

Looking Out for No. 2

A modest proposal for single-use toilets.

By *Ian Ayres*

A few feet from my office, Yale Law School every day violates our nation's civil rights law by needlessly discriminating on the basis of sex. And people walk by this violation day after day and never say a word.

There are two single-use restrooms side by side. One is designated for use solely by men; the other solely by women. This might seem innocuous. But it's a clear violation of **Title VII**, our core federal civil rights law that prohibits private employers from discriminating on the basis of sex. Yale is discriminating on the basis of sex in the conditions of my employment. I can't use this women's bathroom because I'm a man.

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The law in this area is really quite simple: Sex discrimination in conditions of employment is only ever legal if such distinctions based on sex are a "bona fide occupational qualification." The BFOQ defense is extremely narrow. There might be a valid argument for preserving sex-segregation for multiple-use restrooms, ***Ally McBeal*** notwithstanding. Women might be safer in multi-use toilets. But there is no legitimate basis for preserving gender-specific single-use toilets, and that makes them a wonderful lens through which to examine our broader commitment to gender equality.

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These Yale toilets are not a vestige of the past, by the way. They were built from scratch as part of the law school's 2000 renovation. And why did we decide, in 2000, to have one toilet just for men and another just for women? A member of the school's building committee told me candidly that it's because men are sloppier. That's right: The fact that men stand to urinate and at times might not aim accurately is the entire rationale for separate toilets.

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This story is not even close to what courts traditionally accept as a legal BFOQ justification. Even if some men "are pigs," why does this justify forcing non-messy men to use the same toilet? "I'm sorry Felix, because you're a man you have to use the dirty bathroom ..." The deeper justification must be not only that *some* men are messy but that men *as a class* aren't as sensitive as women are to the messiness. But this is just the type of unsupported sexual stereotyping that our discrimination law was meant to stop.

We should be particularly reluctant to justify discrimination on this type of cleanliness grounds. (It's a little bit scary to think about, but a similar argument was used when I was a kid to justify keeping African-Americans from using white toilets.)

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This sounds too trivial to matter, right? This is the kind of sex discrimination that troubles only law professors and no one else; the kind that has no relevance or application outside ivy walls? Well, it matters to Riki Dennis, too. An article in **last week's *New York Times*** described how Ms. Dennis, a transgendered woman, was beaten for going into the wrong bathroom. Bathroom discrimination literally does hurt people. If the toilet Dennis

entered had been gender neutral, there may not have been an attack. Single-sex toilets give bigots another excuse to hit people.

We shouldn't go out of our way to draw lines in sands daring people to cross over them. We don't have single-sex toilets at home, and we don't need them at the office. Then there's also the small question of efficiency. I see my male colleagues waiting in line to use the men's room, when the women's toilet is unoccupied. Which is precisely why Delta Airlines doesn't label those two bathrooms at the back of the plane as being solely for men and women. It just wouldn't fly.

The University of Chicago just got the 10 single-use restrooms on campus designated gender neutral. It's time Yale followed suit. And this is not just an academic problem. There are tens of thousands of single-use toilets at workplaces and public spaces throughout the nation that are wrong-headedly designated for a single-sex. All these single-use toilets should stop discriminating. They should be open to all on a first-come, first-lock basis. This is not just good sense. It's the law.

In the meantime individuals should just engage in a bit of creative civil disobedience. We can just ignore the signs on single-use toilets. When one toilet is being used, we can use the other—just like we do like on airplanes. This cross-over policy would also help shorten the lines that women often face given the disparity in available toilets. And crossing the gender line does more than save time. It actually furthers civil rights. It's refusing to accept separate but equal—particularly when it serves no purpose. A surprising number of people are already doing this just to save to time. But they often report that it's also kind of fun. It's a bit daring to enter a room that's been marked for others. It not only contravenes something our parents taught us, but it also puts us at risk as being misidentified as being members of the opposite sex. And these small steps make the world marginally safer for Riki Dennis and other transgendered people who often have no safe place to go.

Just remember to put down the seat when you're done.