequent violations are assessed civil penalties of fines ranging from \$50 to \$200.<sup>150</sup> Remaining states categorize violations as petty offenses or misdemeanors and apply fines of not more than \$50 to not more than \$200.<sup>151</sup>

There is growing evidence that RAAs do little to help expand accessibility for those with the greatest need. In *Pilotto v. Urban Outfitters*, a case of first impression, a store patron with Crohn’s disease was denied access to the

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than \$100.”) KY. REV. STAT. ANN. § 211.395 (West 2010); TEX. HEALTH & SAFETY CODE ANN. § 341.069 (West 2007).

143 TEX. HEALTH & SAFETY CODE ANN. § 341.069 (2) (West 2007); WASH. REV. CODE ANN. § 70.54.400 (1)(b)(4) (2009).

144 MICH. COMP. LAWS ANN. § 446.71 (1)(c) (West 2009).

145 See, e.g., CONN. GEN. STAT. § 09-129 (1)(3) (2009).

146 See, e.g., DEL. CODE ANN. tit. 16, § 3002H (a)(1) (West 2014).

147 See, e.g., 410 ILL. COMP. STAT. 39/10 (2005).

148 *Id.*

149 N.Y. GEN. BUS. LAW § 492 (McKinney 2021); OHIO REV. CODE ANN. § 4173.01 (West 2008); ME. REV. STAT. ANN. tit. 22, § 1672-B (2010); KY. REV. STAT. ANN. § 211.395 (West 2010); MD. CODE ANN., HEALTH-GEN. § 24-209 (West 2013).

150 DEL. CODE ANN. tit. 16, § 3004H (a)(1) (West 2014); MASS. GEN. LAWS ANN. ch. 270, § 26 (e) (West 2012); MINN. STAT. ANN. § 325E.60 subdiv. 5 (West 2007); WASH. REV. CODE ANN. § 70.54.400 (6) (2009).

151 See, e.g., COLO. REV. STAT. ANN. § 24-41-101 (6) (West 2022).

employee restroom at an Anthropologie, resulting in the plaintiff soiling herself in the shopping center.<sup>152</sup> The plaintiff asserted that an implied right of private action existed under the state's RAA because it was "consistent with the underlying purpose of [the] statute and [was] the only adequate remedy for the Plaintiff and others similarly situated."<sup>153</sup> The state appeals court agreed, finding the law's waiver of civil liability for compliant businesses implicitly conveyed that civil penalties could be pursued by those injured after being denied access to a restroom. In particular, the court spoke to the inadequacies of the RAA's petty offense penalty, stating:

There is nothing regarding investigations or any other sanctions that would seek to ensure that the Act is not repeatedly violated. Defendant . . . certainly has the financial capability to simply refuse to comply with the Act each time it is approached by a customer with an irritable bowel condition, since the maximum penalty that can be assessed for each violation is \$100. . . . [A] retail store that refuses to comply with the Act would not even notice the impact of the petty offense penalty, especially one such as defendant, who has a nationwide presence on the retail market.<sup>154</sup>

Based on qualitative interviews I have conducted with inflammatory bowel disease (IBD) patients about their use and knowledge of RAAs, I have found that, while RAAs are of symbolic importance and represent a victory for disability rights, the laws have had little if any practical effect.<sup>155</sup> Persons with IBD typically structure their day-to-day lives around knowing where available restrooms are located, and they avoid businesses that are unfamiliar or businesses that clearly state they do not have bathrooms or place restrictions on their restrooms.<sup>156</sup> And because there is little public education about RAAs, persons with IBD are doubly burdened by potentially exerting their rights under the law. First, they must explain that they need a restroom immediately, and second, they then must disclose the nature of their condition and attempt to convince a business's employees that they have a right to use the bathroom.<sup>157</sup> That is an onerous task for any person experiencing a health emergency where seconds matter. Overall, in their current form, it appears that RAAs do not necessarily meet the needs of people who live with qualifying conditions, and while their adoption in several states has been the product of hard-fought advocacy efforts, more is

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<sup>152</sup> 72 N.E.3d 772 (Ill.App. 1 Dist. 2017).

<sup>153</sup> *Id.* at 776.

<sup>154</sup> *Id.* at 786–87.

<sup>155</sup> Richard M. Weinmeyer, Aparna Balakrishnan, Salva N. Balbale & Seema K. Shah, *No Public Restroom: Disability, Restroom Access Acts, and Opening Bathrooms to the Public* (on file with author).

<sup>156</sup> *Id.* (manuscript at 29).

<sup>157</sup> *Id.* (manuscript at 26).

needed to provide bathrooms to those with serious health conditions and the broader public.

*b. Survey & Pilot Laws*

Finally, survey and pilot laws are legal interventions that have gained traction within the last few years. These proposed or adopted local resolutions and bills require city governments to assess their municipal toilet needs and then commit to undertaking pilot studies of where toilets should be located.

The first and most comprehensive of this type of law is Washington, D.C.'s Public Restroom Facilities and Installation Act.<sup>158</sup> Signed into law by Mayor Muriel Bowser in April 2019, the law requires the city government to establish a working group that will assess areas of the city in need of increased restroom availability, conduct an audit of the city's public toilet needs, and then carry out a pilot program.<sup>159</sup> Two public restrooms will be installed according to the working group's recommendations, while a community incentive program will also be conducted in a select business improvement district.<sup>160</sup> Under this program, the city will provide funds to business establishments that "make their restrooms available free of charge to any person, regardless of whether the person patronizes the place of public accommodation."<sup>161</sup>

Similar resolutions and bills have been pursued in two other cities: Chicago and New York. Following a 2021 *Chicago Tribune* investigation of Chicago's lack of public and publicly available toilets,<sup>162</sup> nineteen aldermen signed a resolution "call[ing] for the establishment of [a] pilot program to provide publicly available bathrooms throughout [the] City of Chicago."<sup>163</sup> To do so, the resolution calls on the city to participate in data collection to better understand the sanitation service needs across Chicago and to "encourage a study of potential licensing bonuses or subsidies that could be provided to businesses that keep their bathroom(s) open to the public."<sup>164</sup> And in October 2022, the New York City Council passed a bill to identify

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<sup>158</sup> Public Restroom Facilities Installation and Promotion Act of 2018, 66 D.C. Reg. 1595 (Jan. 31, 2019).

<sup>159</sup> D.C. CODE §§ 10-1051–53 (2019).

<sup>160</sup> *Id.* at §§ 10-1052–53.

<sup>161</sup> *Id.* at § 10-1053.

<sup>162</sup> Hoerner, *supra* note 59.

<sup>163</sup> Comm. on Health and Hum. Rels. R2021-1489, City Council Meeting (Chi., Ill. 2021).

<sup>164</sup> *Id.*

areas in every zip code of the city's five boroughs were a potential public bathroom could be located.<sup>165</sup> The law requires that by December 31, 2023 “a report identifying the number of operational public bathroom facilities in each zip code” shall be delivered to the mayor and the city council, and that the report will also identify at least one location in every zip code where a public bathroom facility could be installed.<sup>166</sup>

Survey and pilot laws take an important step in analyzing the public toilet supply problems in their respective jurisdictions: They help cities assess their public bathroom needs and plan for future sanitary reforms. However, like so many other forms of legislative intervention, stronger actions are needed. The implementation of the D.C. law was hindered by the COVID-19 pandemic, but even within the last year, execution of the restroom pilot has been delayed.<sup>167</sup> It bears highlighting that this law is focused on installing only two new toilets for a city with a population of approximately 671,803.<sup>168</sup> The October 2021 Chicago resolution is also in a standstill with no official actions in the works currently.<sup>169</sup> And unlike D.C.'s Public Restroom Facilities and Installation Act, the N.Y.C. law does not require the city to build any new public toilets or to engage in a pilot project to test the suitability of proposed locations. Undertaking a needs assessment of New York City's 178 zip codes is necessary, but not requiring the city government to do anything beyond that is an inherent flaw in the bill.

#### D. HEALTH HARMS

Public bathrooms are unquestionably key features in maintaining the health and wellbeing of populations. The human biological need is universal and considerable: Every person requires the use of a toilet approximately six

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<sup>165</sup> N.Y.C., N.Y., Local Law to Report on Suitable Locations for Installing Public Bathrooms, Int. 0258-2022 (Nov. 27, 2022).

<sup>166</sup> *Id.*

<sup>167</sup> See DC Public Restrooms is Concerned over Delays on the Part of DGS in Implementing the Standalone Public Restrooms Pilots, DC PUBLIC RESTROOMS, <https://dcpublicrestrooms.org/dc-public-restroom-law/law-22-280-status-of-implementation/> [https://perma.cc/ANL7-SKDY] (last visited Feb. 9, 2023) (publishing updates on the status of implementing the standalone public restroom pilots).

<sup>168</sup> See Jenny Gathright, *D.C. Sees Slight Population Increase After Two Years of Decline*, DCIST (Dec. 26, 2022), <https://dcist.com/story/22/12/26/dc-new-census-numbers-population-increase/> [https://perma.cc/7TW2-KZP6] (“The Census Bureau estimates D.C.’s population at 671,803 for 2022 . . .”).

<sup>169</sup> E-mail from Nicholas Zettel, Chief of Staff, to First Ward Alderman Daniel La Spata (Dec. 14, 2022, 3:20 PM) (on file with author).

to eight times a day,<sup>170</sup> and when multiplied by thousands or even millions of residents, the provision of bathrooms by a town, city, or state is necessary. Obviously, restrooms serve a hygienic purpose by allowing people to urinate, defecate, wash, and attend to other matters of personal care in relative privacy and with dignity. Toilets are also focal points of the sanitation system, where they not only contain and remove waste, but also contribute to the broader goals of facilitating aesthetics and livability.<sup>171</sup> Yet when a public restroom cannot be found, it can be a matter of personal frustration or embarrassment for the individual, while also having far reaching effects that can negatively impact the public's health.

The contemporary public health challenges surrounding public toilets have been many. Since 2016, thirty-seven states have reported significant outbreaks of hepatitis A.<sup>172</sup> Although hepatitis A is often linked to contaminated food and water,<sup>173</sup> it is more commonly transmitted person-to-person.<sup>174</sup> To date, this constellation of outbreaks has been unprecedented in scale, resulting in 44,915 cases, 27,445 hospitalizations, and 423 deaths.<sup>175</sup> Cases have largely been concentrated in individuals experiencing housing instability or homelessness.<sup>176</sup> Transmission has been fueled by a lack of

<sup>170</sup> See *What Your Bladder is Trying to Tell You About Your Health*, CLEV. CLINIC (July 17, 2019), <https://health.clevelandclinic.org/what-your-bladder-is-trying-to-tell-you-about-your-health-2/> [<https://perma.cc/RR4Y-3DKB>] (“It’s considered normal to have to urinate about six to eight times in a 24-hour period.”).

<sup>171</sup> See Clara Greed, *The Role of the Public Toilet: Pathogen Transmitter or Health Facilitator?*, 27 BLDG. SERVS. ENG’G RSCH. TECH. 127, 127 (2006) (“Research has demonstrated that public toilet provision constitutes the vital, missing link that would enable the creation of sustainable, accessible, inclusive cities.”).

<sup>172</sup> *Person-to-person outbreaks of hepatitis A across the United States*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/outbreaks/2017March-HepatitisA.htm> [<https://perma.cc/7YT2-WTNT>] (Oct. 10, 2023) [hereinafter *Hepatitis Outbreak*].

<sup>173</sup> See, e.g., *Multistate Outbreak of Hepatitis A Virus Infections Linked to Fresh Organic Strawberries*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/outbreaks/2022/hav-contaminated-food/index.htm> [<https://perma.cc/FC9E-GYLB>] (last visited July 18, 2022) (detailing an outbreak of nineteen cases of hepatitis A associated with the consumption of strawberries from Baja California, Mexico).

<sup>174</sup> See *Hepatitis A Questions and Answers for the Public*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/hav/afaq.htm> [<https://perma.cc/8KME-EP8U>] (last visited July 18, 2022) (“Hepatitis A can be spread from close, personal contact with an infected person . . .”).

<sup>175</sup> *Hepatitis Outbreak*, *supra* note 172.

<sup>176</sup> See Monique Foster et al., *Hepatitis A Virus Outbreaks Associated with Drug Use and Homelessness—California, Kentucky, Michigan, and Utah, 2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 1208, 1208–09 (2018) (stating that “the majority of infections were among persons reporting injection or noninjection drug use or homelessness”); Monique Foster et al., *Increase in Hepatitis A Virus Infections—United States, 2013–2018*, 68 MORBIDITY & MORTALITY WKLY. REP. 413, 413 (2019) (stating that “[s]ince 2017, the vast majority of . . . reports were related to multiple outbreaks of infections among persons reporting drug use or homelessness”).

clean and accessible public bathrooms for this population.<sup>177</sup> An absence of these facilities is a tinderbox for viral outbreaks amidst a vulnerable group living in crowded conditions, and it has been just that for several years.<sup>178</sup> The hepatitis outbreak has been a horrific scenario where the social conditions that initiated the development of the outbreak have received widespread condemnation from the public health community,<sup>179</sup> homeless rights activists,<sup>180</sup> international organizations,<sup>181</sup> and has even been the subject of litigation.<sup>182</sup>

During the first year of the COVID-19 pandemic, concerns over viral exposure created considerable uncertainty around the safety of using public bathrooms. This was in part due to the fact that SARS-CoV-2 had been found in the stool of infected patients when the outbreak began, with studies reporting that a large percentage of infectious persons with light-to-mild

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177 Roxanne Nelson, *Hepatitis A Outbreak in the USA*, 18 LANCET 33, 33 (2018) (“Many homeless people live in crowded encampments that often lack public toilets and sinks....these are environments that promote faecal-oral transmission of disease.”).

178 See, e.g., Anna Gorman & Kaiser Health News, *Medieval Disease are Infecting California’s Homeless*, THE ATL. (Mar. 11, 2019), [https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/?utm\\_source=copy-link&utm\\_medium=social&utm\\_campaign=share](https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/?utm_source=copy-link&utm_medium=social&utm_campaign=share) [https://perma.cc/7NNV-YUPM] (describing the numerous outbreaks of contagious disease that have appeared in California’s homeless population in recent years because of unsanitary and unsafe conditions and a lack of basic preventive health services).

179 See Margot Kushel, *Hepatitis A Outbreak in California—Addressing the Root Cause*, 378 NEW ENG. J. MED. 211, 211 (2018) (“The environmental conditions associated with homelessness — overcrowding in encampments and emergency shelters, exposure to the elements, and limited access to facilities for hygiene and food preparation and storage—facilitate infectious-disease transmission.”).

180 See L.A. CENT. PROVIDERS COLLABORATIVE, NO PLACE TO GO: AN AUDIT OF THE PUBLIC TOILET CRISIS IN SKID ROW 25 (2017), <https://lafla.org/wp-content/uploads/2017/08/No-Place-To-Go-final.pdf> [https://perma.cc/WA3M-3E7S] (“The 2017 Audit of Public Toilets on Skid Row sets out to document the current conditions in Skid Row. Specifically, this Audit seeks to assess how Skid Row’s access to public toilets compares to broadly-accepted standards for how many public toilets should be available to homeless residents.”).

181 See Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, U.N. Doc. A/HRC/38/33/Add.1, at 12 (May 4, 2018) [hereinafter *Extreme Poverty Report*] (stating that “[t]he criminalization of homeless individuals in cities that provide almost zero public toilets seems particularly callous” and citing a report saying “approximately 1,800 homeless individuals on Skid Row in Los Angeles had access to only nine public toilets”); Press Release, U.N. Hum. Rts. Office High Comm’r, “Contempt for the Poor in US Drives Cruel Policies,” Says UN Expert (June 4, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23172&LangID=E> [https://perma.cc/W8UQ-FQFH] (“[O]n Skid Row . . . [there is a ratio of] one public toilet per 200 individuals [which] would not even meet the minimum standards the UN sets for Syrian refugee camps.”).

182 See L.A. All. for Hum. Rts. v. City of L.A., No. LA CV 20-02291-DOC-(KESx), 2021 WL 1546235, at \*33-34 (C.D. Cal. Apr. 20, 2021) (documenting the installation and removal of sanitation facilities over two decades in and around Skid Row).



disease presented with diarrhea, nausea, and abdominal pain.<sup>183</sup> Lingering concerns of COVID transmission forced many businesses to restrict access to their restrooms, and other establishments that once allowed customers to use their facilities temporarily or permanently closed.<sup>184</sup> And as cities and states have grappled with how to operate amidst the constantly changing pandemic circumstances, reports of smaller outbreaks of gastrointestinal disease have come to the attention of public health departments, once again, largely believed to be the product of out-of-reach public toilet facilities.<sup>185</sup>

Distinct from the public health concerns around communicable disease transmission are the innumerable health challenges that can manifest or be worsened from the unavailability of public toilets. Over twenty-five million American adults experience temporary or chronic urinary incontinence.<sup>186</sup> This condition can happen at any age throughout the life course, although it becomes more common in men and women as they grow older.<sup>187</sup> Three to ten percent of men will experience urinary incontinence during their lifetimes.<sup>188</sup> However, twice as many women will be affected by this condition because of how reproductive health events such as pregnancy, childbirth, and menopause affect a woman's bladder, urethra, and pelvic

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<sup>183</sup> Chunxiang Ma, Yingzi Cong & Hu Zhang, *COVID-19 and the Digestive System*, 115 AM. J. GASTROENTEROLOGY 1003, 1004 (2020) (reviewing studies where 53.42% and 29% of hospitalized COVID-19 patients provided stool samples testing positive for SARS-CoV-2 RNA).

<sup>184</sup> Marc Fisher, *The need to go is a big barrier to going out. Why public bathrooms are a stumbling block for reopening*, WASH. POST (May 18, 2020, 2:11 PM), [https://www.washingtonpost.com/national/coronavirus-reopen-bathrooms/2020/05/18/a6ed57fc-93ba-11ea-82b4-c8db161ff6e5\\_story.html](https://www.washingtonpost.com/national/coronavirus-reopen-bathrooms/2020/05/18/a6ed57fc-93ba-11ea-82b4-c8db161ff6e5_story.html) [<https://perma.cc/7UJD-T33P>]; see also Alex Brown, *Coronavirus pandemic causes another health concern – closed public restrooms*, WASH. POST (Aug. 1, 2020, 2:30 PM), [https://www.washingtonpost.com/health/coronavirus-pandemic-causes-another-health-concern-closed-public-restrooms/2020/07/31/5c39b250-d0ff-11ea-8d32-1ebf4e9d8e0d\\_story.html](https://www.washingtonpost.com/health/coronavirus-pandemic-causes-another-health-concern-closed-public-restrooms/2020/07/31/5c39b250-d0ff-11ea-8d32-1ebf4e9d8e0d_story.html) [<https://perma.cc/V6SS-VM5K>].

<sup>185</sup> See Sydney Brownstone, *Hospitalizations high during King County gastrointestinal outbreak among homeless population*, SEATTLE TIMES (May 19, 2021, 6:00 AM), <https://www.seattletimes.com/seattle-news/homeless/hospitalizations-high-during-gastrointestinal-outbreak-among-homeless-population/> (emphasizing that the spread of gastrointestinal infection and diarrheal illnesses were “fueled by a lack of hygiene options accessible during the pandemic”).

<sup>186</sup> *Urinary Incontinence in Women*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/urinary-incontinence/urinary-incontinence-in-women> [<https://perma.cc/NWF6-WVPR>] (last visited Dec. 5, 2022).

<sup>187</sup> *Id.*; see also *Urinary Incontinence in Older Adults*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/urinary-incontinence-older-adults> [<https://perma.cc/FF5J-WV3H>] (last updated Jan. 24, 2022).

<sup>188</sup> Adam R. Miller, *Treatment options for men with urinary leakage*, MAYO CLINIC HEALTH SYS. (Sept. 26, 2022), <https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/treatment-options-for-men-with-urinary-leakage> [<https://perma.cc/P32C-VM7K>].

muscles.<sup>189</sup> Pregnant people are especially burdened by stress urinary incontinence, with approximately forty-two percent suffering from it during their pregnancy.<sup>190</sup>

Fecal incontinence also affects the American public and its need for available toilets. The estimated prevalence of fecal incontinence in non-institutionalized U.S. adults is 8.3%, with similar prevalence in women at 8.9% and in men at 7.7%.<sup>191</sup> As with urinary incontinence, the likelihood of fecal incontinence increases with age and the incidence of other health complications, including nerve damage from injuries or longstanding chronic conditions such as diabetes and multiple sclerosis.<sup>192</sup> Pregnancy once again increases the risk for fecal incontinence, affecting up to twenty-five percent of childbearing women, and is often tied to complications or injuries resulting from childbirth.<sup>193</sup>

Numerous illnesses and their subsequent treatments can modify one's use and need for a toilet and increase the demand for greater bathroom availability. For example, prostate cancer, diabetes, urinary tract infections, and kidney and bladder stones are all diseases that present with signs or symptoms of more frequent urination.<sup>194</sup> Urinary incontinence is often the

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<sup>189</sup> See *Urinary incontinence*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/a-z-topics/urinary-incontinence#3> [<https://perma.cc/Q24T-GXCT>] (last updated Feb. 22, 2021) (“[P]regnancy, childbirth, and menopause may make urinary incontinence more likely.”).

<sup>190</sup> Bussara Sangsawang & Nucharee Sangsawang, *Stress urinary incontinence in pregnant women: A review of prevalence, pathophysiology, and treatment*, 24 INT'L UROGYNECOLOGY J. 901, 902–03 (2013).

<sup>191</sup> William F. Whitehead et al., *Fecal Incontinence in US Adults: Epidemiology and Risk Factors*, 137 GASTROENTEROLOGY 512, 514 (2009).

<sup>192</sup> See *Fecal incontinence*, MAYO CLINIC (Nov. 3, 2022), <https://www.mayoclinic.org/diseases-conditions/fecal-incontinence/symptoms-causes/syc-20351397> [<https://perma.cc/G48G-YMDN>] (detailing the causes and risk factors of fecal incontinence).

<sup>193</sup> *Incontinence During Pregnancy and Childbirth*, NAT'L ASS'N FOR CONTINENCE, <https://nafc.org/pregnancy-and-childbirth/> [<https://perma.cc/7VVP-MCSA>] (last visited Dec. 6, 2022).

<sup>194</sup> See *Prostate Cancer Symptoms and Signs*, PROSTATE CANCER FOUND., <https://www.pcf.org/about-prostate-cancer/what-is-prostate-cancer/prostate-cancer-symptoms-signs/> [<https://perma.cc/N94B-SZVB>] (last updated Oct. 5, 2020) (stating that, although prostate cancer does not typically produce warning signs, one possible sign is “[a] need to urinate frequently, especially at night, some- times (sic) urgently”); *Diabetes Symptoms*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/diabetes/basics/symptoms.html> [<https://perma.cc/FD6K-BTDY>] (last updated Apr. 27, 2021) (noting that frequent urination is a sign of diabetes); *Urinary Tract Infections*, CLEV. CLINIC, <https://my.clevelandclinic.org/health/diseases/9135-urinary-tract-infections> [<https://perma.cc/JK8C-DNTM>] (last updated Apr. 6, 2023) (naming the symptoms of a urinary tract infection to include frequent urination, urinary incontinence, and urge incontinence); *Kidney stones*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/kidney-stones/symptoms-causes/syc-20355755> [<https://perma.cc/DXU6-4TSC>] (last

side effect of diuretics which are prescribed to treat high blood pressure and vascular conditions, alpha blockers are prescribed for hypertension in women and prostate enlargement in men, and so forth.<sup>195</sup> And when it comes to fecal incontinence, the pharmacological side effects tend to come from common prescriptions and over-the-counter medications.<sup>196</sup> Antipsychotic drugs, well known for their toxicity and debilitating side effects, can trigger both forms of incontinence.<sup>197</sup>

Even for those who are in a perfect state of health, the inability to find a bathroom can be physically harmful. Urine retention can increase the frequency of abdominal pain, urinary tract infections, and even lead to renal damage.<sup>198</sup> Similarly problematic, delayed defecation can produce constipation, abdominal pain, hemorrhoids, and diverticulitis.<sup>199</sup> These conditions can impose an incredible strain not only the individual, but also on the health care system. Incontinence, overactive bladder, and other

updated June 3, 2022) (explaining that signs and symptoms of kidney stones may include “[a] persistent need to urinate, urinating more than usual or urinating in small amounts”); *What are Bladders Stones?*, PENN MED., <https://www.pennmedicine.org/for-patients-and-visitors/patient-information/conditions-treated-a-to-z/bladder-stones> [<https://perma.cc/L8CU-7NEW>] (last updated Apr. 10, 2022) (stating that a symptom of bladder stones is the “[f]requent urge to urinate”).

<sup>195</sup> *See Are Your Medications Causing Your Incontinence, or Making It Worse?*, CLEV. CLINIC (Jan. 13, 2020), <https://health.clevelandclinic.org/are-your-medications-causing-or-increasing-incontinence/> [<https://perma.cc/B5YW-H548>] (“There are four groups of medications commonly recommend by doctors that can cause or increase loss of bladder control[,]” including diuretics and alpha blockers).

<sup>196</sup> *See What medications can cause bowel incontinence?*, DRUGS.COM, <https://www.drugs.com/medical-answers/medications-bowel-incontinence-3559405/> [<https://perma.cc/82J8-YR2D>] (last updated Aug. 23, 2022) (identifying a number of prescription and over-the-counter medications that can cause bowel incontinence).

<sup>197</sup> *See Amin Arasteh, Soroush Mostafavi, Sepideh Zununi Vahed & Seyede Saba Mostafavi Montazeri, An association between incontinence and antipsychotic drugs: A systematic review*, 142 *BIOMEDICINE & PHARMACOTHERAPY*, 2021, at 6 (“Incontinence as a side effect of antipsychotic medication tends to occur early in treatment, usually within the first few weeks, and is usually self-limiting; however, subsequent studies suggest that this condition may persist in a proportion of individuals.”).

<sup>198</sup> *See Memorandum from John B. Miles, Jr., Directorate of Compliance Programs, OSHA to Reg'l Adms' & State Designees* (Apr. 6, 1998) (citation omitted), <https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0> [<https://perma.cc/L9KT-24VA>] (“Adverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections . . . and, in rare situations, renal damage.”); *see also Stop holding it in! 4 bodily functions you should let out*, GEISINGER (Mar. 29, 2018), <https://www.geisinger.org/health-and-wellness/wellness-articles/2018/03/29/21/13/stop-holding-it-in-4-bodily-functions-you-should-let-out> [<https://perma.cc/XYR3-ZBVS>] (detailing the health risks associated with urine retention).

<sup>199</sup> *Id.* (“Medical evidence also shows that health problems, including constipation, abdominal pain, diverticuli, and hemorrhoids, can result if individuals delay defecation.”).

illnesses and disorders generate tens of billions of dollars in direct health care costs,<sup>200</sup> and there are also intangible costs in terms of quality of life.

The physical discomfort of not being able to find a public restroom is harmful in and of itself, yet the mental health ramifications can be equally injurious. Stress and anxiety can accompany the search for an available bathroom outside the home. It is far too common in the United States for people to be brought to tears,<sup>201</sup> forced to plead with store employees,<sup>202</sup> and in some instances, suffer the embarrassment of having an accident in public.<sup>203</sup> And for those who are especially vulnerable, such as people without housing, the mental strain can be ongoing. As one unhoused New Yorker has stated, “You run around desperately looking for a restroom, but find nobody empathetic or sympathetic to your situation . . . . You begin to panic. You are full of shame but have no choice; you are going to have to find a secluded place, [often] in public.”<sup>204</sup>

The most severe mental health harm that can come from a lack of public toilets is social isolation. Whether it is because of disability, old age, or a chronic health condition, many people often restrict their personal and social lives because of the unavailability of toilets in and around the areas they would otherwise frequent.<sup>205</sup> Commonly referred to as the “bladder leash”

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<sup>200</sup> See, e.g., Karin S. Coyne et al., *Economic Burden of Urgency Incontinence in the United States: A Systematic Review*, 20 J. MANAGED CARE PHARMACY 130, 136 (2014) (“The total national cost [of urgency urinary incontinence] is projected to be \$76.2 billion in 2015 and \$82.6 billion in 2020, with the highest costs incurred by patients aged 75-84 years . . .”).

<sup>201</sup> See, e.g., Steve Chapman, *Should private businesses have to open their bathrooms to the public?*, CHI. TRIB., <https://www.chicagotribune.com/columns/steve-chapman/ct-public-toilets-access-chicago-perspec-0430-20170428-column.html> [<https://perma.cc/Z5NG-RAUC>] (last updated Apr. 28, 2017, 2:35 PM) (“South Side Ald. David Moore, 17th, was in a Subway restaurant when he saw a woman crying. She had urgently needed to relieve herself upon arriving there, she told him, but the staff wouldn’t let her use the restroom until she bought something . . .”).

<sup>202</sup> See, e.g., Laura Norén, *Only Dogs Are Free to Pee: New York City Cabbies’ Search for Civility*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 93, 98 (Harvey Molotch & Laura Norén eds., 2010) (“I tried the deli next door, but the cashier said, ‘No bathroom.’ I was doubled over, about to lose it, and I pleaded with him. ‘It’s really an emergency. Please. I mean, where do you go to use the bathroom?’ He looked at me coldly and said, ‘Employees only.’”).

<sup>203</sup> See Chapman, *supra* note 201 (discussing the “humiliating” experience of a Chicago resident who had an accident in public after being denied use of a restroom).

<sup>204</sup> Valeria Ricciulli, *New York Needs a Place to Pee in Public* So Bad, CURBED (Dec. 3, 2020), <https://www.curbed.com/2020/12/nyc-public-bathrooms-locations-problem.html> [<https://perma.cc/9PAP-URPM>].

<sup>205</sup> See Rob Kitchin & Robin Law, *The Socio-spatial Construction of (In)accessible Public Toilets*, 38 URB. STUD. 287, 289 (2001) (“Without accessible toilets, people are subject to ‘the bladder’s leash’, restricting how long they are able to stay in a place and thus constraining their participation.”) (citation omitted).

or “loo leash,” the seclusion people encounter is palpable.<sup>206</sup> Some permanently stop running errands to shops or other haunts because a nearby once-reliable public toilet has been shuttered, or they decline opportunities to leave the home altogether because they fear what will happen if they are caught in public without a nearby bathroom.<sup>207</sup>

### III. LOOKING ABROAD: THE RECOGNITION AND INFLUENCE OF A HUMAN RIGHT TO SANITATION

The nation’s staggering lack of public bathrooms has been met with meek legislative measures while Americans continue to suffer. And the pursuit of woefully inadequate solutions, combined with the continued reliance of privately held facilities, has unleashed numerous public health harms. Bolder moves must be pursued to remedy the problem. Examining successful international efforts to recognize and implement a human right to sanitation in countries such as India reveals a playbook that U.S. states would do well to follow.

This Part introduces the human right to sanitation and its evolution through law and policy mechanisms. The right has taken hold internationally and has often been grounded in language committing nations and institutions to the protection of public health. In recent years, the right to sanitation has been recognized by the international community as a distinct human right, one that calls upon states and their citizens to work towards the provision of services to eradicate the deleterious effects of poor or non-existent sanitation services. Although this human right to sanitation does not itself articulate a specific right to toilets, several Indian high courts have gone one step further, finding an implicit right to public toilets based on their interpretation of international law and the Indian constitution.

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<sup>206</sup> See Emine Saner, *The Urinary Leash: How the Death of Public Toilets Traps and Trammels Us All*, THE GUARDIAN (Dec. 1, 2021, 7:00 AM), <https://www.theguardian.com/lifeandstyle/2021/dec/01/the-urinary-leash-how-the-death-of-public-toilets-traps-and-trammels-us-all> [https://perma.cc/G548-QKGT] (detailing the decline of public toilets in the United Kingdom and the disparate impact this has had on people living with chronic health conditions and disabilities).

<sup>207</sup> LEZLIE LOWE, NO PLACE TO GO: HOW PUBLIC TOILETS FAIL OUR PRIVATE NEEDS 82 (2018) (“There was a shop there he fancied, and it was a nice little jaunt that kept him moving. But since the toilet at the local train station had closed, he couldn’t make it anymore without being uncomfortable or risking an accident.”).

## A. GLOBAL SANITATION CHALLENGES

The problem of providing public toilets is a dilemma that is not solely confined to the United States. Public toilets, publicly available toilets, and more broadly, universal sanitation, present a cascade of predicaments for numerous countries and their residents worldwide. Low and middle-income nations, specifically, face a seemingly insurmountable public health challenge when it comes to the provision of sanitation services. It is estimated that 3.6 billion people do not have access to safely managed sanitation in their homes, a staggering number that accounts for nearly half the world's population.<sup>208</sup> And in 2020, global water, sanitation, and hygiene data found that approximately 494 million people were practicing open defecation, a practice in which a complete lack of sufficient, functional indoor plumbing necessitates “defecating in fields, forests, bushes, bodies of water, or other open spaces.”<sup>209</sup> Though this number has decreased markedly since 2000, there are fifty-five countries where five percent or more of their respective populations continue to engage in open defecation.<sup>210</sup> Universal sanitation is a difficult benchmark to achieve in even the wealthiest of countries regardless of their economic and geographic circumstances, yet open defecation is most prevalent in nations found in Sub-Saharan Africa, Central and Southern Asia, and Oceania.<sup>211</sup>

The immediate and downstream health effects of poor sanitation can be devastating. For example, pathogenic viruses, bacteria, and helminth eggs can be more easily transmitted in open defecation settings, resulting in outbreaks of diarrhea, cholera, typhoid, severe trachoma, schistosomiasis, and other bacterial, viral, and parasitic infections.<sup>212</sup> Women and girls are

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<sup>208</sup> *Global WASH Fast Facts: Access to Clean Water, Sanitation, and Hygiene*, CTR. FOR DISEASE CONTROL & PREV. (May 31, 2022), [https://www.cdc.gov/healthywater/global/wash\\_statistics.html](https://www.cdc.gov/healthywater/global/wash_statistics.html) [<https://perma.cc/366H-9727>].

<sup>209</sup> *Id.* (citation omitted); *Open Defecation*, WHO/UNICEF JOINT MONITORING PROGRAMME, <https://washdata.org/monitoring/inequalities/open-defecation> [<https://perma.cc/U3L8-ALPS>] (citation omitted) (last visited Oct. 21, 2022).

<sup>210</sup> *Open Defecation*, *supra* note 208 (“Between 2000 and 2022, the number of people practicing open defecation declined from 1,3 million to 419 million, reducing by more than two thirds.”).

<sup>211</sup> *Id.* See also *Progress on Household Drinking Water, Sanitation and Hygiene 2000-2020: five years into the SDGs*, WHO/UNICEF JOINT MONITORING PROGRAMME (July 1, 2021), <https://data.unicef.org/resources/progress-on-household-drinking-water-sanitation-and-hygiene-2000-2020/> [<https://perma.cc/9PM2-9KML>] (depicting the fifty-five nations where more than five percent of the population practiced open defecation in 2020).

<sup>212</sup> Mahrukh Saleem et al., *Health and Social Impact of Open Defecation on Women: A Systematic Review*, 19 BMC PUB. HEALTH 1, 2 (2019); ANNETTE PRÜSS-USTÜN ET AL., SAFER WATER, BETTER

especially vulnerable to harm. With few sanitation options in many parts of the world, women are often at a greater risk for experiencing physical and sexual violence when traveling to and from areas to relieve themselves, often having to wait until nighttime to do so in order to attain some level of privacy.<sup>213</sup> In other words, by attempting to avoid the prying eyes of men during daylight hours, women are at greater likelihood of being attacked by men because they are compelled to urinate and defecate after dark. Open defecation can also expose pregnant women to infections and stressors that are associated with adverse pregnancy outcomes.<sup>214</sup> Children, too, suffer in villages and regions with poor sanitation, where the practice of open defecation is associated with stunting and low weight.<sup>215</sup>

Open defecation is but one example of the wide variety of problems related to sanitation around the world. Whether it is the provision of free-standing urinals in Paris,<sup>216</sup> the closure of public restrooms in Scotland,<sup>217</sup> or

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HEALTH: COSTS, BENEFITS AND SUSTAINABILITY OF INTERVENTIONS TO PROTECT AND PROMOTE HEALTH, WORLD HEALTH ORG. 7–9 (2008), <https://apps.who.int/iris/handle/10665/43840> [<https://perma.cc/DS47-VWVJ>].

<sup>213</sup> Saleem et al., *supra* note 212, at 5–12; Apoorva Jadhav, Abigail Weitzman & Emily Smith-Greenaway, *Household Sanitation Facilities and Women’s Risk of Non-Partner Sexual Violence in India*, 16 BMC PUB. HEALTH 1, 3–9 (2016); Joanna Pearson & Kate McPhedran, *A Literature Review of the Non-Health Impacts of Sanitation*, 27 WATERLINES 48, 49–50 (2008) (“Open defecation was a common practice . . . which meant that women would risk violence and sexual abuse and would be obligated to wait until nightfall.”).

<sup>214</sup> Bijaya K. Padhi et al., *Risk of Adverse Pregnancy Outcomes among Women Practicing Poor Sanitation in Rural India: A Population-Based Prospective Cohort Study*, 12 PLOS MED., no. 7, July 7, 2015, at 10, <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001851> [<https://perma.cc/EG9U-ULKH>] (“After adjusting for socio-demographic, anthropometric, and other sanitation-related behaviours, we observed that women who reported poor sanitation practices in the early phase of pregnancy (10–12 [weeks] of gestation) were more likely to experience an [adverse pregnancy outcome.]”).

<sup>215</sup> Mohammad Hifz Ur Rahman et al., *Examining the Linkage between Open Defecation and Child Malnutrition in India*, 117 CHILDREN & YOUTH SERVS. REV., 2020, at 7 <https://doi.org/10.1016/j.childyouth.2020.105345> [<https://perma.cc/MXE8-EX7H>] (“We found that the prevalence of stunting and underweight was higher among the children who usually belong to households defecating in the open.”).

<sup>216</sup> Eleanor Beardsley, *Paris Tries to Control Rampant Public Urination with Sidewalk Urinals*, NPR (Sep. 11, 2018), <https://www.npr.org/2018/09/11/646567224/paris-tries-to-control-rampant-public-urination-with-sidewalk-urinals> [<https://perma.cc/6Q4U-6JKB>] (reporting on the controversial installation of freestanding urinals in Paris to combat public urination).

<sup>217</sup> Alistair Grant, *Public Toilets Disappearing across Scotland, Figures Show*, SCOTSMAN (Jan. 3, 2023), <https://www.scotsman.com/news/politics/public-toilets-disappearing-across-scotland-figures-show-3971525> [<https://perma.cc/N439-DVNM>] (detailing the decline of public toilets in Scotland since 2007, with some councils reporting a ninety-four percent drop in public toilet availability).

the lack of stable sewer connections in the favelas of Brazil,<sup>218</sup> international, national, and local organizations and governments have had to confront these matters not only through cultural, technical, and economic terms, but also through law and policy.

## B. HUMAN RIGHT TO SANITATION

While the disposal and treatment of human waste has been a vital component of human civilization for millennia,<sup>219</sup> the human right to sanitation is in its infancy. It was only in July 2010 that the U.N. General Assembly adopted a resolution acknowledging the right to “sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>220</sup> By 2013, the recognition of the human right to sanitation as a matter of international law would be confirmed by a consensus vote in the United Nations,<sup>221</sup> and by 2015, the right would be considered a distinct human right, completely distinguished from the right to water (a right to which it has historically been joined).<sup>222</sup> But the right to sanitation is rooted in transnational commitments to basic human existence and thriving that have been recognized by the international community, including the United States, for decades.

The human right to sanitation emerged from the documents, treaties, committees, and special procedures that make up the international legal system.<sup>223</sup> The U.N. Charter is the founding document of the

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<sup>218</sup> Dom Phillips, *Sewage, Zika Virus – and the Team in Brazil Mapping Disease Hotspots*, THE GUARDIAN (Sept. 2, 2019), <https://www.theguardian.com/global-development/2019/sep/02/zika-virus-team-brazil-mapping-disease-hotspots> [https://perma.cc/6LJZ-6NDP] (discussing the work of local teenage volunteers to map and investigate sanitation conditions in Salvador, Brazil with the goals of disease eradication and improved sanitation infrastructure).

<sup>219</sup> Kelly Ann Naylor & Bruce Gordon, *Learning from History: Sanitation for Prosperity*, WORLD HEALTH ORG. (Nov. 19, 2020), <https://www.who.int/news/item/19-11-2020-learning-from-history-sanitation-for-prosperity> [https://perma.cc/N4KA-LBD9]

<sup>220</sup> G.A. Res. 64/292, U.N. Doc. A/RES/64/292, at ¶ 1 (July 18, 2010). The resolution also confirmed the right to safe and clean drinking water, which, albeit a critically significant right, is beyond the scope of this article. For more on this right, see Martha F. Davis, *Freedom from Thirst: A Right to Basic Household Water*, 42 CARDOZO L. REV. 879 (2021).

<sup>221</sup> G.A. Res. 68/157, U.N. Doc. A/RES/68/157, at ¶ 1 (Dec. 18, 2013).

<sup>222</sup> G.A. Res. 70/169, U.N. Doc. A/RES/70/169, at ¶ 1 (Dec. 17, 2015).

<sup>223</sup> This Article provides a summary of the development and recognition of the human right to sanitation. For a complete picture, see the excellent work of Sharmila Murthy, Inga Winkler, and Margaret Satterthwaite. Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization*, 31 BERKELEY J. INT’L L. 89 (2013); Inga T. Winkler, *The Human Right to Sanitation*, 37 U. PA. J. INT’L L. 1331 (2016); Margaret L. Satterthwaite, *Assessing the Rights to Water and Sanitation: Between Institutionalization and Radicalization*, 52 GEO. J. INT’L L. 315 (2021).



intergovernmental body and establishes the purposes, governing structure, and the overall framework of the U.N. system and its principal organs.<sup>224</sup> But the Charter also serves as the bedrock for international human rights. For the purposes of this Article, the most important component is Article 55, which commits the United Nations to the promotion of “*higher standards of living*, full employment, and conditions of economic and social progress and development[.]” and to the identification and provision of “solutions [for] international economic, social, health, and related problems . . . .”<sup>225</sup>

Although the U.N. Charter provides the basis on which to develop and commit to the realization of international human rights, it does not outline what specific human rights are to be considered. Instead, those rights are housed within the Universal Declaration of Human Rights (UDHR).<sup>226</sup> This document is intended to mark the moral, ethical, and legal aspirations of the international community and to recognize “the inherent dignity” and “equal and inalienable rights of all members of the human family.”<sup>227</sup> Since its drafting, the international human rights system has materialized and evolved into a forum for “articulating legally binding obligations and aspirational goals through soft law instruments.”<sup>228</sup> The UDHR itself is not a legally binding instrument, though.

Since 1948, the UDHR has also been incorporated into several international human rights treaties that impose legal obligations on the national governments that have signed them. One such treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>229</sup> The ICESCR contains economic and social rights including but not limited to the rights to work,<sup>230</sup> unionize,<sup>231</sup> and to be afforded favorable working conditions;<sup>232</sup> the right to social security and social insurance;<sup>233</sup> the right to the “highest attainable standard of physical and mental health;”<sup>234</sup> and “the right . . . to an adequate standard of living . . . ,

<sup>224</sup> U.N. Charter ch. I–V.

<sup>225</sup> *Id.* art. 55 (emphasis added).

<sup>226</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/RES/217 (Dec. 10, 1948).

<sup>227</sup> *Id.* at pmbl.

<sup>228</sup> Murthy, *supra* note 223, at 91.

<sup>229</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

<sup>230</sup> *Id.* at art. 6.

<sup>231</sup> *Id.* at art. 8.

<sup>232</sup> *Id.* at art. 7(b).

<sup>233</sup> *Id.* at art. 9.

<sup>234</sup> *Id.* at art. 12.

including . . . the continuous improvement of living conditions.”<sup>235</sup> The United States signed on to the treaty in 1977, but has never ratified the ICESCR.<sup>236</sup> Few of the ICESCR’s rights are recognized under the U.S. Constitution, and the federal government has stated that because it is not a party to the ICESCR, “the rights contained therein are not justiciable in U.S. courts.”<sup>237</sup>

It is from the interpretation of the ICESCR that the human right to sanitation takes shape. The treaty is silent on sanitation. However, scholars who have analyzed the intentions of the ICESCR drafters suggest that Article 11—which recognizes a right to an adequate standard of living—was meant to be broad and that the rights it contains (food, clothing, and housing) were designed to be illustrative, not exhaustive.<sup>238</sup>

In 2002, the Committee on Economic, Social, and Cultural Rights,<sup>239</sup> charged with interpreting and monitoring the implementation of the ICESCR, adopted General Comment 15 which establishes a right to water.<sup>240</sup> The Committee stated that water is “a public good fundamental

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<sup>235</sup> ICESCR, *supra* note 229, at art. 11.

<sup>236</sup> The ICESCR has 171 nations that are a party to the instrument, respectively. *Status of Treaties, International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en) [https://perma.cc/47LE-HUD5] (last visited Oct. 26, 2023).

<sup>237</sup> *Explanation of Position for the Human Rights to Safe Drinking Water and Sanitation Resolution*, U.S. MISSION TO THE U.N. (Nov. 15, 2021), <https://usun.usmission.gov/explanation-of-position-for-the-human-rights-to-safe-drinking-water-and-sanitation-resolution/> [https://perma.cc/D8PT-T395] (statement of Sofija Korac, Advisor for Economic and Social Affairs); Philip Alston, *Putting Economic, Social And Cultural Rights Back On The Agenda of the United States* 2 (Ctr. for Hum. Rts. & Glob. Just., Working Paper No. 22, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397703) [https://perma.cc/A9FF-7NP6] (“Because most of these [rights] have no counterpart in the U.S. Bill of Rights, they are inevitably considered more exotic within the United States.”).

<sup>238</sup> MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 291–92 (1995).

<sup>239</sup> The United Nations established the Committee on Economic, Social and Cultural Rights in 1985. The Committee engages with state parties to determine whether the ICESCR’s norms are being applied by parties to the treaty and to assess how the application and “enforcement of the Covenant could be improved so all people can enjoy these rights in full.” *Committee on Economic, Social, and Cultural Rights*, OFF. U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/cescr> [https://perma.cc/MVT5-XMM8] (last visited Feb. 11, 2023); INGA T. WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 40 (2012) (noting that the Committee “does not have the authority to create new obligations, but rather interprets and clarifies the provisions of the ICESCR”).

<sup>240</sup> U.N. COMM. ON ECON., SOC. & CULTURAL RTS., *General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant)*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), <https://www.refworld.org/pd/4538838d11.pdf> [https://perma.cc/ZJ69-CS83] [hereinafter General Comment No. 15]. General comments are authoritative interpretations of the provisions

for life and health” and that “[t]he human right to water is indispensable for leading a life in human dignity”<sup>241</sup> and “fundamental for survival.”<sup>242</sup> General Comment 15 reasoned that the ICESCR’s catalogue of rights are not intended to be exhaustive and that a right to water clearly falls within the stated guarantees to an adequate standard of living and highest attainable standard of health.<sup>243</sup> Sanitation is interconnected to the right to water according to the Committee, noting that along with the over one billion people who do not have access to a safe, available water supply, several billion people also do not have access to proper sanitation.<sup>244</sup>

In July 2009, the independent expert on the rights to water and sanitation presented a report to the U.N. Human Rights Council supporting the existence of a distinct human right to sanitation.<sup>245</sup> Sanitation was defined as “a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene,” including the wastewater collected from toilets, sinks, and showers.<sup>246</sup> Further elaborating upon the right, the report stated that “states must ensure without discrimination that everyone has physical and economic access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.”<sup>247</sup> The independent expert found that sanitation is an integral component of numerous human rights, from the perhaps more obvious rights of a right to an adequate standard of living and the right to health, to the more all-encompassing right to life.<sup>248</sup> However, these linkages

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of human rights treaties by each respective treaty body. They can cover a wide range of subjects, from the comprehensive interpretation of substantive provisions to general guidance on when states must provide information to specific treaties. *General Comments*, OFF. U.N. HIGH COMM’R FOR HUM. RTS. <https://www.ohchr.org/en/treaty-bodies/general-comments> [https://perma.cc/4Y9Q-TY47] (last visited Feb. 11, 2023).

<sup>241</sup> General Comment No. 15, *supra* note 240, at ¶ 1.

<sup>242</sup> *Id.* at ¶ 3.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at ¶ 1.

<sup>245</sup> Catarina de Albuquerque (Independent Expert on Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation), *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, U.N. Doc. A/HRC/12/24 (Jul. 1, 2009), ¶¶ 55, 58–60, 81 [hereinafter Report of the Independent Expert].

<sup>246</sup> *Id.* at ¶ 63; *see also id.* at n.87 (“The independent expert further recognizes that, in some places, existing solutions for human excreta management make it inseparable from solid waste management.”).

<sup>247</sup> *Id.* at ¶ 63.

<sup>248</sup> The full list of human rights discussed includes: adequate standard of living, adequate housing, health, education, water, work and the right to just and favorable working conditions, life, physical security, prohibition of inhuman or degrading treatment, equality of women and men, prohibition of discrimination. *Id.* at 7–18.

failed to account for the full dimensionality of sanitation, which is a right that is indispensable to the realization and enjoyment of so many other human rights.<sup>249</sup> As the report states,

Sanitation, more than many other human rights issue, evokes the concept of human dignity; consider the vulnerability and shame that so many people ever experience every day when, again, they are forced to defecate in the open, in a bucket or a plastic bag . . . . It is such infringements on the very core of human dignity that are not wholly captured by considering sanitation only as it relates to other human rights.<sup>250</sup>

The human right to sanitation was officially recognized in July 2010. At that time, the U.N. General Assembly adopted a resolution recognizing “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”<sup>251</sup> The resolution also called upon states and international organizations to provide investment and resources in nations, particularly low- and middle-income nations, in order to establish the building capacity and technological infrastructure to “provide safe, clean, accessible and affordable drinking water and sanitation for all[.]”<sup>252</sup> Subsequent resolutions recognizing the right to sanitation were initiated, moving from discussions of the “human rights obligations related to access to sanitation” to an explicit recognition of “the human right to sanitation.”<sup>253</sup>

Perhaps one of the most important aspects of the realization of a human right to sanitation is its conceptualization as a *distinct* right that, while inextricably linked to the right to water, stands on its own.<sup>254</sup> The 2009 report argued forcefully for the recognition of the independent right given that sanitation is undeniably bound to notions of human dignity.<sup>255</sup> Applying standards set forth by the General Assembly, the independent expert asserted that distinct human rights should be “‘of fundamental character and derive from the inherent dignity and worth of the human person’ and ‘[are] sufficiently precise to give rise to identifiable and practicable rights and obligations.’”<sup>256</sup> Sanitation meets this bar, and, based on the independent

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<sup>249</sup> *Id.* at 18.

<sup>250</sup> *Id.*

<sup>251</sup> G.A. Res. 64/292, *supra* note 220, at ¶ 1.

<sup>252</sup> *Id.* at 2.

<sup>253</sup> Winkler, *supra* note 223, at 1365.

<sup>254</sup> *Id.* at 1374; Keri Ellis & Loretta Feris, *The Right to Sanitation: Time to Delink from the Right to Water*, 36 HUM. RTS. Q. 607–29 (2014); Murthy, *supra* note 223, at 117.

<sup>255</sup> Report of the Independent Expert, *supra* note 245, at 18–20.

<sup>256</sup> *Id.* at 19 (citing General Assembly resolution 41/120 on setting international standards in the field of human rights, 4 Dec. 1986).

expert's analysis, is further supported by the existence of the right to sanitation in the national constitutions of several states.<sup>257</sup>

Pragmatic justifications strengthen this position, as well. With a right to sanitation, there are technical challenges to consider that may not necessarily present in situations focused on water rights. For example, sanitation does not necessarily require the use of water, as is evidenced by pit latrines and the development of technologies such as waterless toilets.<sup>258</sup> Whatever the specific receptacle, jurisdictions and parties must consider the collection, removal, and treatment of waste, and the provision of other materials, including but not limited to soap and feminine hygiene products. Sanitation also can involve significant educational, social, and cultural investment in behavioral and public health campaigns as areas adapt their sanitation structures, such as moving away from the practice of open defecation.<sup>259</sup> The benefits of sanitation can also only be realized when the entire community has access to, and participates in, safe and clean sanitation resources, making it a public good.<sup>260</sup> While an individual or several individuals can reap the benefits of having access to clean and available water without an entire community benefiting, when even a few households engage in open defecation, the larger community can experience poorer health outcomes.<sup>261</sup>

### C. RIGHTS IN INDIA

Thus, a human right to sanitation has been officially recognized in international law as a mechanism for improving public health, raising global living standards, and restoring basic human dignity to the billions of people who have been left without reliable sanitation for too long. Though the ICESCR has led the way in the development and recognition of the right to sanitation, the right has now also gained either explicit or implicit recognition

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<sup>257</sup> *Id.* at ¶ 58 n.85 (highlighting the constitutions of Bolivia, Uruguay, and Kenya).

<sup>258</sup> *Id.* at ¶ 63 n.87.

<sup>259</sup> *Id.* at ¶ 74.

<sup>260</sup> CTR. ON HOUS. RTS. & EVICTIONS ET AL., SANITATION: A HUMAN RIGHTS IMPERATIVE 7 (2008), [https://sswm.info/sites/default/files/reference\\_attachments/COHRE%202008%20Sanitation%20a%20human%20rights%20imperative.pdf](https://sswm.info/sites/default/files/reference_attachments/COHRE%202008%20Sanitation%20a%20human%20rights%20imperative.pdf) [<https://perma.cc/QE5N-VZMV>].

<sup>261</sup> *Id.*

in other treaties,<sup>262</sup> been adopted in international development goals,<sup>263</sup> and resulted in the creation of a new special rapporteur responsible for overseeing water and sanitation rights.<sup>264</sup>

There is one country in particular that has advanced legal recognition of the right to sanitation through interpretation of both international and domestic law: India.<sup>265</sup> India and the United States are vastly different countries, but they also share a common trait in their lack of available public toilets and dubious efforts to expand bathroom availability.<sup>266</sup> And the recognition of not only a right to sanitation, but a right to public toilets in some Indian courts, could serve as a model for the identification of such a right in the American legal system.

There is no explicit right to sanitation in the Indian constitution. But the Supreme Court of India has interpreted such a right under what is essentially a due process clause of the Indian Constitution.<sup>267</sup> Article 21 of the Constitution states that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>268</sup> Elaborating upon the role of Article 21 in India, Justice J.S. Verma, the former Chief Justice of the Court once stated that the nation’s greatest resource was its people, and that to increase their value and the prosperity of the country, the Court’s interpretation of Article 21 was “to mean life with dignity and not

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<sup>262</sup> Satterthwaite, *supra* note 223, at 341–45 (discussing the inclusion of a right to sanitation in the Convention on the Elimination of All Forms of Discrimination Against Women).

<sup>263</sup> See *Progress on Sanitation (SDG target 6.2)*, U.N. WATER, <https://www.sdg6data.org/en/indicator/6.2.1a> [<https://perma.cc/XUJ9-YVP8>] (last visited Feb. 13, 2023) (“By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation[.]”).

<sup>264</sup> Hum. Rts. Council Res. 16/2, at ¶ 4 (Apr. 8, 2011).

<sup>265</sup> Report of the Independent Expert, *supra* note 245, at ¶¶ 36, 55.

<sup>266</sup> In 2014, India began “Swachh Bharat Abhiyan” or “Clean India” mission, a multiyear government program to end public defecation across India via the construction of nearly 100 million latrines and toilets around the country. See Rama Lakshmi, *India is Building Millions of Toilets, but That’s the Easy Part*, WASH. POST (June 4, 2015), [https://www.washingtonpost.com/world/asia\\_pacific/india-is-building-millions-of-toilets-but-toilet-training-could-be-a-bigger-task/2015/06/03/09d1aa9e-095a-11e5-a7ad-b430fc1d3f5c\\_story.html](https://www.washingtonpost.com/world/asia_pacific/india-is-building-millions-of-toilets-but-toilet-training-could-be-a-bigger-task/2015/06/03/09d1aa9e-095a-11e5-a7ad-b430fc1d3f5c_story.html) [<https://perma.cc/ZF2B-U5NW>]; *India’s Toilets: Report Questions Claims That Rural Areas Are Free from Open Defecation*, BBC NEWS (Nov. 27, 2019), <https://www.bbc.com/news/world-asia-india-46400678> [<https://perma.cc/A8RY-F97B>].

<sup>267</sup> Rebecca M. Coleman, Comment, *The Human Right to Sanitation for All: A Study of India*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267, 286 (2011).

<sup>268</sup> INDIA CONST. art. 21.

mere animal existence has the effect of increasing the worth of human beings.”<sup>269</sup>

Examining early cases that developed Article 21 reveals how Indian jurisprudence grew to realize a right to sanitation and even public toilets in some states. In 1980, the Supreme Court of India heard a challenge from impoverished city residents in the case of *Ratlam v. Vardhichand*, who argued that officials had violated their legal obligations to maintain the sanitary conditions of public spaces. This included a failure to abate the runoff from a nearby alcohol plant, creating sewage-covered slums, filthy roads, and an inhospitable stench.<sup>270</sup> The opinion noted that there were no municipally-provided lavatories in impoverished areas, thereby forcing people to live in an “open latrine.”<sup>271</sup> In its defense, the municipality claimed it lacked the financial resources to build drains and provide sanitary amenities.<sup>272</sup> Therefore, the question before the Court was this: Could it compel a municipality to abate nuisances and protect the public’s health even at great cost? The Court determined that it had the power and justification to do so. Affirming a lower court decision, the Supreme Court ruled that “decency and dignity are non-negotiable facets of human rights,” and that a simple study of Ratlam’s statutory obligations under India’s Municipalities Act of 1961 made clear that the city needed to respond.<sup>273</sup> By failing to address the sanitation crisis, the city was promoting the practice of open defecation and creating an “intolerable situation for habitation” in violation of country’s laws.<sup>274</sup> In describing the humiliation and indignity caused by Ratlam’s “grievous” sanitation failures, the Court said it drove “the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature’s pressure, bashfulness becomes a luxury and dignity a difficult art.”<sup>275</sup> The Court found that a responsible city could not run from its duty to preserve the public’s health by pleading financial instability.<sup>276</sup>

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<sup>269</sup> Chief Justice J.S. Verma, *Constitutional Obligations of the Judiciary*, R.C. Ghiya Memorial Lecture (June 28, 1997), <https://www.ebc-india.com/lawyer/articles/97v7a1.htm> [<https://perma.cc/C9FZ-WXFG>].

<sup>270</sup> *Municipal Council, Ratlam v. Shri Vardhichand*, 1980 AIR 1622 (India), [https://www.escriet.org/sites/default/files/caselaw/municipal\\_council\\_ratlam\\_vs\\_shri\\_vardhichand\\_ors\\_on\\_29\\_july\\_1980.pdf](https://www.escriet.org/sites/default/files/caselaw/municipal_council_ratlam_vs_shri_vardhichand_ors_on_29_july_1980.pdf) [<https://perma.cc/VBP6-GS3Q>].

<sup>271</sup> *Id.* at 6.

<sup>272</sup> *Id.* at 5–6.

<sup>273</sup> *Id.* at 13.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 12.

<sup>276</sup> *Municipal Council, Ratlam v. Shri Vardhichand*, 1980 AIR 1622, at 13 (India), [https://www.escriet.org/sites/default/files/caselaw/municipal\\_council\\_ratlam\\_vs\\_shri\\_vardhichand\\_ors\\_on\\_29\\_july\\_1980.pdf](https://www.escriet.org/sites/default/files/caselaw/municipal_council_ratlam_vs_shri_vardhichand_ors_on_29_july_1980.pdf) [<https://perma.cc/YSB5-69SJ>].

Just six years later, in *Koolwal v. Rajasthan*, a resident of the city of Jaipur filed suit against the city claiming that the conditions were so acutely unsanitary that they were hazardous to human life, slowly poisoning the residents and inviting an early death.<sup>277</sup> Under Article 21 of the Indian Constitution, the Rajasthan High Court found that the preservation of sanitation and the environment fell within the purview of the Article's commitment to life.<sup>278</sup> And therefore, under both the Jaipur's constitutional and statutory obligations to protect the health and welfare of its residents, city officials were ordered to clean the entire city within six months.<sup>279</sup>

More recently, the high courts of two cities, Bombay and Patna, have gone beyond the right to sanitation and identified an implicit right to bathrooms in the Indian constitution, basing their decisions, in part, on the recognition of international human rights. In 2015, in *Saryajani v. Pune*, a suit was filed against the municipality for failing to provide clean toilets and washrooms to women, offering as evidence the population-level health harms that had been suffered by the city's female residents.<sup>280</sup> The plaintiffs also demonstrated that the few toilets that were available were entirely substandard: poorly designed, filthy, and without water, electricity, and any modicum of security and hygienic amenities.<sup>281</sup> And the court agreed, noting that clean public toilets support the public's health, and that the toilet needs of women "cannot be ignored."<sup>282</sup>

The court in *Saryajani* based its reasoning on Article 47 of the Indian Constitution which makes "improvement of public health, a primary duty of the State,"<sup>283</sup> but also Article 21, stating "No human being can live with dignity unless there are facilities to maintain basic hygiene."<sup>284</sup> The court held that the right conferred by Article 21 is without consequence if clean and hygienic toilets are not available to women.<sup>285</sup> By applying these two rights recognized by the Indian Constitution, in conjunction with the municipal laws of Mumbai, the court ruled that public health is of paramount importance and that it is the duty of the State to ensure that public latrines,

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<sup>277</sup> L.K. Koolwal v. State of Rajasthan, AIR 1988 (Raj.) 2 (1986) (India), <https://indiankanoon.org/doc/778875/> [<https://perma.cc/PUB3-YDCP>].

<sup>278</sup> *Id.* at 2.

<sup>279</sup> *Id.* at 4.

<sup>280</sup> Milun Saryajani v. Pune Municipal Commissioner, C.A. (Bom.) ¶ 8 (2015) (India), <https://indiankanoon.org/doc/3070943/> [<https://perma.cc/U4FA-6NBR>].

<sup>281</sup> *Id.* at ¶ 40.

<sup>282</sup> *Id.* at ¶ 41.

<sup>283</sup> *Id.* at ¶ 4.

<sup>284</sup> *Id.* at ¶ 7.

<sup>285</sup> *Id.*



urinals, and similar conveniences are constructed, maintained, and kept in a hygienic condition.<sup>286</sup>

Finally, in 2022, the High Court in Patna heard a suit filed by female residents against the state of Bihar for failing to finalize the installation of petrol stations with public bathrooms along the state's highway system, a responsibility that was held by the Ministry of Petroleum of the National Highway Authority of India and several local officials.<sup>287</sup> Highlighting the sex disparities in sanitation availability, the court acknowledged that “[u]nlike women, men shamelessly stand on the Highways to ease off themselves, but a society cannot expect the same from the former and therefore it is an urgent duty upon the State/its instrumentalities to ensure that such needs, which are the very definition of basic needs, are met.”<sup>288</sup> Finding that the national and local officials had failed to meet their legal obligations, the court looked again to Articles 21 and 47 and national and local statutory provisions. But the court also incorporated the right to sanitation found by the Patna court in an earlier case, as well as the human right to sanitation recognized in international law.<sup>289</sup> In articulating its decision, the court stated:

The right to sanitation comes within the expansive and further expanding scope of Article 21 . . . . Equally, the State has obligations imposed by International law various Human Rights Instruments and Resolutions to ensure that the basic right of sanitation is available to all, irrespective of any differences in social or economic status.<sup>290</sup>

Hence, the Indian courts provide persuasive reasoning and a model for state courts in the United States on how a right to public toilets could be recognized.

#### IV. RECOGNIZING A STATE RIGHT TO PUBLIC TOILETS

The outlook for recognizing a right to public toilets in the United States may, at first sight, appear bleak; however, this Part demonstrates that there is cause for optimism on several fronts. First, it shows how the United States has already implicitly recognized a right to sanitation in many respects, without formally doing so. Next, it explains why a right to sanitation is insufficient, and then shows that a right to public toilets remains necessary

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<sup>286</sup> *Id.*

<sup>287</sup> *National Highway Projects in the State of Bihar v. State of Bihar*, No. 8900 (Pat.) (2022) (India), <https://indiankanoon.org/doc/131453077/> [<https://perma.cc/K3FB-X9YR>].

<sup>288</sup> *Id.* at ¶ 4.

<sup>289</sup> *Id.* at ¶ 36–47.

<sup>290</sup> *Id.* at ¶ 65.

by delineating the elements of this right and what changes they could foster. Finally, this Part explains how a right to public toilets might ultimately become legally recognized in the United States. Many of the rights recognized under the U.S. Constitution have been interpreted to be negative rights (or freedoms to be left alone), but a right to public toilets would have to be a positive right to spur the change that is needed. State constitutions contain many positive rights, including rights to public health, and they are much more hospitable to the creation of a right to public bathrooms. Specifically, this Part argues that state courts could support a right to public bathrooms by relying on provisions of state constitutions that relate to public health, along with using international human rights law as an influential interpretative source—a practice which is becoming increasingly common for positive social, economic, and cultural rights. This Part concludes by offering New York as an example of the state most likely to lead the charge as a laboratory of democratic innovation related to restrooms.

#### A. IMPLICIT RECOGNITION

The human right to sanitation is, by its very nature, intended to be a right of considerable breadth.<sup>291</sup> I argue that the right to sanitation has been implicitly statutorily and administratively recognized in the United States through the actions of public and private efforts to construct, operate, and monitor the sanitation infrastructure on which most Americans rely. As is the case with comfort stations and other toilet facilities, the larger project of American sanitation emerged during the late nineteenth century and grew in size and technological sophistication throughout the twentieth century.<sup>292</sup> This has had a transformational impact on morbidity and mortality in the United States. The public health interventions of sanitation and clean water technologies significantly reduced the transmission of infectious disease,<sup>293</sup> so much so that sanitation's ability to stop outbreaks of diseases like typhoid and cholera was lauded by the U.S. Centers for Disease Control and Prevention as one of the Ten Great Public Health Achievements of the twentieth

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<sup>291</sup> Winkler, *supra* note 223, at 1379 (defining sanitation in broad human rights terms).

<sup>292</sup> See generally MARTIN V. MELOSI, *THE SANITARY CITY: ENVIRONMENTAL SERVICES IN URBAN AMERICA FROM COLONIAL TIMES TO THE PRESENT* (2000) (detailing the rise and development of urban sanitation in the United States from the nations found until the end of the twentieth century).

<sup>293</sup> See, e.g., David Cutler & Grant Miller, *The Role of Public Health Improvements in Health Advances: The Twentieth-Century United States*, 42 *DEMOGRAPHY* 1, 2 (2005) (identifying various studies that argue large-scale public health interventions, including sanitation, helped to improve health in the United States).

century.<sup>294</sup> And, by some accounts, the effectiveness of the United States' sanitation system is only matched by its universality. According to the World Health Organization-UNICEF Joint Monitoring Programme, the United States has near universal sanitation coverage, with 98.3% of the country having safely managed sanitation services.<sup>295</sup>

Of course, challenges remain. Scholars have noted that estimates of the United States' sanitation coverage fail to account for persons experiencing homelessness,<sup>296</sup> while considerable attention has been paid to the numerous sanitation failures experienced by Americans living in both impoverished rural<sup>297</sup> and urban<sup>298</sup> parts of the country.

The United States' comparatively successful sanitation achievements are supported by laws and regulations at the federal, state, and local level. Perhaps the most well-known yet continuously contested law is the Clean Water Act,<sup>299</sup> which was enacted in 1972 to create a basic regulatory structure for reducing the release of pollutants into U.S. waters and overseeing the quality standards of surface waters.<sup>300</sup> Under the Act, the

<sup>294</sup> Ctr. for Disease Control & Prevention, *Ten Great Public Health Achievements – United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241–43 (1999) (“Control of infectious diseases has resulted from clean water and improved sanitation. Infections such as typhoid and cholera transmitted by contaminated water, a major cause of illness and death early in the 20th century, have been reduced dramatically by improved sanitation.”).

<sup>295</sup> WHO-UNICEF JOINT MONITORING PROGRAMME FOR WATER SUPPLY, SANITATION AND HYGIENE, <https://washdata.org> [<https://perma.cc/5HP7-9BU5>] (go to “See data for a country” and enter “United States of America”; select “View data table” and unselect “drinking water” and “hygiene”) (last visited Jan. 9, 2022).

<sup>296</sup> Drew Capone et al., *Water and Sanitation in Urban America, 2017–2019*, 110 AM. J. PUB. HEALTH 1567, 1567 (2020) (“[W]hen we accounted for residents experiencing homelessness and residents in substandard housing, we found that at least 630,000 are without sustained access to a flush toilet and a further 300,000 rely on shared sanitation.”).

<sup>297</sup> *Closing America’s Wastewater Access Gap Community Initiative*, ENV’T PROT. AGENCY, <https://www.epa.gov/water-infrastructure/closing-americas-wastewater-access-gap-community-initiative> [<https://perma.cc/58CY-E2P6>] (last updated Dec. 14, 2022); Inga T. Winkler & Catherine Coleman Flowers, “America’s Dirty Secret”: *The Human Right to Sanitation in Alabama’s Black Belt*, 49 COLUM. HUM. RTS. L. REV. 181 (2017); Alexis Okeowo, *The Heavy Toll of the Black Belt’s Wastewater Crisis*, NEW YORKER (Nov. 23, 2020), <https://www.newyorker.com/magazine/2020/11/30/the-heavy-toll-of-the-black-belts-wastewater-crisis>.

<sup>298</sup> Nina Lakhani, Maanvi Singh & Rashida Kamal, *Almost Half a Million US Households Lack Indoor Plumbing: “The Conditions Are Inhumane”*, GUARDIAN (Sept. 27, 2021), <https://www.theguardian.com/us-news/2021/sep/27/water-almost-half-million-us-households-lack-indoor-plumbing>.

<sup>299</sup> Stephen M. Johnson, *From Protecting Water Quality to Protecting States’ Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. REV. 359 (2021); David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENV’T. L. 267 (2009).

<sup>300</sup> 33 U.S.C. § 1251 (1972).

National Pollutant Discharge Elimination System imposes a state and regional permitting scheme where, for example, households and firms that are not connected to a municipal sewer system may have to obtain a permit for discharging of wastewater and other pollutants.<sup>301</sup> Of course, given the role state and local governments play in safeguarding the health of their respective communities, the codes and regulations of these jurisdictions charge these governments with the construction and maintenance of their water, sewage, and treatment systems.<sup>302</sup>

Yet public toilets have been absent from this larger sanitary project. As conveyed in Parts I and II of this Article, public bathrooms have been shuttered and legislation and policies to expand some availability and accessibility have been weak and ineffective. Even renewed effort to address the nation's sanitation shortfalls appear to ignore the provision of public toilets. Under the Bipartisan Infrastructure Bill, approximately fifty-five billion dollars will be invested into updating, building, and maintaining the water and wastewater systems across the country, including sewage systems.<sup>303</sup> But critics have noted that there has been no mention (as of yet) about the possibility of the funds being allocated to state and local communities to use for the construction and operation of public toilets.<sup>304</sup> A recognized right to public bathrooms may help to focus support for the greater provision of these facilities and bring greater attention to a component of the public health infrastructure that has largely fallen off of the radar of law makers and the political process.

### 1. Elements

Although public toilets are a necessary part of any sanitation system, they have been forgotten in the larger sanitation infrastructure of the United States. The international human right to sanitation does, however, contain elements that are helpful for assessing the need for and appropriate structure

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<sup>301</sup> 40 C.F.R. § 122.1 (2019).

<sup>302</sup> Chicago, Illinois serves as a useful example. Wastewater treatment is regulated by the state, while care for sewer systems divides responsibilities across the city and private property owners depending on where the drains and sewer connections are located. 415 ILL. COMP. STAT. 50/1; Chi. Mun. Code 11-16-010.

<sup>303</sup> Glenn Thrush, *White House Retrofits Infrastructure Bill to Better Help Poor Communities*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/politics/biden-infrastructure-bill-poor-communities.html?smid=url-share> [https://perma.cc/N5L3-3PKE].

<sup>304</sup> See, e.g., Kristof, *supra* note 12 (“The White House can work with cities to experiment with various approaches to expand restroom access. We can work with corporate sponsors. We can use advertising to help underwrite the expense. We can give tax breaks to businesses that make restrooms open to all.”).

of a right to public toilets. Specifically, the elements of the right to sanitation include: availability, accessibility, quality and safety, affordability, acceptability, dignity, and privacy. Each of these elements is discussed at greater length below.

*a. Availability*

It goes without saying that more public bathrooms are necessary under a right to public bathrooms. Just how many are needed will be entirely dependent on the respective jurisdiction and the needs and wants of its community, but toilets must be in spaces like public squares, transportation hubs, commercial districts, and other areas of human activity, and there must be enough to prevent long waiting times for users.<sup>305</sup> Governments are not required to build the facilities; however, they must provide the enabling environment in which public bathrooms can be delivered in some form.<sup>306</sup> Whether managed and maintained by a parks department, a business, or a private contractor, the number of bathrooms must be balanced against the ability of authorities to clean and attend to the bathrooms to ensure they are hygienic and safe.<sup>307</sup>

*b. Accessibility*

Public toilets “must be located and built in such a way that [they are] genuinely accessible, with consideration given to people who face specific barriers, such as children, older persons, persons with disabilities and chronically ill people.”<sup>308</sup> The current accessibility of public toilets and publicly available toilets in the United States is shameful. In 2021, 11,452 federal lawsuits were filed against businesses over disability issues,<sup>309</sup> with many of them involving violations over bathroom accessibility.<sup>310</sup> People

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<sup>305</sup> Report of the Independent Expert, *supra* note 245, at ¶ 70, 71.

<sup>306</sup> *Id.* at ¶ 67.

<sup>307</sup> *Id.* at ¶ 63, 70.

<sup>308</sup> CATARINA DE ALBUQUERQUE, REALISING THE HUMAN RIGHTS TO WATER AND SANITATION: A HANDBOOK BY THE UN SPECIAL RAPPOREUR 34 (2014), [https://www.pseau.org/outils/ouvrages/ohchr\\_realizing\\_the\\_human\\_rights\\_to\\_water\\_and\\_sanitation\\_a\\_handbook\\_2014.pdf](https://www.pseau.org/outils/ouvrages/ohchr_realizing_the_human_rights_to_water_and_sanitation_a_handbook_2014.pdf) [<https://perma.cc/6QW6-9RTK>].

<sup>309</sup> Amy Yee, *U.S. Businesses Get Hit With Record Numbers of Disability Lawsuits*, WASH. POST (Apr. 14, 2022), [https://www.washingtonpost.com/business/on-small-business/us-businesses-get-hit-with-record-numbers-of-disability-lawsuits/2022/04/14/a43b330e-bbf3-11ec-a92d-c763de818c21\\_story.html](https://www.washingtonpost.com/business/on-small-business/us-businesses-get-hit-with-record-numbers-of-disability-lawsuits/2022/04/14/a43b330e-bbf3-11ec-a92d-c763de818c21_story.html) [<https://perma.cc/5QJP-2L4Z>].

<sup>310</sup> Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. TIMES MAG. (July 21, 2021), <https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html?smid=url-share> [<https://perma.cc/6FFY-5THJ>].

experiencing homelessness often find automated public toilets powered down and inaccessible while other viable options, too, are blocked or have no doors.<sup>311</sup> A right to public toilets requires that all users be able to physically access the premises, whether pregnant, accompanying an elderly relative, or in perfect health.<sup>312</sup> And the structure, its design, and the amenities therein must be delivered in a way conducive to health and safety.<sup>313</sup>

*c. Quality & Safety*

A right to public toilets also requires that bathrooms be hygienically safe to use.<sup>314</sup> A salient risk with public bathrooms is that they can be filthy and, therefore, people may be more likely to avoid them.<sup>315</sup> In one study of women’s perceptions and use of public restrooms, eighty-four percent of those who limited their use of public toilets rated poor quality as the chief reason why.<sup>316</sup> Restrooms that lack proper cleaning, running water, soap, toilet paper, and some semblance of privacy are not only unpleasant, they can be unsafe in terms of disease, injury, and mental stress. “Maintenance is crucial to guarantee technical safety.”<sup>317</sup> If the toilets in a public bathroom do not flush, or if the floors are covered in urine, feces, or dirt, no one will use it and the facility is of no benefit to the public.

*d. Affordability*

International human rights law does not mandate that sanitation services be provided at no cost to everyone,<sup>318</sup> and neither should a right to public bathrooms. Public bathrooms must be available in a variety of forms that are affordable to everyone, including the poorest. The price tag of installing a public toilet, and the associated costs of maintenance, is frequently the target of political attacks in jurisdictions quibbling over whether to build or

<sup>311</sup> LOWE, *supra* note 207; L.A. CENT. PROVIDERS COLLABORATIVE, *supra* note 179, at 30 (“During overnight hours, only one provider offers nine public toilets . . . and these toilets are largely inaccessible — users have to step over people sleeping in a crowded courtyard to get to the toilets, and once inside, users discover that stalls have no doors.”).

<sup>312</sup> Report of the Independent Expert, *supra* note 245, at ¶ 75, 76.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at ¶ 72–74.

<sup>315</sup> Alice Callahan, *How Bad Are the Germs in Public Restrooms, Really?*, N.Y. TIMES (June 21, 2022), <https://www.nytimes.com/2022/06/21/well/live/public-bathrooms-health-safety.html> [<https://perma.cc/Y6JF-8WFC>].

<sup>316</sup> Reynolds et al., *supra* note 53, at 312.

<sup>317</sup> Report of the Independent Expert, *supra* note 245, at ¶ 73.

<sup>318</sup> Winkler, *supra* note 223, at 1382–83.

expand bathrooms.<sup>319</sup> And when cities and states experience budget crunches, public bathrooms are often one of the first resources to be shuttered.<sup>320</sup> But some restrooms will need to be offered for free, while others should be allowed the flexibility to assess minimum fees for entrance for the purposes of cleaning, maintaining, and keeping the bathroom in operation. To that end, laws prohibiting pay toilets should be repealed. Pay toilets already operate in every state and city in the country given the breadth of businesses that restrict bathrooms to customers only or require some sort of minimal purchase to use their restrooms. Laws that ban fee-for-service restrooms operate on an antiquated idea of freedom that no longer makes sense. While those who can afford to pay a small fee to use a restroom can be expected to do so, those payments should be employed to expand access for others without the ability to pay.

*e. Acceptability, Dignity & Privacy*

Public bathrooms in the United States must meet social or cultural standards of the American public. “[F]acilities will only be acceptable to users if the design, positioning and conditions of use are sensitive to people’s cultures and priorities.”<sup>321</sup> Restrooms must have toilets, urinals, running water, and hygiene amenities (soap, hand towels or dryers, menstrual hygiene products), and they should offer the opportunity to urinate and defecate in privacy. For example, portable toilets are often used in lieu of permanent public restroom options in any number of temporary situations, but when they are used in spaces and communities that require fully operational bathrooms, they are degrading substitutes. Protests in South Africa over portable toilets highlight this symbolism. Between 2013 and 2015, protestors

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<sup>319</sup> See, e.g., Henry Grabar, *A Crappy Process in San Francisco*, SLATE (Oct. 28, 2022, 5:45 AM), <https://slate.com/business/2022/10/san-francisco-toilet-million-noe-valley-design-review.html> [https://perma.cc/33BW-8NJB] (reporting on the turmoil around a proposed public toilet that would have cost the city of San Francisco \$1.7 million); see also Michael Waters, *The Fight to Build More Public Bathrooms in America*, THE HUSTLE (Nov. 4, 2022), <https://thehustle.co/the-fight-to-build-more-public-bathrooms-in-america%EF%BF%BC/> [https://perma.cc/2XBJ-VBQR] (“Most public bathrooms cost between around \$80k and \$500k, depending on the size and the sophistication of the model. But sometimes they can go way over that.”); see also Yoav Gonen, *No Relief as Pricey Park Bathrooms Put Pressure on Taxpayers*, THE CITY (April 4, 2019), <https://www.thecity.nyc/2019/4/4/21211167/no-relief-as-pricey-park-bathrooms-put-pressure-on-taxpayers> [https://perma.cc/6L43-VJL4] (“THE CITY found that the typical city Parks Department bathroom – a no-frills rectangular structure with four walls, several toilets and a number of hand-washing sinks – costs taxpayers just under \$3.6 million on average.”).

<sup>320</sup> Waters, *supra* note 319.

<sup>321</sup> DE ALBUQUERQUE, *supra* note 308, at 36.

in Cape Town were arrested for dumping bags of human waste in local government offices and setting portable toilets on fire.<sup>322</sup> The reason for these acts: outrage over the government providing portable toilets to impoverished communities instead of investing in sanitation infrastructure and building permanent, sanitary flush toilets and sinks.<sup>323</sup> This anger and frustration is similarly present in the homeless encampments of the United States where the tepid response of local governments to address the public toilet crisis is characterized by denial and indignity.<sup>324</sup>

## B. A U.S. RIGHT

A right to public bathrooms, like other social, economic, and cultural rights, is a positive right. Such a right “imposes on government some obligation to bestir itself, to *act*, in a manner conducive to the fulfillment of certain interests of persons.”<sup>325</sup> In other words, “[w]hen a citizen enforces a positive right, she can compel the government to take action to provide certain services.”<sup>326</sup> Negative rights stand in opposition to the obligations required of the government in a positive rights context. “[N]egative rights entail freedom *from* government action. To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom.”<sup>327</sup> While negative rights are a category of rights for people to be free from government intervention, positive rights entail the right to command that the government act.<sup>328</sup> The U.S. Constitution famously exists within the

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<sup>322</sup> See *Cape Town ‘Poo Wars’: Mass Arrests in South Africa*, BBC NEWS (June 11, 2013), <https://www.bbc.com/news/world-africa-22853095> [<https://perma.cc/HS5W-LPFC>]; *South Africa Toilet Protest: Campaigners Reveal Rears*, BBC NEWS (June 11, 2014), <https://www.bbc.com/news/world-africa-27805393> [<https://perma.cc/HDM5-GLB3>].

<sup>323</sup> S. AFR. HUM. RTS. COMM’N, REPORT ON THE RIGHT TO ACCESS SUFFICIENT WATER AND DECENT SANITATION IN SOUTH AFRICA: 2014 (2014), [https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf) [<https://perma.cc/25HF-V9RF>].

<sup>324</sup> Maylin Tu, *Skid Row’s Toilet Crisis: How a Basic Necessity Became a Political Battle*, THE GUARDIAN (Dec. 12, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/dec/12/skid-row-toilets-los-angeles-homelessness> [<https://perma.cc/A4P7-QK36>] (“The lack of a lasting solution points to an uncomfortable paradox. To invest in public infrastructure like more bathrooms would be to admit that more people are falling into homelessness every day, and it’s only getting worse. ‘Nobody’s ready to admit that Skid Row is here to stay.’”).

<sup>325</sup> Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1893 (2001).

<sup>326</sup> Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 n.2 (2001) (citing Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990)).

<sup>327</sup> *Id.*

<sup>328</sup> Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001).



negative rights tradition, with its most well-known rights—freedom of speech, religion, and the right to peaceably assemble and the freedom against unreasonable searches and seizures—is a check on the power of governmental interference in the lives of its citizens. It is “a charter of negative rather than positive liberties.”<sup>329</sup>

The right to public toilets is a positive right. It will impose an affirmative duty on the government to pursue efforts to provide the public with available and accessible restroom facilities. Unlike the United States, the constitutions of numerous other nations include positive rights to education, health, and the environment.<sup>330</sup> Yet how those obligations are met can vary considerably. In South Africa, for example, the national constitution contains explicit positive rights to housing and water,<sup>331</sup> but the courts have not mandated the state to provide unlimited housing or potable water to individuals and communities.<sup>332</sup> Instead, courts have determined that the government must gradually fulfil the state’s obligation to the right in question, such as developing, funding, and implementing programs to address disparities and continually “review its policies to ensure that the achievement of the right is progressively reali[z]ed.”<sup>333</sup> Given the magnitude of the public bathroom challenges felt across the United States, a similar approach should be taken with the recognition of a right to bathrooms. This positive right will not necessarily transform the sanitation and hygiene landscape of the American public overnight, but it will solidify the bedrock responsibility of the government to act towards improving the health and wellbeing of the public.

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<sup>329</sup> Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7<sup>th</sup> Cir. 1983).

<sup>330</sup> Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1464–76 (2010) (reviewing positive state constitutional provisions including education, assistance for indigent persons, physically or mentally challenged persons, public health and health care, and environmental rights); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 3 (2013); WHO/OHCHR, FACT SHEET NO. 31: THE RIGHT TO HEALTH 10 (2008), <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf> [<https://perma.cc/2WQ6-KBFG>] (“[T]he right to health or the right to health care is recognized in at least 115 constitutions.”).

<sup>331</sup> S. AFR. CONST., 1996, §§ 26, 27.

<sup>332</sup> See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* 5 (John M. Olin L. & Econ., Working Paper No. 124, 2001), [https://dash.harvard.edu/bitstream/handle/1/12785996/Social%20and%20Economic%20Rights\\_%20Lessons%20from%20South%20Africa.pdf?sequence=1&isAllowed=y](https://dash.harvard.edu/bitstream/handle/1/12785996/Social%20and%20Economic%20Rights_%20Lessons%20from%20South%20Africa.pdf?sequence=1&isAllowed=y) [<https://perma.cc/T4ZT-W57V>] (highlighting the interpretation by the South African Constitutional Court regarding the constitutional guarantees to water and housing).

<sup>333</sup> Mazibuko and Others v. City of Johannesburg 2009, SA 1 (CC) at ¶ 67 (S. Afr.).

### 1. Federal

A right to public bathrooms is unlikely at the federal level given the lack of explicit protections for positive economic, social, and cultural found within the U.S. Constitution. Beginning in the 1970s, the U.S. Supreme Court firmly took a stand against the recognition of constitutional socioeconomic rights by declining to find a fundamental constitutional right to education.<sup>334</sup> Perhaps nowhere has the Court made its opposition to positive rights clearer than in *DeShaney v. Winnebago County Department of Social Services*.<sup>335</sup> In its analysis of whether Wisconsin’s failure to protect a child from disabling abuse constituted a violation of the Fourteenth Amendment’s Due Process Clause, the majority wrote that the clause “is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”<sup>336</sup> Even as a state is prohibited from depriving individuals of life, liberty, and property without due process of law, the Court continued that the amendment’s language “cannot fairly be extended to the affirmative obligations on the State to ensure that those interests do not come to harm through other means.”<sup>337</sup> The Court later reaffirmed this position in *Town of Castle Rock v. Gonzales*.<sup>338</sup> Scholars point out that the prevailing view of the federal judiciary is that “issues of poverty and distributive justice should be resolved through legislative policymaking rather than constitutional adjudication.”<sup>339</sup> And with the Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, it has shown that even implicit, long-held rights upheld by decades of precedent have no place in the U.S. Constitution.<sup>340</sup> Furthermore, “no court has been willing to read the Constitution so broadly” as to find implicit rights to health and welfare, including financial assistance

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<sup>334</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

<sup>335</sup> *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>336</sup> *Id.* at 195.

<sup>337</sup> *Id.*

<sup>338</sup> See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (“In light of today’s decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”).

<sup>339</sup> Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205 (2008).

<sup>340</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”).

for housing and education.<sup>341</sup> As such, a positive right to public bathrooms is highly unlikely to be judicially recognized under the federal Constitution for the foreseeable future.

## 2. *State*

Recognizing a right to public bathrooms under state constitutional law offers greater promise. Once again, there is no explicit textual language regarding bathrooms or sanitation within these fifty-one foundational documents. Nonetheless, states hold an important place in the nation as wellsprings for the guarantees of several individual freedoms and offer the space and tools for the development of more novel constitutional claims. As Justice William Brennan famously wrote in 1977, “[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those . . . of federal law.”<sup>342</sup>

States constitutions are first and foremost the home to myriad rights. This is because state constitutions are often quite distinct from the U.S. Constitution in both form and function. While the federal Constitution creates the framework for the national government and secures certain basic rights, state constitutions address a much broader array of topics and, in many ways, are effectively extensive codes of law.<sup>343</sup> “[V]irtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them.”<sup>344</sup> And unlike the U.S. Constitution, state constitutions “often include positive mandates for rights protection or government action.”<sup>345</sup> In other words, “states constitutions expressly protect positive rights.”<sup>346</sup> The positive rights found within state constitutions are many, ranging from rights often debated regularly in the public sphere, such as the right to education<sup>347</sup> and the

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<sup>341</sup> Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1330 (2010).

<sup>342</sup> William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

<sup>343</sup> Usman, *supra* note 330, at 1486 (citing RACHEL KANE ET AL., 16 OHIO JUR. 3D CONSTITUTIONAL LAW § 4 (2001)).

<sup>344</sup> JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1 (2018).

<sup>345</sup> Robert F. Williams, *Rights*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 10 (Alan Tarr & Robert F. Williams eds., 2006).

<sup>346</sup> Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 993 (2013).

<sup>347</sup> Every state constitution contains a clause or provision expressly addressing education. *See, e.g.*, SCOTT DALLMAN & ANUSHA NATH, FED. RSRV. BANK MINNEAPOLIS, EDUCATION CLAUSES IN

protection of the environment,<sup>348</sup> to more esoteric concerns, like the constitutional duty to protect livestock from the spread of infectious disease<sup>349</sup> and the duty to encourage virtue and temperance.<sup>350</sup> This plethora of rights is attributed to the unique place of states in the constitutional framework and the plenary powers guaranteed to them by the Tenth Amendment.<sup>351</sup> Under this authority, “[s]tates retain vast powers and broad discretion to carry out state policy objectives”<sup>352</sup> and “state constitutional language mandates that states use their plenary authority in specific ways to achieve explicit and highly self-conscious policy goals.”<sup>353</sup>

Given the sanitary role of public toilets, and the role of sanitation in the grander objectives of improving the public’s health, constitutional provisions pertaining to public health may serve as a viable venue for identifying a right to public bathrooms. Eight state constitutions contain provisions affirming a general obligation to public health. In Hawaii, the constitution declares that the state “shall provide for the protection and promotion of the public health,”<sup>354</sup> and in Illinois, the state is endowed with the “civil, political and religious liberty . . . to provide for the health, safety and welfare of the people.”<sup>355</sup> The constitutions of Michigan,<sup>356</sup> New York,<sup>357</sup> South Carolina,<sup>358</sup> and Wyoming<sup>359</sup> are fairly similar in their construction, with each stating that the public’s health is clearly a matter of “public concern” or “essential” to the public’s wellbeing; therefore, each state then delegates the responsibility to its legislature to pass suitable laws, make determinations, or empower subdivisions and agencies to protect and promote public health. Alaska’s public health provision simply states that “[t]he legislature shall provide for the promotion and protection of public health,”<sup>360</sup> while

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STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (2020), <https://www.minneapolisfed.org/~media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en> [<https://perma.cc/4977-PADQ>].

<sup>348</sup> See, e.g., MONT. CONST. art. IX.

<sup>349</sup> IDAHO CONST. art. XVI.

<sup>350</sup> WYO. CONST. art. VII, § 20.

<sup>351</sup> U.S. CONST. amend. X.

<sup>352</sup> Weeks, *supra* note 341, at 1338 (citing Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 278).

<sup>353</sup> Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 18 (1993).

<sup>354</sup> HAW. CONST. art. IX, § 1.

<sup>355</sup> ILL. CONST. pmb. l.

<sup>356</sup> MICH. CONST. art. 4, § 51.

<sup>357</sup> N.Y. CONST. art. 17, § 3.

<sup>358</sup> S.C. CONST. art. XII, § 1.

<sup>359</sup> WYO. CONST. art. 7, § 20.

<sup>360</sup> ALASKA CONST. art. VII, § 4.

Louisiana's constitution says "[t]he legislature may establish a system of economic and social welfare, unemployment compensation, and public health."<sup>361</sup>

Even as these states include constitutional provisions dedicated to public health, their presence has not translated into a rich or nuanced understanding of the legal protections they potentially offer.<sup>362</sup> States have obviously used their plenary powers and constitutional obligations to establish public health departments and agencies to implement and oversee a wide range of programs meant to improve, protect, and enhance the health and welfare of their residents.<sup>363</sup> However, the judicial interpretation of state constitutional public health provisions and other health-oriented constitutional rights has remained relatively thin.<sup>364</sup>

An extensive examination of the relevant case law conducted by Elizabeth Weeks found that, when state courts do enforce health and public health provisions, they often do so narrowly and refrain from "recognizing, broad enforceable rights to health."<sup>365</sup> For example, in *Michigan Universal Health Care Action Network v. State*, the Michigan Court of Appeals reviewed a class action suit brought by advocacy groups for uninsured residents who argued that the state's constitutional public health and welfare provision required the state to implement a universal health care plan.<sup>366</sup> Affirming the lower court's holding that the plaintiffs lacked standing, the appellate court noted that the constitution's public health provision states "[t]he legislature shall pass suitable laws for the protection and promotion of the

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<sup>361</sup> LA. CONST. art. XII, § 8.

<sup>362</sup> Weeks Leonard, *supra* note 341, at 1348 ("When state courts have enforced the provisions, the holdings have been deliberately narrow.").

<sup>363</sup> See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 153–90 (3d ed. 2016) (covering the topic of public health governance, including state and local public health agencies and the roles of administrative law and local government law in the enactment and oversight of public health activities).

<sup>364</sup> Weeks Leonard, *supra* note 341, at 1348. The relative lack of examination of many state constitutional provisions by courts, including health and public health, is largely attributed to the failure of litigants to bring state constitutional claims before state courts, thus relegating state constitutions to second-tier status. See, e.g., Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. HAW. L. REV. 63, 106 (2016) ("State constitutional law is generally considered second-tier to federal constitutional law because the former is under a stranglehold of the latter. State constitutional law is an under-researched, under-developed, under-theorized, and over-ignored aspect of our Nation's constitutional tradition.").

<sup>365</sup> Weeks Leonard, *supra* note 341, at 1348–68 (reviewing the interpretation of state constitutional health provisions in Michigan, New York, North Carolina, Mississippi, South Carolina, Montana, and New Jersey).

<sup>366</sup> No. 261400, 2005 WL 3116595 (Mich. Ct. App. 2005).

public health.”<sup>367</sup> Based on its reading of the provision, the court found that the language was “in very broad public policy terms” and was “not self-executing” and required “legislative action” to carry out the state’s health goals.<sup>368</sup> Furthermore, if the state had “no duty or legal obligation under the Constitution . . . to provide health coverage,” there could not be a causal connection between residents who became ill due to a lack of health insurance “because there simply is no nexus where there is no duty or obligation on the part of [the] State.”<sup>369</sup> At the very least, other scholars have found that under Michigan’s constitution, health is a government function where the “state has a primary role in maintaining the health of its residents.”<sup>370</sup>

Other public health provisions are similarly limited in their review by the courts. In *Gray v. State*, the Supreme Court of Alaska determined that the right to privacy was not absolute, and that when a compelling state interest is shown, the right could be subordinated to the legislature’s constitutional authorization to “promote and protect public health and provide for the general welfare.”<sup>371</sup> The court later expanded on this interpretation in *Ravin v. State*, finding that the state was only authorized to limit the actions of individuals in the event their behaviors “affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare.”<sup>372</sup> Thus, under *Ravin* and its review of the state’s constitutional public health powers, the court found that the private use of marijuana was protected by Alaska’s state constitutional right to privacy.<sup>373</sup>

### 3. *New York*

One state in particular, New York, may prove particularly amenable for the recognition of a right to public bathrooms. This is based on the history of its public health provision and arguments that have been made for various health and welfare rights within the provision’s purview.

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<sup>367</sup> *Id.* at \*2.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> Gary A. Benjamin & Shaakirrah R. Sanders, *Michigan’s Duty to Provide Access to Health Care*, 6 J. L. IN SOC’Y 1, 13 (2004).

<sup>371</sup> *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974).

<sup>372</sup> *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975).

<sup>373</sup> *Id.* (“The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course.”).

New York's Constitution public health provision, Article XVII, Section 3 states:

The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.<sup>374</sup>

Section 3, together with Section 1—the aid to the needy provision<sup>375</sup>—create what has become known as the “Social Welfare Article,” an article added to the New York Constitution during the 1938 constitutional convention amidst the turmoil of the Great Depression.<sup>376</sup> During the 1930s, the social and economic conditions suffered by so many Americans made it clear that government intervention was needed to address health and welfare issues.<sup>377</sup> As the New York Court of Appeals found in *City Housing Authority v. Muller*, a case concerning the acquisition of title for property intended to be used for low-income housing, “[t]he fundamental purpose of the government is to protect the health, safety, and general welfare of the public,” and “[w]henver there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply *whatever power is necessary and appropriate to check it.*”<sup>378</sup> Within two years of *Muller*, Article XVII would become the state’s constitutional mandate to protect the public’s health and welfare.<sup>379</sup>

The legislative history of Section 3 of the social welfare article clearly demonstrates that part of the motivation for the amendment’s introduction was to systematically address population-wide health issues, including sanitation, hygiene, and their relationship to the outbreak of infectious disease.<sup>380</sup> Edward Corsi, Chairman of the Committee on Social Welfare,

<sup>374</sup> N.Y. CONST. art. 17, § 3.

<sup>375</sup> N.Y. CONST. art. 17, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

<sup>376</sup> *Asian Am. for Equal. v. Koch*, 514 N.Y.S.2d 939, 961 (App. Div. 1987) (Carro, J., dissenting) (“[P]rompted by the aftermath of the Great Depression, Article XVII, of the New York State Constitution was adopted, making it a constitutional mandate in New York for the state to provide for the needy.”).

<sup>377</sup> *City Hous. Auth. v. Muller*, 1 N.E.2d 153, 154 (N.Y. 1936) (describing unsafe and unsanitary living conditions for low-income individuals in areas of the state that could not “be remedied by the ordinary operation of private enterprise”).

<sup>378</sup> *N.Y.C. Hous. Auth. v. Muller*, 1 N.E.2d 153, 155 (N.Y. 1936) (emphasis added).

<sup>379</sup> Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 *FORDHAM URB. L.J.* 479, 485 (2008) (“Once ratified, the social welfare amendment vested in the state government an affirmative obligation to provide for the health of its residents.”)

<sup>380</sup> Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 *FORDHAM URB. L.J.* 479, 485 (2008)

described the need for Section 3 as a response to the complete silence of the then-state constitution on the matter of public health.<sup>381</sup> The reason for this silence, as Corsi explained, was that public health, both its scientific model and scope, had expanded beyond the state's police powers model as a localized source of "adequate implied authority for dealing with such subjects and conditions."<sup>382</sup> Quoting a former president of the American Public Health Association, Corsi advocated that public health now encompassed sanitation, the control of infections, education on hygiene, the organizing of preventive services, and the improvement of living standards.<sup>383</sup> "The interest of the present day health officer not only involves supervision of the swamp, of the drinking well, the reservoir, the garbage dump and the sewage system, but encompasses the control of infections from man to man."<sup>384</sup> Disease was no longer confined to a single person or area, and thus, disease control was beyond the solo capabilities of local health officials. A public health amendment would demonstrate that "public health is primarily a function of the State rather than the localities."<sup>385</sup> Furthermore, he argued that the state could no longer rely on the limited nature of police powers for the promotion of health, and instead, that the state should assume primary public health authority by securing in the state constitution "a constructive program for the promotion of positive health."<sup>386</sup>

New York's public health constitutional amendment did not happen in a vacuum. In the first decades of the twentieth century, the public health sciences focused on industrial hygiene and sanitary issues associated with urbanization and internationalization, including the demands created by World War I.<sup>387</sup> There was also growing recognition of a government's role in protecting and promoting public health as part of the expanding international public health movement, including International Sanitary Conferences to develop procedures to prevent the spread of diseases like cholera from disrupting international trade.<sup>388</sup> Subsequent treaties related to

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381 III REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2131 (1938).

382 *Id.* at 2131–33.

383 *Id.* at 2133.

384 *Id.* at 2132.

385 *Id.* at 2133.

386 *Id.* at 2133.

387 Michael R. Greenberg, *Sanitation and Public Health: A Heritage to Remember and Continue*, 102 AM. J. PUB. HEALTH 204, 204 (2012).

388 Charles Clift, *The Role of the World Health Organization in the International System*, CHATHAM HOUSE 6 (Feb. 2013), <https://www.chathamhouse.org/sites/default/files/publications/research/2013-02->



cholera, plague, and yellow fever would be followed by the creation of the International Sanitary Bureau (1902) and Office International d'Hygiène Publique (1907) and, some years later, the World Health Organization.<sup>389</sup> Thus, by the time of the 1938 New York Constitutional Convention, there was already a rich understanding of the connections between governance and public health.<sup>390</sup> There was also an acknowledgement of the affirmative obligations state and national governments had to not only protect the health of their respective populations, but also the far-reaching implications domestic health matters could have globally and how law could be used to moderate those pathways.<sup>391</sup>

Like the public health provisions in other state constitutions, the New York courts have rarely examined Section 3, often doing so in conjunction with Section 1—the aid to the needy provision—and even then, the analysis has generally avoided reaching the public health provision.<sup>392</sup> For example, in *Hope v. Perales*, plaintiffs claimed that the New York Prenatal Care Assistance Program's ("PCAP") exclusion of abortion from its comprehensive medical services violated both Sections 1 and 3 of the Constitution.<sup>393</sup> The New York Court of Appeals only addressed section one, finding that the women eligible for the program were not indigent and therefore outside the scope of PCAP, while briefly stating that PCAP was not intended to protect public health; consequently, the public health provision was not applicable.<sup>394</sup> In *Aliessa v. Novello*, the Court of Appeals similarly avoided the constitutional public health provision in a suit's challenge to the state's denial of Medicaid benefits to permanent resident immigrants who

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01-role-world-health-organization-international-system-clift.pdf [https://perma.cc/R64W-YK2Q].

<sup>389</sup> *Id.*

<sup>390</sup> See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 392–93 (2006) (citing several *N.Y. Times* stories from the 1920s and 1930s as evidence that “public-minded New Yorkers were well-aware of the growing international public health movement”).

<sup>391</sup> See David P. Fidler, *The Globalization of Public Health: the First 100 Years of International Health Diplomacy*, 79 BULL. WORLD HEALTH ORG. 842, 842 (2001) (“The history of public health is, in fact, that of the processes of increasing interconnectedness between societies such that events in one part of the world have health effects on peoples and countries far away.”).

<sup>392</sup> Davis, *supra* note 390, at 395; Alan Jenkins & Sabrineh Ardalan, *Positive Health: The Human Right to Health Care Under the New York State Constitution*, 35 FORDHAM URB. L.J. 479, 495–97 (2008).

<sup>393</sup> *Hope v. Perales*, 634 N.E.2d 183, 183 (N.Y. 1994).

<sup>394</sup> *Id.* at 188 (“This contention fails because, as discussed previously, we are bound to accept the legislative determination that PCAP-eligible women are not indigent or in need of public assistance to meet their medical needs.”).

met the program's financial eligibility requirements.<sup>395</sup> Again, the court did not reach Section 3,<sup>396</sup> finding under Section 122 that there was an affirmative duty of the state to provide benefits to permanent residents.<sup>397</sup>

Even with its limited and narrow interpretation by the courts, New York's constitution has long been a beacon for scholars and advocates looking to identify and expand health rights, from a right to health care and a state-wide health care system<sup>398</sup> to hardier conceptions of rights to health, education, and welfare meant to better protect the public's health.<sup>399</sup> New York, along with other states with constitutional provisions to public health, should be considered potential homes for a recognized right to public toilets.

#### 4. *From International to State*

The interpretation of state constitutions by state courts can provide an opportunity to look beyond state and national borders. Even in the face of a rights recalcitrance at the federal level, there has been effective recognition of positive social and economic rights at the state and local level, including rights derived from international human rights law.

Implementation of international human rights norms and standards is quite possible at the state and local level. This applies to the courts as well. The U.S. Constitution's Supremacy Clause declares that ratified treaties are the "supreme Law of the Land" and are binding on "Judges in every State."<sup>400</sup> As such, state courts have been receptive to human-rights based arguments when those rights have extended from treaty obligations, including matters related to health, discrimination, and child welfare.<sup>401</sup> And when the U.S. Senate has provided its advice and consent during the treaty ratification process, it has done so noting "state or local governments may

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<sup>395</sup> 754 N.E.2d 1085, 1098 (N.Y. 2001) ("Thus, we address this case outside the context of a Congressional command for nationwide uniformity in the scope of Medicaid coverage for indigent aliens as a matter of federal immigration policy.")

<sup>396</sup> *Id.* At 1093 n.12 ("In light of this determination, we do not address plaintiffs' argument under this article XVII, § 3.")

<sup>397</sup> *Id.* at 1098–99 ("We hold that section 122 violates the Equal Protection Clauses of the United States and New York State Constitutions insofar as it denies State Medicaid to otherwise eligible PRUCOLs and lawfully admitted permitted residents based on their status as aliens").

<sup>398</sup> Jenkins & Ardan, *supra* note 386, at 481 (claiming that the New York State Constitution "creates a legal right to equal access to quality health care for all New Yorkers").

<sup>399</sup> Davis, *supra* note 390, at 360–61 (arguing, overall, that the state constitutions should be interpreted using international law to help elucidate greater public health protections).

<sup>400</sup> U.S. CONST. art. VI, cl. 2.

<sup>401</sup> Cathy Hollenberg Serrette, *Invoking International Human Rights Law in Litigation: A Maryland Judge's Perspective*, 45 CLEARINGHOUSE REV. 238, 238–42 (2011).

take appropriate measures for the fulfillment of the [treaty].”<sup>402</sup> Even when the U.S. government has not ratified a particularly treaty, that has not necessarily absolved it or the states of some of their obligations related to social and economic rights.<sup>403</sup>

State courts are not bound by the same interpretive limitations as the federal courts and federal government given the plethora of positive rights state constitutions often contain. And sources of foreign law and policy can help to reify or clarify the rights that states have included in their respective legal systems. When state courts delve into rights and areas of law addressed by foreign courts or institutions, it “can provide insight into how other courts have made positive rights justiciable.”<sup>404</sup> Moreover, the drafting of state laws has also been influenced by international agreements, including the Universal Declaration of Human Rights.<sup>405</sup> Therefore, states can possess the same rights formulations and constitutional constructions found in transnational law.<sup>406</sup> For example, state courts and legislatures have served as effective subnational units for recognizing disability rights found in the Convention on the Rights of Persons with Disabilities despite the U.S. government having never ratified the convention.<sup>407</sup> And, in the litigation that led to the U.S. Supreme Court’s *Roper v. Simmons* ruling that held the juvenile death penalty is unconstitutional,<sup>408</sup> it was the Missouri Supreme Court that first struck down the juvenile death penalty by citing to the

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<sup>402</sup> See, e.g., 138 Cong. Rec. 8086, 8071 (1992) (ratifying the International Covenant on Civil and Political Rights); 140 Cong. Rec. 14326, 14326 (1994) (ratifying the International Convention on the Elimination of All Forms of Racial Discrimination).

<sup>403</sup> For example, the U.S. government has opened itself up for evaluation by U.N. special rapporteurs, including on issues related to sanitation. See Extreme Poverty Report, *supra* note 181,

<sup>404</sup> Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 477 (2008).

<sup>405</sup> See Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 *MONT. L. REV.* 15, 21–27 (2004) (discussing the influence of transnational law, including the Universal Declaration of Human Rights, on the constitutions of Puerto Rico and Montana).

<sup>406</sup> See Davis, *supra* note 390, at 371 (“Even where no binding transnational law is at issue, state courts can appropriately reference transnational law.”).

<sup>407</sup> See Benjamin A. Barsky, *Dual Federalism, Constitutional Openings, and the Convention on the Rights of Persons with Disabilities*, 24 *U. PA. J. CONST. L.* 345, 393–405 (2022) (illustrating how Section 12 of the Convention of the Rights of Persons with Disabilities influenced state legislative decisions).

<sup>408</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

Convention on the Rights of the Child<sup>409</sup>—another convention to which the United States is not bound.<sup>410</sup>

A right to public toilets should be derived from the norms and standards found in international law that have motivated the recognition of the foundational human right to sanitation. And, as has been argued above, this positive right can find a constitutional hook in state constitutional public health provisions. Looking to international law in determining the contours of this right make sense given the right’s fundamental conception as a public health right. As is evident in the history of New York’s Article XVII, public health law is often the culmination of local, national, and international responses to transnational health events, whether they are environmental disasters or pandemics.<sup>411</sup> Because of the international nature of public health, it is incumbent upon courts construing the meaning of a right to public toilets to look to other positive public health rights found outside the United States.

## CONCLUSION

This Article illustrates how a right to public toilets is critically important and could and should be enacted in the United States. While some may object that this right is unlikely to be realized, the right to public bathrooms could be politically appealing for a public that is often suspicious of social reforms geared towards the poor and that can impart private benefits to some.<sup>412</sup> A right to public toilets can be framed as a right that makes our

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<sup>409</sup> See *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (“We also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles. Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice.”), *aff’d*, 543 U.S. 551, 579 (2005).

<sup>410</sup> See Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. UNIV. L.J. 365, 387 (2012) (noting that the Missouri Supreme Court cited the Convention on the Rights of the Child in *Simmons v. Roper* even though the convention was not binding in the United States).

<sup>411</sup> Davis, *supra* note 390, at 394 (describing the transnational nature of public health law).

<sup>412</sup> See, e.g., John A. Powell & Arthur Brooks, *America Can’t Fix Poverty Until It Stops Hating Poor People*, BLOOMBERG (Oct. 10, 2017), [https://www.bloomberg.com/news/articles/2017-10-10/a-bipartisan-plea-to-stop-othering-those-in-poverty?utm\\_source=website&utm\\_medium=share&utm\\_campaign=copy](https://www.bloomberg.com/news/articles/2017-10-10/a-bipartisan-plea-to-stop-othering-those-in-poverty?utm_source=website&utm_medium=share&utm_campaign=copy) [<https://perma.cc/R27T-2NHC>] (“Americans, it seems, have a uniquely low opinion of poor people: We offer them neither our empathy nor our respect.”); Anne Kim, *How America Stopped Caring About the Poor*, WASH. MONTHLY (Feb. 2, 2022), (“[T]he real obstacle is the current politics of poverty—a toxic stew of Americans’ indifference, lack of trust in government, and long-standing biases against the poor. Decades of conservative assaults on means-tested

public spaces more livable and welcoming for *everyone*, while also better meeting the biological needs that so many struggle with in private.

While I have argued that states' exploration of and reliance upon international human rights law must include the right to sanitation, the arguments here extend beyond this right. As states look to innovate in ways that are unlikely to happen at the federal level, international human rights can provide a pathway. For example, the right to health or the right to an adequate standard of living may be promising ways to support a right to public toilets and other critical entitlements that have not yet been secured for the American public. Given the federal government's reluctance to recognize rights pertaining to health, welfare, and human rights, advocates and courts lack models from which to draw as they assess the positive rights of their forums. However, the identification and implementation of transnational rights in international forums, including in nations like India where the right to public toilets has been recognized, can serve as instructive guidance for understanding what a right to public toilets and other basic needs should look like and how they could potentially exist in the United States.

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programs like SNAP as well as large and popular entitlement benefits like Medicare have hardened Americans' views of who should benefit and who is 'deserving.'").