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THE CHANGING FACES OF WOMEN'S COLLEGES: STRIKING A BALANCE BETWEEN TRANSGENDER RIGHTS AND WOMEN'S COLLEGES' RIGHT TO EXCLUDE

CATHY PERIFIMOS*

INTRODUCTION

a. Meet Jane¹

Jane, a high school senior, is ecstatic to have been admitted to her first choice school, a prestigious women's college. The admissions counselor reading her application was impressed by what her application revealed: she was thoughtful, bright and talented. Her application failed to reveal, however, that Jane has a penis and an XY chromosome.

While his female classmates ceremoniously ushered in their sixteenth year with ball gowns and tiaras, John ushered his in with psychotherapy, hormone treatment and female pronouns. By his senior year, John was fully "passing" as Jane. But underneath her skirt was a different matter; Jane had temporarily opted to forgo the genital surgery, since she could not afford it.

For Jane, a women's college was a natural choice since she had always felt like a woman and now lived like one too. Furthermore, because her college was founded on the defiance of gender stereotypes, she hoped to find more open-minded students, faculty and administrators there than at coeducational schools. But, she knew that not everyone sees it this way. Many would still consider her to be a man or, even more complicated, in gender no man's land.²

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¹ Jane is a fictional character created to illustrate a hypothetical situation.

² It is important to note, however, that one of the complexities of a transgender identity is that many transgendered individuals view gender as a continuum. In this way, one person may not simply be male or female, but may be slightly more female than male. For example, Alissa Quart, *When Girls Will Be Boys*, N.Y. TIMES, Mar. 16, 2008, at 2. Further, "genderqueer" is a term that describes people "who consider themselves beyond or between genders." Adrian Brune, *When She Graduates as He*, THE BOSTON GLOBE, Apr. 8, 2007, available at

Jane is thrilled to have been accepted to her first choice school, but signs her response letter with trepidation. She has researched her school's treatment of transgender students and discovered that there is no official policy. She has read in the newspaper that a few female-to-male students attended her college but thinks that she may be the first male-to-female student.

Jane plans to live in the college dormitories because her home is several states away and because the school places great emphasis on on-campus living. However, this choice raises serious issues for Jane as it will expose her to the college's administration. Jane worries that she will be perceived as having deceived the admissions counselors and that her admission will be revoked. If she is allowed to remain at the college, she wonders whether she will be allowed to have a roommate or use the communal restrooms. She also wonders if her care will be compromised in a clinic staffed with women's healthcare providers. Above all, Jane wonders if she or the college has the power to decide if she is a woman.

b. Objectives

The gender binary system is pervasive cross-culturally and is perhaps humankind's most fundamental means of categorization; American society has consistently expected an agreement between sex and gender. The women's liberation movement succeeded in breaking down many traditional, restrictive conceptions of gender roles, but, ultimately, a liberated woman is still a woman. What happens to this system when the chasm between male and female is bridged such that a person can experience both genders, or neither?

The state of being transgender, or of a non-traditional gender identity, renders deficient the documentation, such as birth certificates and immigration documents, that comprises our legal identities.³ The complications of negotiating a transgender identity within the gender binary are especially profound in a college setting. From the application process to registration, roommates, restrooms and healthcare, students are constantly faced with compulsory gender identification.

The above complications that transgender students face at coeducational institutions are even more complicated when transgender students attend women's

http://www.boston.com/news/globe/magazine/articles/2007/04/08/when_she_graduates_as_he/; see also HOLLY DEVOR, GENDER BLENDING: CONFRONTING THE LIMITS OF DUALITY vii-viii (1989) (using the term "gender blending" to describe people whose gender identity combines typically male and female traits). Gender neutral pronouns have been developed to accommodate people who choose to avoid female or male categorization. Through the creation of unique sets of pronouns, androgynous people are codifying their identity. Oberlin College, which has accommodated gender neutrality in several of its policies, outlines two models of gender neutral pronouns. In the first, the words he/she, him/her, his/hers, and himself/herself are replaced by sie, hir, hirs, and hirsself, respectively. In the second model, the gender specific pronouns are substituted with zie, zir, zirs, and zirself, respectively. See, Gender Neutral Pronouns, http://www.oberlin.edu/mrc/Workshops.Trainings/trans_trainings/Trans%20Pronouns.pdf

³ See, e.g., Sylvia Rivera Law Project, Areas of Work: Identity Documents, http://www.srlp.org/areas/identity_documents (last visited Oct. 19, 2008) (identifies the major issues regarding sex designation on birth certificates and immigration documents for transgender individuals).

colleges because these colleges exist for the sole purpose of serving one gender. Women's colleges continue to be valuable, successful academic centers and have a serious interest in maintaining their single-sex status. However, with transgender students in the mix, it becomes difficult to maintain single-sex colleges, primarily because a definition of the word "woman" is so hard to pinpoint.

This note explores the placement of students like Jane and her female-to-male classmates on women's college campuses.⁴ First, I will provide a brief foundation for the discussion of transgender identities, including introducing the transgender lexicon. I will then discuss the interest of women's colleges in maintaining a single-sex tradition and the Supreme Court cases that help define these colleges' right to exclude based on sex. In Section II, I will address landmark cases that have helped shape the legal treatment of transgendered individuals. In Section III, I will report on the current status of transgender students at three women's colleges. I will conclude this note by conflating women's colleges' right to exclude with transgender rights so as to provide a framework for women's colleges to institute policies that are fair to their transgender students and that honor their single-sex tradition.

c. Transgender 101

Before exploring transgender-specific terminology, it is necessary to differentiate the ideas of "sex" and "gender." Feminist scholar Judith Butler states that, "originally intended to dispute the biology-is-destiny formulation, the distinction between sex and gender serves the argument that whatever biological intractability sex appears to have, gender is culturally constructed: hence, gender is neither the causal result of sex nor as seemingly fixed as sex."⁵ Therefore, "*man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one."⁶

Because of the highly personal and variable nature of a transgender identity, the transgender lexicon is particular and dynamic. According to the Diagnostic and

⁴ Jane may not be representative of the average transgender student at women's colleges, judging by the news coverage which has reported mainly on female-to-male transgender students, but Jane's case is perhaps the most challenging one, particularly because it has received almost no attention. See, e.g., Brune, *supra*, note 2 (describing experiences of transgender students at the all-female Mount Holyoke College, but addressing the issue only within the context of female-to-male students and only fleetingly addressing the possibility of male-to-female applicants). Brett-Genny Janiczek Beemyn, an expert on transgender college students, states that the number of transgender people who transition in their teenage years is increasing as a result of the easy access to information that the internet provides. *Id.* This may mean that, in the near future, more biological men will be applying to women's colleges, since they will have begun or completed their transition to womanhood prior to matriculation. *Id.* See also Craig Offman, *A Class Apart*, FIN. TIMES WEEKEND MAGAZINE, Apr. 16, 2005, available at <http://www.ft.com/cms/s/0/14a5a0d4-aca8-11d9-ad92-00000e2511c8.html> (reporting on the Smith College controversy of transgender students, but not addressing the possibility of male-to-female students).

⁵ JUDITH BUTLER, GENDER TROUBLE 8 (1999).

⁶ *Id.* at 9.

Statistical Manual of Mental Disorders (“DSM”) published by the American Psychiatric Association (“APA”), the identity that is known as transgender is called “gender identity disorder.”⁷ By APA standards, in order to qualify as having this “disorder,” a person must satisfy four general criteria.⁸ First, one must strongly desire to be, or insist that one is, of the other sex and do so independently of “a desire for any perceived cultural advantages of being the other sex.”⁹ Second, one must experience persistent discomfort with his or her assigned gender role.¹⁰ Third, this sense of being the wrong sex must be entirely mental, and not the result of a physical intersex condition, such as chromosomal abnormalities.¹¹ Finally, in order to make the diagnosis, there must be evidence of “significant distress or impairment in social, occupational, and other important areas of functioning.”¹²

The definition of transgender may not be as straightforward as the APA suggests because being transgender can span many stages and understandings of

⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTICS AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994) [hereinafter APA]. Other terms commonly used to describe this same condition are “gender variance” and “gender dysphoria.” See, e.g., Answers to Your Questions About Transgender Individuals and Gender Identity, <http://www.apa.org/topics/transgender.html> (last visited Jul. 13, 2008).

⁸ APA, *supra* note 7, at 532-533.

⁹ *Id.* at 533.

¹⁰ *Id.*

¹¹ *Id.* The term “intersex” describes a variety of biological anomalies. For example, some intersex people have genitalia that appear to have both male and female qualities. Intersex Society of North America, What is Intersex, http://www.isna.org/faq/what_is_intersex (last visited Oct. 22, 2008) [hereinafter What is Intersex]. Some boys are born with unusually small penises or with a scrotum that is divided and resembles labia; similarly, some girls are born with unusually large clitorises or lacking a vaginal opening. *Id.* Also considered intersex are people with “mosaic genetics”—some of their cells have XX chromosomes and some XY. *Id.* Additionally, people with androgen insensitivity—characterized by external feminization of genitalia, abnormal sexual development in puberty and infertility in people with XY chromosomes—may be considered intersex. Bruce Gottlieb, Lenore K. Beitel, & Mark A. Trifiro, *Androgen Insensitivity Syndrome*, Oct. 22, 2008, <http://www.geneclinics.org/profiles/androgen/details.html>. Typically, it is up to the doctors to decide when genitalia is so ambiguous that a person must be considered intersex—e.g. an infant’s penis must be a certain size in order for the infant to be considered male—and there is a variety of opinions on the matter. See, e.g., What is Intersex. Because many of the abnormalities that constitute intersex identification are not outwardly apparent, people may live most or all of their lives without knowing that they are intersex, Intersex Society of North America, *supra*.

¹² APA, *supra* note 7, at 533. Arguably, the APA’s identification of transgenderism in the DSM is arbitrary. Prior to 1973, homosexuality was listed by the APA as a mental disorder, leading to the social categorization of homosexuals as deviant. See Answers to Your Questions for a Better Understanding of Sexual Orientation and Homosexuality, <http://www.apa.org/pubinfo/answers.html> (last visited Jul. 13, 2008) (scroll down to the sub-heading, “Is Homosexuality a Mental Disorder?”). One may argue that homosexuality was once listed as a “disorder” in the DSM simply because science followed society’s insecurity about homosexuality. The same may be true for transgender people. Many transgender activists argue that the categorization of gender variant people as mentally disordered leads to social stigmatization. The connotations attached to such a label may also provide the foundation for legal discrimination and deprivation of equal rights. Interestingly, although “gender identity disorder” is identified in the DSM, “transsexualism” and “gender identity disorders not resulting from physical impairments” are expressly excluded from the Americans with Disabilities Act and the Rehabilitation Act. 42 U.S.C. § 12211(b)(1) (2007). Therefore, the labeling of “gender identity disorder” conveniently brands transgender people as deviant, but denies them the special legal protection received by other mental disorder sufferers.

gender transgression, and manifest differently among different people.¹³ The American Civil Liberties Union acknowledges the APA's definition, but expands the breadth of gender, explaining that:

Transgender is an umbrella term used to describe a range of identities and experiences, including but not limited to preoperative, postoperative, and nonoperative transsexual people; male and female cross-dressers; intersex individuals; and men and women, regardless of their sexual orientation, whose appearance, behavior, or characteristics are perceived to be different than that stereotypically associated with their sex assigned at birth.¹⁴

In addition to the many definitions of transgenderism is an equally complex set of terms used to describe people with these identities. The most frequently used terms are the acronyms "MTF" and "FTM," which are shorthand for male-to-female and female-to-male, respectively, and can be used interchangeably with "trans female" and "trans male," respectively.

d. Why A Women's College?

In her book on the subject, Maggie Coats, a scholar of gender and education, defines women's education as being "for women only and designed intentionally for that purpose."¹⁵ Although women's colleges may differ in ideology, the common thread that binds them is the recognition of women's historically disadvantaged position and the belief that education is the way to remedy that disadvantage. Moreover, Coats explains, the "recognition of *commonality*," in "the experiences of the individual women—is another important component of women's education."¹⁶ There is obvious tension between Coats' explanation of women's colleges and the placement of transgender students within these institutions. It is arguable whether FTM transgender students help advance the objective of remedying women's historically disadvantaged position in society since they perceive themselves to be male and project this image to society. Furthermore, it is further arguable whether MTF students can share in the experiences of being a

¹³ Biological women realizing their male gender identity usually begin their transition with masculine attire, adopting male pronouns and a male name. After counseling, some begin taking testosterone, known in the transgender community as "T," which deepens the voice, causes facial hair to grow, enlarges the clitoris, and reduces breast size. Next they may opt for a double mastectomy, hysterectomy and ovary removal. The last, but infrequently achieved step is penis construction surgery. See, e.g., Brune, *supra* note 2, at 1. Biological men realizing their female identity also face a gradual transition that includes assuming a female name and pronoun removing hair—particularly facial hair—receiving voice therapy, growing out the hair on their head and possibly correcting receding hair lines surgically, taking hormones, and undergoing facial feminization surgery, vaginoplasty, labiaplasty and breast augmentation. See Customizing a transition timetable, <http://www.tsroadmap.com/start/timetable.html> (last visited Jul. 13, 2008).

¹⁴ NAN D. HUNTER, COURTNEY G. JOSLIN & SHARON M. MCGOWAN, THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE: THE AUTHORITATIVE ACLU GUIDE TO A LESBIAN, GAY, BISEXUAL, OR TRANSGENDER PERSON'S RIGHTS 172 (Eve Cary ed., 4th ed. 2004).

¹⁵ MAGGIE COATS, WOMEN'S EDUCATION 1 (1994).

¹⁶ *Id.*

woman, since they generally have been received by society as men for most of their lives.

The historical roots of women's colleges continue to be essential to their current missions. In the United States, most women's colleges were founded in the mid- to late- nineteenth century at a time when women were generally excluded from institutions of higher education.¹⁷ The Northeastern colleges of Barnard, Wellesley, Smith, Vassar, Mount Holyoke, Bryn Mawr and Radcliffe came to be known as the "Seven Sisters"—a network which made them analogous to the eight men-only Ivy League schools.¹⁸ As a result, women not only began attaining college degrees, but were doing so with prestige.

The feminist movement resulted in women's large-scale entry into the professional world, and American women's presence and success in colleges and graduate schools has skyrocketed. But, this breach of the sex divide was not a one-way street. Most women's colleges either began accepting men, merged with men's or coeducational institutions, or closed due to the waning enrollment and financial problems associated with the increased competition in higher education.¹⁹ In 1960, the number of women's colleges peaked at about three hundred; by 1999, the number had decreased to fewer than eighty.²⁰

Currently, only about one percent of women attending post-secondary institutions attend women's colleges.²¹ But, this statistic does not reflect the disproportionately high influence that women's college graduates exert and the success they attain in their lives after college, particularly in areas typically dominated by men.²² Ironically, it seems that women's colleges provide unrivaled preparation for female success in a coeducational world. Therefore, dissolution of single-sex colleges, which may seem like a fair and easy solution in dealing with transgender students, is not an option. Eradication of women's colleges would be a huge blow to the academic community and may have extensive detrimental effect on women's professional progress.

¹⁷ IRENE HARWARTH, MINDI MALINE, ELIZABETH DEBRA, WOMEN'S COLLEGES IN THE UNITED STATES: HISTORY, ISSUES, AND CHALLENGES, <http://www.ed.gov/offices/OERI/PLLI/webreprt.html> (last visited Oct. 20, 2008).

¹⁸ The Seven Sisters, http://vcencyclopedia.vassar.edu/index.php/The_Seven_Sisters (last visited Oct. 19, 2008).

¹⁹ Lisa Wolf-Wendel, *Gender and Higher Education: What Should We Learn from Women's Colleges?*, in GENDERED FUTURES IN HIGHER EDUCATION 35 (Becky Ropers-Huilman ed., 2003).

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Why Attend a Women's College?, <http://www.barnard.edu/about/why.html> (Women's college graduates constitute more than twenty percent of women in Congress and thirty percent of a *Business Week* list of rising female stars in Corporate America. They form a higher percentage of majors in economics, math and life science today than men at coeducational colleges and are three times more likely to earn a degree in economics and one and one-half times more likely to earn baccalaureate degrees in life sciences, physical sciences and mathematics than at a coeducational institution. Women's college graduates scored higher on standardized tests; and are more likely to continue to doctorate programs in math, science and engineering than their coeducational counterparts).

Critics consider women's education to be highly problematic. In her book, *Gender and the Law*, Professor Deborah Rhode addresses the ambivalence associated with women's colleges. These schools, she writes, "evolved against a backdrop of separatism that they helped both to challenge and perpetuate."²³ Her criticism seems to evoke the idea that women's education may foster the now unmentionable *Plessy v. Ferguson*²⁴ doctrine of "separate but equal." The Civil Rights movement promoted the idea that separate is inherently unequal, and in the realm of the women's liberation movement, Rhode claims that "advocates and critics alike unquestioningly held equal education for women and men to be synonymous with coeducation."²⁵

In her inaugural address, Barnard College President Judith Shapiro, refutes such criticism and asks, "[w]hy are women's colleges constantly being asked to account for themselves in a way that coeducational institutions are not?"²⁶ Coeducation, she suggests, is no more than a declaration of the admission of male and female applicants.²⁷ Coeducation does not necessarily result in equal treatment of the sexes or equal success.²⁸ It does not mean that both sexes will be awarded with equally numerous and prestigious leadership or faculty positions on campus.²⁹ Perhaps President Shapiro implied that we must invert the common refrain that

²³ DEBORAH RHODE, *GENDER AND THE LAW* 288 (1991).

²⁴ 163 U.S. 537, 549. See About Mount Holyoke, <http://www.mtholyoke.edu/cic/about/index.shtml> (last visited Oct. 19, 2008); see also History of Oberlin, <http://cms.oberlin.edu/inauguration/history.dot> (last visited Oct. 19, 2008) (When discussing the constitutionality of single-sex education, racial segregation comes to mind. But, racially segregated schools are considered in the greater context of America's violent history of racial inequalities and are, therefore, regarded as insidious. Women's education, on the other hand, has been historically viewed as a tool of empowerment and advancement, free from the degrading connotations of racial segregation in schools. Moreover, unlike racial segregation, single-sex education was never legally mandated. In fact, coeducation, though rare, generally preceded the wave of women's colleges. Oberlin, the first coeducational college in the U.S., was founded in 1833 when only one all-women's higher education school existed. So, though their options were limited, women have been provided with a choice of education type since the mid-nineteenth century).

²⁵ Wolf-Wendel, *supra* note 19, at 37. Rhode bolsters her argument by addressing cases questioning the viability of two single-sex colleges. *Allred v. Heaton* involved a woman's challenge to Texas A&M's male-only admissions policy. *Allred v. Heaton*, 336 S.W.2d 251 (Tex. 1960). Similarly, in *Williams v. McNair*, a man sought admission to the women's only Winthrop College. *Williams v. McNair*, 316 F.Supp. 134 (D.S.C. 1970). In both cases, the courts upheld the schools' single-sex admissions. Rhode emphasizes that the judges seemed unaffected by each school's curriculum, which relied heavily on gender stereotypes. RHODE, *supra* note 23, at 294-5. Texas A&M required military training while Winthrop offered courses in stenography, housekeeping and dressmaking. *Id.* She argues that, in protecting these single-sex institutions, the courts enforced discriminatory and archaic gender stereotypes. *Id.* The debate over whether separation is empowering or debilitating in college educations remains, but it is important to keep in mind that Rhode's extreme examples of single-sex education do not represent the curriculums of many women's colleges, which, as noted above, pride themselves in fostering female success in typically male-dominated fields.

²⁶ Judith Shapiro, President, Barnard College, Barnard College Inaugural Address at Riverside Church (Oct. 27, 1994).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

“separate but equal is inherently unequal” and consider that “together is not inherently equal.”

II. NEGOTIATING BETWEEN WOMEN’S COLLEGES’ RIGHT TO EXCLUDE AND TRANSGENDER RIGHTS

a. The Right to Exclude

After reflecting on the pros and cons of women’s education, one larger question remains: is it constitutional to exclude applicants on the basis of sex? Gender separation in public education went largely unquestioned until the 1970s with debates over Title IX of the Civil Rights Act and the Equal Educational Opportunities Act.³⁰ So far, the Supreme Court and Congress have upheld the constitutionality of women’s colleges partly because these colleges are regarded as a remedy for the inequities women have historically faced in educational and professional endeavors.³¹

The overarching conception of women’s education as a means of integration rather than alienation, coupled with relevant case law upholding the right to expressive association and exclusion, has allowed the preservation of women’s education. In particular, four cases have come before the Supreme Court in the past twenty-five years in an attempt to further define the reach of free association: *Roberts v. U.S. Jaycees*,³² *Boy Scouts of America v. Dale*,³³ *Mississippi Univ. for Women v. Hogan*³⁴ and *United States v. Virginia*.³⁵

Roberts challenged the exclusion and unequal treatment of women and older men from the Jaycees, a private organization designed to promote civic engagement

³⁰ Title IX was the first federal law to prohibit sex discrimination against students and employees of educational institutions. It requires females and males to receive fair and equal treatment in public school, including: recruitment, admissions, programs and activities, course offerings and access, counseling, financial aid, facilities, benefits, scholarship, sexual harassment, and athletics. *See, e.g.*, <http://www.dol.gov/oasam/regs/statutes/titleIX.htm>. (last visited Oct. 19, 2008). The Equal Educational Opportunities Act prohibits a state from denying “equal educational opportunity to an individual on account of his or her race, color, sex, or national origin,” including “deliberate segregation” or overlooking the barriers and segregation that exists. *See* 20 U.S.C. § 1703 (2007).

³¹ *See, e.g.*, *Miss. Univ. for Women et al. v. Hogan*, 458 U.S. 718 (1982). In her opinion for the majority, discussed *infra*, Justice O’Connor, invalidated Mississippi University’s exclusionary policies against male applicants to the School of Nursing because “Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities.” *Id.* at 729. She further noted that “[r]ather than compensate for discriminatory barriers faced by women, MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.” *Id.* It follows from her opinion, therefore, that the standard for upholding sex-based exclusionary policies is whether or not the exclusion works to compensate for past obstacles to opportunities.

³² 468 U.S. 609 (1984).

³³ 530 U.S. 640 (2000).

³⁴ 458 U.S. 718 (1982).

³⁵ 518 U.S. 515 (1996).

in young males.³⁶ The Jaycees asserted that their policy was a valid expression of freedom of association.

Ruling against the Jaycees, the Supreme Court invalidated the absolute right to exclusion and the case is now instrumental in defining the rights of a women's college to exclude male applicants. The Court recognized that varying degrees of freedom from government regulation can exist based on a group's associational purpose. Justice Brennan, writing the opinion, specified the types of organizations that should be accorded with the most leniency in their exclusionary policies. These organizations must:

by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.³⁷

Though perhaps unintentionally, Justice Brennan spoke directly to the constitutionality of women's colleges. Women's colleges, at their very essence, are communities that celebrate the shared, "distinctively personal" experience of being a woman. These colleges are also small and there is a "high degree of selectivity" in choosing the students and faculty who comprise their academic community. By possessing their own administration, funding and pedagogy, women's colleges work to maintain independence from coeducational institutions. Because admission to women's colleges is not arbitrary and because a single-sex student body is essential to the mission of women's colleges, their exclusivity is constitutional under *Roberts*.

In *Boy Scouts of America v. Dale*,³⁸ the Supreme Court upheld the Boy Scouts' right to exclude homosexuals for the same reason it deemed the Jaycees' exclusion of women to be unconstitutional. Building on the decision in *Roberts*, Chief Justice Rehnquist reinforced the idea of conditional freedom of association.³⁹ He explained that in order for a group to merit associational protection, it must engage in expressive association. Rehnquist wrote that, "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."⁴⁰

³⁶ *Roberts*, 468 U.S. at 612-14 (Regular membership was limited to men between the ages of eighteen and thirty-five, while women and older men were accorded with lesser membership. When two Minnesota chapters began admitting women as regular members, the organization placed sanctions against them. Both chapters filed discrimination charges).

³⁷ *Id.* at 619-20.

³⁸ 530 U.S. 640 (2000).

³⁹ *Id.* at 647-48.

⁴⁰ *Id.* at 648 (citing *New York State Club Assn, Inc. v. City of New York*, 487 U.S. 1 (1988)).

Judging by the Boy Scouts' mission statement which is "to instill values in young people"⁴¹ and their claim that homosexual membership would encumber their code of conduct, which calls for a "morally straight" and "clean" character,⁴² the Chief Justice determined that the organization had a system of values that it aimed to disseminate and that, therefore, it engaged in expressive association. Whereas the Jaycees did not have a codified belief system and participated in civic matters in a more general sense, the Boy Scout Law set forth a specific way of life to which scouts must adhere.⁴³

Justice Rehnquist also wrote that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."⁴⁴ This sentence opens the flood gates for exclusionary policies by precluding courts from judging the substance and validity of the expression and subsequent exclusion, even if these exclusions are directed at typically vulnerable classes of people.⁴⁵

Justice Rehnquist's opinion in *Boy Scouts* protects the right of women's colleges to exclude on the basis of gender. The lenient standard that he established when holding that the barring of homosexuals was justified by the Code's vague language makes it extremely easy for women's colleges to uphold their exclusionary policies. Many of these colleges have precise mission statements and constitutions which detail their intent to maintain an all-female environment and their reasons for doing so.⁴⁶ Such documentation satisfies Rehnquist's test for the protection of expressive association because it proves that the colleges' exclusionary practices are essential to the successful communication of the group's values and goals.

⁴¹ *Id.* at 649 (internal citations omitted).

⁴² *Id.* at 651. Though the Code's language does not mention homosexuals, Rehnquist defers to the Boy Scouts' understanding of "morally straight" and "clean" as excluding homosexuals.

⁴³ The Scout Oath is: "On my honor I will do my best/ To do my duty to God and my country/ and to obey the Scout Law;/ To help other people at all times/ To keep myself physically strong,/ mentally awake, and morally straight." Boy Scouts of America National Council Mission Statement, <http://www.scouting.org/media/mission.aspx> (last visited Jul. 13, 2008). The Scout Law says that a Scout is, "trustworthy," "loyal," "helpful," "friendly," "courteous," "kind," "obedient," "cheerful," "thrifty," "brave," "clean," and "reverent." *Id.*

⁴⁴ *Boy Scouts of Am.*, 530 U.S. at 651.

⁴⁵ See *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (Justice Harlan Stone acknowledged that certain minority groups that have been alienated from mainstream political processes and societal development may be accorded greater protection in the courts than members of social majorities who have greater access to justice).

⁴⁶ Barnard College's mission statement, for example, makes its purpose for exclusion overt: "Barnard College aims to provide the highest quality liberal arts education to promising and high-achieving young women" Barnard College Mission Statement, <http://www.barnard.edu/about/mission.html> (last visited on Jul. 13, 2008). Similarly, the mission of Wellesley College "is to provide an excellent liberal arts education for women who will make a difference in the world." Quick Facts About Wellesley College, <http://www.wellesley.edu/PublicAffairs/Media/facts.html> (last visited on Oct. 22, 2008).

*Mississippi University for Women v. Hogan*⁴⁷ provides an example of when the Court chose not to defer to an organization's reasons for exclusion. In this case, the Supreme Court held that the School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment by limiting its enrollment to women.⁴⁸ The Court maintained that the School must provide evidence that the exclusionary policy met heightened scrutiny, meaning, "important governmental objectives" and that "the discriminatory means employed" are "substantially related to the achievement of those objectives."⁴⁹

Justice O'Connor criticized the University's single-sex policy for perpetuating stereotypes that are harmful to women. By propagating the notion that nursing is a woman's job, the University policy "penalize[s] the very class the State purports to benefit."⁵⁰ Because most women's colleges in existence today are of the liberal arts variety and supply a plethora of majors, it seems unlikely that the court would refute women's colleges based on this rationale. However, it is possible that a future court may decide that, based on Justice O'Connor's argument, the very philosophy of women's colleges is actually more detrimental to women than it is helpful. Or, as women make greater advancement in the future, a judge may take Justice O'Connor's position and hold that the idea of educational disadvantages for women is archaic, thereby eliminating the need for separate college experiences. This will spurn the general debate—to be discussed below in Part d., Section I of this Note—and ultimately, the case for women's education seems stronger than the case against it.

Justice O'Connor makes another point which is particularly applicable to women's colleges that permit men to audit or enroll in their classes. Because men were permitted to audit the classes in the School of Nursing, O'Connor rejected the University's claim that their female students were adversely affected by the presence of male students. If this were true, O'Connor argued, the University would not have permitted men to participate in the classes at all.⁵¹

O'Connor's argument raises serious questions for women's colleges. First, does any women's college that allows men to attend some or all of its classes destroy the validity of its justification for existence as exclusionary? Second, does the presence of transgender students and students who conform to neither gender identity as fully admitted students, and not auditors like above, "fatally undermine

⁴⁷ 458 U.S. 718 (1982).

⁴⁸ *Id.* at 731.

⁴⁹ *Id.* at 724. Speaking for the majority, Justice O'Connor implored that this test must be applied free of gender stereotypes. *Id.* at 724-25. She explained that a state can employ sex discrimination as a compensatory measure if, in some situation, the preferred sex has been traditionally disadvantaged. *Id.* at 728. This was not the case for the Nursing School at Mississippi University for Women (MUW), because nursing is a stereotypically female profession. *Miss. Univ. for Women*, 458 U.S. at 729. O'Connor noted, for example, that a 1981 census reported that 96.5% of nurses were women. *Id.* at 729 n.14.

⁵⁰ *Id.* at 730 n. 15.

⁵¹ *Id.* at 730.

[] its claim that women . . . are adversely affected by the presence of men?”⁵² Barnard President Judith Shapiro, would answer both questions in the negative because she believes that the mission and relevance of women’s colleges are not affected by a male presence. She has noted that, “having spent over three decades of [her] life at women’s colleges with close ties to coed institutions—Bryn Mawr and Barnard, [she has] a rich ethnographic sense of how such arrangements are compatible with the women’s college serving quite powerfully as Virginia Woolf’s proverbial room of one’s own.”⁵³ It is likely, however, that it will be more difficult for a women’s college to preserve its identity when faced with transgender students on campus, because the divide between the genders is ill-defined.

Further, one may argue that these questions cannot be answered because women’s colleges have not decided upon a working definition of what a woman is. If a woman is a person with an XX chromosome or female reproductive organs, then the presence of intersex people would also count as a harmful presence, even if they identify and present themselves as women. On the other hand, a biological woman who fully appears and identifies as a man would not be viewed as hindering the mission of the college, even though that person is more aligned with the class of males the school purports to exclude than the class of females it aims to support. And what about Jane’s case, where a student was once a man but now identifies as and appears as a woman? Does she still share the experience of being a woman such that she will be a productive contributor to the all-women’s community, or does her unique experience of womanhood prohibit her from sharing in the women’s college experience? Further, how much of this should be based on the way that a transgendered individual presents himself or herself? To what degree is this a valid measure of whether or not a person belongs at a women’s college? Certainly, there are biological and gender-identified women who challenge the traditional conceptions of female appearances whose presence at women’s colleges would not be questioned.

*United States v. Virginia*⁵⁴ is another case that directly questions the constitutionality of single-sex colleges. This widely-publicized suit was brought against the Virginia Military Institute (“VMI”) by the United States on behalf of a woman who wanted to attend VMI, the state’s only public, all-male, higher education institution.⁵⁵ VMI’s distinctive mission was to produce “citizen-soldiers,” meaning men prepared for leadership in civilian life and military service.⁵⁶ VMI pursued this mission through a type of training called the “adversative method,” not available anywhere else in Virginia.⁵⁷ The Fourth

⁵² *Id.* at 730.

⁵³ E-mail from Judith Shapiro, President, Barnard College, to author (Jun 30, 2006, 11:24:38 EST) (on file with author).

⁵⁴ 518 U.S. 515 (1996).

⁵⁵ *Id.* at 520.

⁵⁶ *U.S. v. Virginia*, 766 F.Supp 1407, 1425 (D. Va. 1991).

⁵⁷ *Id.* at 1432. The “adversative model” is based on English public school teaching and was a

Circuit held that VMI did not advance any state policy by which it could justify its single-sex status.⁵⁸ In response, Virginia proposed a parallel program for women called Virginia Women's Institute for Leadership ("VWIL"), a four-year, state-sponsored undergraduate program at Mary Baldwin College, a private liberal arts school for women.⁵⁹

The Supreme Court held that Virginia violated the Equal Protection Clause of the Fourteenth Amendment because the opportunities afforded to VWIL students were not equal to those afforded to VMI students.⁶⁰ The Court reasoned that neither the goal of producing "citizen soldiers" nor VMI's adversative method was inherently unsuitable to women.⁶¹ In fact, even the District Court, which ruled to uphold VMI's exclusionary admission, noted that some women might prefer the adversative method to other educational models, and could meet the physical requirements imposed on VMI cadets.⁶² The Court wrote that, although women would require modified accommodations, "the VMI methodology could be used to educate women."⁶³

The Court's solution of integrating women while maintaining the integrity of VMI's educational model may also apply to the discussion of transgender students at women's colleges. One may consider, as offensive as it may be to the sensibilities of women's college administrators, that a women's college can maintain its ideology for advancing the interests of women while admitting men and transgender students. Although VMI's mission and its gender-based exclusion are not as directly connected as those of women's colleges, it is possible that women's colleges can evolve to become woman-centric without excluding men. A woman-centric college might include one with a strong women's studies

traditional form of military instruction. *Id.* at 1421. It emphasizes extreme physical and mental hardship and discipline with the objective of a greater capacity to deal with duress and stress. *Id.* Adherence to this model requires cadets to live in barracks with constant surveillance and no privacy. *Id.* at 1421. The most extreme aspect of VMI's method is the "rat line," which is comparable to Marine Corps boot camp in its mental and physical rigor. *U.S. v. Virginia*, 766 F.Supp.at 1422. The rat line is comprised of indoctrination, egalitarian treatment, rituals, minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors. *Id.* at 1422.

⁵⁸ *U.S. v. Va.*, 976 F.2d 890, 892 (4th Cir. 1992).

⁵⁹ *U.S. v. Virginia*, 518 U.S. at 526-27. Although VWIL would share VMI's mission to produce "citizen soldiers," the VWIL program would differ "in academic offerings, methods of education and financial resources", including a minimized emphasis on military training. *Id.* at 526. This framework would ultimately fail because the academic standards of Mary Baldwin were significantly lower than those of VMI, and the teaching style at Mary Baldwin was substantially different from that at VMI; namely, the adversative method was replaced by "a cooperative method which reinforces self-esteem." *Id.* at 527 (internal citation omitted).

⁶⁰ *Id.* at 534. The Court held that, while "inherent differences" were no longer accepted as grounds for classifications based on race or national origins, "physical differences between men and women . . . are enduring." *Id.* at 533-34. However, these inherent differences are not a cause for "denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 533. Sex classifications may not be used "to create or perpetuate the legal, social and economic inferiority of women." *U.S. v. Virginia*, 518 U.S. at 533.

⁶¹ *Id.* at 540.

⁶² *Id.* at 540-41.

⁶³ *Id.* at 540 (citing *U.S. v. Virginia*, 852 F. Supp.471 (1994)).

department, that maintains the same percentage of female professors and administrators as women's colleges, focuses on directing its female students into typically male-dominated careers, and ensures that the majority of its campus events and services are directed at women's issues. It would be interesting to see whether the success that women's college alumnae enjoy would be preserved in female-centric but non-exclusively female admission environments.

Referencing *Mississippi Univ. for Women*, the Court questioned VMI's expert testimony on various male and female "tendencies" and "fixed notions concerning the roles and abilities of males and females."⁶⁴ The Court emphasized that the State cannot deny women admission to VMI if they have the capability and desire to attend the Institute.⁶⁵

The Supreme Court's reasoning in *U.S. v. Virginia* might stand in response to the defenders of women's colleges who question transgender students' motives for applying to these schools. President Shapiro of Barnard College said that she did not understand,

given that women's colleges occupy such a small segment of higher education, why [] people who are transgendered [would] feel that they want to go to a single-sex college. There are many coeducational colleges that are highly liberal and sort of free-wheeling on issues of gender and sexuality and I would think that that would be a natural choice for students in the process of transition.⁶⁶

It may be more convenient or desirable for a transgender student to attend a coeducational institution. Yet, to question why transgender students would want to attend a woman's college does not provide a ground for excluding them, particularly if their presence is compatible with the college's mission.⁶⁷

b. Transgender Rights

In the Matter of Anonymous,⁶⁸ one of the transgender movement's seminal cases, was decided, rather unassumingly, in the Civil Court of New York. The petitioner, an MTF post-operative transsexual, applied to the court for a legal name change to honor her new gender identity.⁶⁹ She also requested that the Department of Health of New York City change her birth certificate to reflect her new gender or that a court issue an order proclaiming that her change in identity be attached to her

⁶⁴ *U.S. v. Va.*, 518 U.S. at 541.

⁶⁵ *Id.* at 542-46.

⁶⁶ Interview with Judith Shapiro, President, Barnard College, in N.Y., N.Y. (Nov. 14, 2005).

⁶⁷ Of particular interest to this note is Justice Scalia's dissent which warns that the VMI decision may signal the end of private single-sex schools. *Id.* at 598. Private institutions rely on government support and charitable status under tax law. *Id.* Justice Scalia fears that this decision may be used to hold charitable donations to private single-sex colleges as contrary to public policy, preventing donations from being tax deductible and leading to their demise. *Id.*

⁶⁸ 57 Misc.2d 813 (1968).

⁶⁹ *Id.* at 813.

birth certificate.⁷⁰ No New York court had been faced with the name-changing of a transsexual.⁷¹ Judge Francis N. Pecora's decision to grant the petitioner her name change and attach it to her birth certificate, as well as the relatively progressive dictum that accompanied the holding, was influential.⁷²

Though intent on expanding legal conceptions of gender, Judge Pecora explained that such expansion had limits.⁷³ He explicitly noted that his decision to grant the petitioner's requests hinged on the fact that all of her male organs had been removed and replaced by female ones.⁷⁴ Judge Pecora explained that,

there is no chance that this petitioner will ever again function as a male either procreatively or sexually. The petitioner is now capable of having sexual relations as a woman although unable to procreate. "Her" physiological orientation is complete . . . absent surgical intervention, there is no question that his social sex must conform with his anatomical sex, his mental attitude notwithstanding.⁷⁵

It is evident that the judge regarded pre-operative transgender people as less deserving of legal recognition from the fact that he placed quotation marks around the word "her" and used the male pronoun when referring to the hypothetical pre-operative name-change applicant.⁷⁶ However, this decision provided the first legal validation of transsexualism and was a springboard for further legal proceedings. The influence of this decision is due in part to Judge Pecora's rejection of the argument that allowing transsexuals to change the name on their documentation would open the flood gates to various fraudulent schemes. Instead, he insisted that the greater threat of fraud lied in birth certificate classifications that do not conform to a person's current identity.

Several cases that help define transgender law emerged out of Title VII of the Civil Rights Act, which ensures equal opportunity in the workplace. Federal courts have consistently ruled that the protection against employment discrimination on the basis of sex does not extend to discrimination against transsexuals. In *Ulane v. Eastern Airlines*,⁷⁷ for example, the Seventh Circuit held that Congress had a narrow conception of sex and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."⁷⁸

⁷⁰ *Id.*

⁷¹ *Id.* at 814.

⁷² *Id.* at 817.

⁷³ In the Matter of Anonymous, 57 Misc.2d at 816.

⁷⁴ *Id.* at 815-16.

⁷⁵ *Id.* at 836-37.

⁷⁶ His opinion also implies that the capability of engaging in sexual intercourse as a male or female may be determinative of whether a person qualifies as either gender. This is a controversial position that probably cannot be sustained, because an individual's gender identity should not depend on whether that individual is capable of engaging in sexual intercourse as a man or woman. In other words, gender and sexuality should not necessarily depend on each other. See also BUTLER *supra* note 5, at 8.

⁷⁷ 742 F.2d 1081 (7th Cir. 1984).

⁷⁸ *Id.* at 1085. The petitioner in *Ulane* was a post-operative transsexual and thus, *Ulane* can be

A few years after the *Ulane* decision, the Supreme Court ruled on *Price Waterhouse v. Hopkins*,⁷⁹ helping to further develop transgender law, although the court did not speak directly to the rights of transsexuals. The court held that workplace discrimination against a woman based on sexual stereotyping, such as assertions that her mannerisms and dress were “macho” or not “femininely,” constituted sex discrimination and violated Title VII.⁸⁰ *Price Waterhouse* has been interpreted to prohibit discrimination against people whose gender expression does not conform to typical societal expectations.⁸¹ Therefore, the decision may apply to situations like Jane’s and work to limit colleges’ generalizations and judgments about gender identity based on the way transgendered people choose to express it.

In *Smith v. City of Salem*,⁸² the court ratified *Price Waterhouse* and affirmed its application to transgender employees. At issue was whether Title VII prohibited discrimination against a firefighter who was biologically male, but began assuming a feminine appearance at work.⁸³ The Fire Department sought to use Smith’s transgenderism as a cause to terminate his employment.⁸⁴ The court held that Smith was the victim of sex discrimination because his gender expression failed to conform with his employer’s assumptions on masculinity.⁸⁵ Later, in *Schwenk v. Hartford*,⁸⁶ the Ninth Circuit followed *Price Waterhouse* and *Smith* by holding that the term “sex,” as used in Title VII, includes sex *and* gender, such that the law protects people whose gender expression does not conform to typical expectations.

*Goins v. West Group*⁸⁷ placed a limit on the degree to which transgender people may be recognized as a class warranting special protection. Julienne Goins was a transgender woman, who was granted by a Texas court her petition for a name change and a gender change “from genetic male to reassigned female.”⁸⁸ However, several of Goins’ female coworkers objected to her use of the women’s bathroom.⁸⁹ West Group’s director of human resources considered this complaint to allege a hostile work environment by its female employees and enforced the policy of restroom categorization based on biological sex.⁹⁰

seen as rejecting Judge Pecora’s framework of providing legal recognition to post-operative transsexuals. This puts transsexuals at risk for victimization and leaves even less room for protection of pre-operative transgendered people such as Jane of our hypothetical.

⁷⁹ 490 U.S. 228 (1989).

⁸⁰ *Id.* at 235.

⁸¹ National Center for Lesbian Rights, Federal Cases Recognizing that Discrimination on the Basis of Gender Non-Conformity and/or Transgender Status is a Form of Discrimination on the Basis of Sex, <http://www.transgenderlaw.org/cases/federalcases.htm>.

⁸² 378 F.3d 566 (6th Cir. 2004).

⁸³ *Id.* at 567.

⁸⁴ *Id.* at 568-69.

⁸⁵ *Id.* at 574-75.

⁸⁶ 204 F.3d 1187 (9th Cir. 2000).

⁸⁷ 635 N.W.2d 717 (2001).

⁸⁸ *Id.* at 720.

⁸⁹ *Id.* at 721.

⁹⁰ *Id.*

Goins continued using the female restroom closest to her workstation.⁹¹ After receiving a threat of disciplinary action, and despite an offer of promotion, Goins resigned from her position.⁹² She sued West Group based on the Minnesota Human Rights Act's prohibition of sexual orientation discrimination, alleging that her employer's refusal to allow her to use female restrooms constituted unlawful discrimination and created a hostile work environment for *her*.⁹³

The Minnesota Supreme Court held that the state's Human Rights Act cannot be invoked to challenge an employer's designation of bathrooms based on biological sex. The court explained that Goins' case had no foundation because, "absent more express guidance from the legislature, . . . an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination"⁹⁴

The court further noted that Goins failed to prove that West Group created a hostile work environment because she provided no credible evidence that she was harassed.⁹⁵ Her allegations that co-workers gossiped, stared and restricted her use of the women's bathroom did not meet the degree of hardship needed to be considered an actionable harassment.⁹⁶ This decision, though specific to Minnesota statutes, has larger implications because it preserves the right of institutions to regulate facility usage based on biological gender, as opposed to gender identity. Further, the evidentiary burden placed on transgender petitioners to prove harassment makes it difficult for them to survive the motion to dismiss. This decision gives women's colleges leeway in deciding whether or not to accept the chosen identity of their MTF applicants, and also allows them to restrict FTM students from using men's bathrooms on campus.

Cruzan v. Special School District, #1,⁹⁷ another Minnesota case, was filed shortly after the *Goins* decision. This case approached the issue of transgender rights in the context of bathroom usage from a viewpoint opposite to that of *Goins*. Carla Cruzan, a non-trans teacher, sued the school district, alleging that the school discriminated against her on the basis of her sex and her religion by allowing an MTF coworker, Debra Davis, to share the women's faculty bathroom.⁹⁸ The court decided that Davis had the right to use the women's restroom.⁹⁹

⁹¹ *Id.*

⁹² *Goins*, 635 N.W.2d at 721.

⁹³ *Id.*

⁹⁴ *Id.* at 723.

⁹⁵ In order to prove that West Group created a hostile work environment, she must have proved, *inter alia*, that the employer was aware of the harassment and failed to remedy it. *Id.* at 725.

⁹⁶ *Id.* at 725-26.

⁹⁷ *Cruzan v. Special School District, #1*, 294 F.3d 981 (8th Cir. 2002).

⁹⁸ *Id.* at 982-83.

⁹⁹ *Id.* at 982. The District Court decided that Cruzan did not establish a *prima facie* case of discrimination based on religion because she failed to disclose her religious belief to the school district and show that she suffered an employment disadvantage as a result. The Court of Appeals agreed. Additionally, she failed to explain the specific reason for her disapproval of Davis's use of the women's restroom. Her vague disapproval was insufficient according to both courts because her title, salary and

A women's college may easily face a suit similar to Cruzan's in the event that a biologically female student sues the school, alleging that the presence of an MTF or FTM student on campus is offensive to her values. Such an argument may hold more weight than Cruzan's because of the unique mission statement of women's colleges. Unlike Cruzan's school district, women's colleges are intended solely for the education of women. Women apply to women's colleges with the clear understanding of the single-sex nature of the student body and facilities and with the expectation that they will benefit in some way from attending a school that purports to be dedicated entirely to women. Applying the language of *Cruzan*, a female student can argue that sharing the campus with trans students negatively affects a "term, condition, or privilege" that she expects to receive as a student of a women's college.¹⁰⁰

*Palmore v. Sidoti*¹⁰¹ did not involve transgender people, but established an important principle for future cases exploring the degree to which the government should protect transgender people from discrimination.¹⁰² This Supreme Court case involved a custody dispute between a white couple. At the time of the divorce, the mother was awarded custody of their daughter. Later, the father petitioned for custody because the mother subsequently married a black man. His primary argument was that, "[the] wife has chosen for herself and for her . . . child a life-style unacceptable to the father *and to society* The child . . . is, or at school age will be, subject to environmental pressures not of choice."¹⁰³ The lower courts concluded that it would be in the best interests of the child to remove her from the interracial household. However, the Supreme Court unanimously reversed.

The *Palmore* decision is important because it insists that the law does not ratify prejudice. Chief Justice Burger acknowledged the challenges that living in an interracial home would present to the child, but asserted that "the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹⁰⁴ This principle may come into play in Jane's case, because a court may hold that the perception of what a woman is, by her college and/or her female classmates, or their discomfort about sharing a living and learning space with an MTF, cannot be upheld in court when Jane identifies herself as a woman.

benefits were unaffected by Davis's use of the women's bathroom. Furthermore, Cruzan had the opportunity—of which she took advantage—to use the female students' bathroom which was closer to her classroom, as well as the single-stall unisex bathrooms. *Id.* at 984.

¹⁰⁰ *Id.* at 984.

¹⁰¹ 466 U.S. 429 (1984).

¹⁰² *Id.* at 433 (The opinion asserted that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

¹⁰³ *Id.* at 431.

¹⁰⁴ *Id.* at 433.

Also important in considering special protection for oppressed people is Justice Harlan Stone's famous footnote in *United States v. Carolene Products*.¹⁰⁵ Justice Stone noted that the court ought to accord more protection to groups that constitute "discrete and insular minorities," mainly, "religious . . . or national, . . . or racial minorities." He wrote: "Prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."¹⁰⁶ Justice Stone's footnote, in conjunction with the principles established in *Palmore*, can help determine which minorities require protection under the law. It may be argued that transgender people fall into Stone's category of a "discrete and insular" minority. Today, courts review political inequalities on the basis of sex with heightened scrutiny.¹⁰⁷ As sex discrimination has evolved from mainly considerations of the women's liberation movement to gay rights and now to transgender rights, it is feasible to use the logic of Justice Stone's footnote to regard transgender people as a minority whose issues are worthy of heightened scrutiny. The stigma that transgender people bear, as well as their relatively small numbers, pose clear impediments in the political arena. As Seton Hall Law Professor Marc Poirier explains,

[T]he first battle of the trans community (like the gay and lesbian community before it) is to achieve some kind of tolerated visibility, instead of being stigmatized by medical and psychological and moral stereotypes and made invisible and thus politically powerless. The first battle has been to emerge from the shadows and claim a human dignity that justifies legal protection.¹⁰⁸

Based on Professor Poirier's assessment—that the transgender community is disadvantaged in the political world—transgender people should be given more attention and greater protection in under the law.

The "Yale 5" saga is an interesting case for exploring colleges' obligations to accommodate their students' personal preferences and may be helpful in discussing Jane's plight.¹⁰⁹ In 1997, five Orthodox Jewish undergraduates at Yale sued the University, charging that its housing policy which required unmarried freshmen and sophomores to live on-campus in co-ed dormitories violated their religious commitment to modesty between genders.¹¹⁰ On December 28, 2000, the Second

¹⁰⁵ 304 U.S. 144, 153 n.4 (1938).

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁰⁸ E-mail from Marc R. Poirier, Professor of Law, Seton Hall Law School, to Paula Franzese, Peter W. Rodino Professor of Law, Seton Hall Law School (Apr. 3, 2006).

¹⁰⁹ *Hack v. Pres. and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000).

¹¹⁰ The students asserted that Yale could not defend its policy on the basis of its status as a private university because Yale has a long-standing historical relationship with the State of Connecticut; the court disagreed. *Id.* at 83-85. Yale defended its policy by emphasizing the ways in which mandatory

Circuit Court of Appeals upheld a 1998 District Court decision in favor of Yale, stating that the plaintiffs could have chosen to attend another university if they felt that Yale's housing policy violated their religious beliefs.¹¹¹

The decision in the Yale case is particularly troubling for transgender students who, like Jane, seek exemption from the school's housing regulations as a result of their non-normative identity. If Yale reserves the right to require all students to live in mixed-gender on-campus housing, then this ruling can potentially extend to transgender students who may also feel uncomfortable in a mixed, or either male or female, housing that does not accommodate the needs corresponding to their changing or non-normative gender identity. A decision such as this may contribute to uneasy relations between transgender students and their classmates, and may effectively exclude transgender students from campuses that will not accommodate them.

III. TRANSGENDER STUDENTS AT WOMEN'S COLLEGES TODAY

Transgender visibility at women's colleges is on the rise.¹¹² As transgender activism gains momentum, transgender students are increasing in number, visibility and influence on college campuses, so it is in the best interests of students and colleges to address this conundrum. Although the transgender question has caused some controversy among the student bodies at women's colleges,¹¹³ statements made by administrators have generally been progressive and welcoming.¹¹⁴ However, it seems that, generally speaking, no formal policies are in place for handling trans students.¹¹⁵ Further, the discourse generally remains limited to the treatment of FTM students who transition while at college.

a. Smith

Smith College, one of the Seven Sisters in Massachusetts, received a lot of press in 2003 when its student body voted for a referendum to make the school's

communal living enriches the education of its students. *Id.* at 91. Yale did not require students to physically inhabit their on-campus rooms, but did require that they pay the housing fee for their unused rooms. *Id.*

¹¹¹ Eli Muller, *Orthodox Jews Relieved by 'Yale 5' Loss*, YALE DAILY NEWS, Jan. 12, 2001 at 1.

¹¹² Allison Metz, *Do Transgender Students Adhere to the Mission of a Women's College?*, MOUNT HOLYOKE NEWS, May 3, 2007, available at <http://media.www.themhnews.com/media/storage/paper999/news/2007/05/03/News/Do.Transgender.Students.Adhere.To.The.Mission.Of.A.Womens.College-2895355.shtml>. See also Quart, *supra* note 2, at 2 (explaining that the number of women who transition in college has grown over the past ten years, and this increase is placing new demands on women's colleges).

¹¹³ See, e.g., Offman, *supra* note 4, at 3.

¹¹⁴ See, e.g., Metz, *supra* note 112, at 2,4. The article includes a statement by Mount Holyoke's Associate Director of Residential life who created the Transgender Awareness Committee in 2006 and has expressed his belief that "there's room at Mount Holyoke for transgender students." *Id.* at 4.

¹¹⁵ See, e.g., Offman, *supra* note 4 at 2 (quoting one student activist at Smith College who believes that the college needs to be more active in addressing transgender issues on campus).

constitution gender-neutral.¹¹⁶ The effect was to remove the words “she” and “her” from the constitution and replace them with “the student;” this change caused a sharp division in the student body.¹¹⁷ Further efforts to accommodate trans students include professors asking students the names and pronouns they wish to be referred by and providing gender neutral bathrooms. Smith also hosts gender-queer organizations that boast membership of more than one percent of the student body.¹¹⁸

According to a 2005 Financial Times article, about twenty four of the 2,500 women who attend Smith identify themselves as FTM—the article failed to address the possibility of MTF students like Jane.¹¹⁹ Notwithstanding the small number of transgender students, transgender activism has divided Smith into two opposing camps— those for and those against transgender recognition.¹²⁰ The “against” side feels that FTM students should attend coeducational schools because “women go to Smith because they only want to learn with other women.”¹²¹ These students often question why students who identify themselves as males continue attending a women’s college.¹²² A noteworthy response came from one student who claimed that he matriculated prior to deciding about his transgender identity and that he does not want to leave Smith after becoming comfortable there.¹²³ Keeping in mind that women’s colleges have dwindled in recent history, the “against” camp fears that Smith will lose its identity as a women’s college if it graduates FTM students.¹²⁴

It is interesting to note that Smith does allow men from nearby colleges and the local high school to attend selected courses at the school.¹²⁵ Because the male students are not fulltime, they are not causing the same discontent within the community. However, applying Justice O’Connor’s reasoning in *Mississippi University for Women for Women* to this situation, the fact that Smith allows men into their classes may weaken the argument that men and transgender students negatively affect the character of the women-only education.

Transgender students at Smith have expressed their dissatisfaction with the administration’s lack of activism in facing transgender issues, particularly because some students experience intolerance from their classmates and because the college

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.*

¹¹⁸ Quart, *supra* note 2, at 2.

¹¹⁹ This figure corresponds to current national estimates of the proportion of the U.S. population that is transgender. *Id.* A recent survey by the National Center for Transgender Equality estimated that between .25% and 1% of the U.S. population, or about 3 million people, are transgender. *Id.*

¹²⁰ Offman, *supra* note 4, at 1.

¹²¹ *Id.* at 3.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ It is relevant to note that Smith grants name changes on diplomas to students who attend commencement as women but transition later. Brune, *supra* note 2, at 4.

¹²⁵ Offman, *supra* note 4, at 1.

seems to have an uncertain policy on transgender applicants.¹²⁶ The college stated that admissions are open only to women whose gender at birth was female, thereby excluding people like Jane, who were born male but currently live as female.¹²⁷ The college did say that it would consider a female applicant who wants to be called male, but was unsure of how it would treat a female who receives medical treatments to become male.¹²⁸ Punting, the school said that it would never be privy to that information on an application and declared the point moot.¹²⁹ Thus, the question of how these students—either biologically male or female—who have undergone surgery prior to matriculation will be treated once they slip through the admissions cracks remains unanswered.

b. Mount Holyoke

Mount Holyoke is another member of the Seven Sisters located in Massachusetts that has received some attention regarding its transgender students. The Dean of Mount Holyoke admits that tension exists between the school's support of transgender students and the mission of a women's college, but he does not believe that supporting the transgender population at the college will turn the school coeducational.¹³⁰ Similarly, the College's President asserts that trans students do not detract from the mission of the College.¹³¹ One FTM student at Mount Holyoke agreed with the President because these students were "born female, raised female, conditioned as female and experienced life as a female for most of their lives," and therefore can share in the experience of being a woman.¹³²

The Mount Holyoke constitution, like Smith's, was amended in 2005 to replace the word "she" with "student."¹³³ However, unlike Smith's amendment, Mount Holyoke's was fairly secretive.¹³⁴ Students contend that this was a result of a lack of dialogue between the transgender students and their allies, and the faction that does not agree with their membership in the Mount Holyoke community.¹³⁵ An alumna wrote an angry letter to a Mount Holyoke periodical, charging that the school was "passively going coed" and that transgendered students were "men seeking to take advantage of Mount Holyoke's liberal and accepting atmosphere."¹³⁶

¹²⁶ *Id.* at 2.

¹²⁷ *Id.* at 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Metz, *supra* note 112, at 1.

¹³¹ *Id.* at 2.

¹³² *Id.*

¹³³ *Id.* at 1.

¹³⁴ Metz, *supra* note 112, at 1,2.

¹³⁵ *Id.*

¹³⁶ Quart, *supra* note 2, at 6.

Mount Holyoke does not have an official policy for admitting transgender students. The Dean of Admissions states that her office “admit[s] and enroll[s] students whose legal status is female.”¹³⁷ However, it is unclear what “legal status” means. A common gauge of people’s legal status on gender is their birth certificate because a birth certificate is the foundation for other legal documents, such as driver’s license and passport. But, the ability of transgender people to change the gender designation on their birth certificate varies by state.¹³⁸ As a result, applicants to Mount Holyoke will be treated differently by the college depending on their state of birth. To consider two similarly situated and equally qualified applicants differently based on their birth state denies them equal protection under the law.

Nevertheless, administrators at Mount Holyoke do not believe that there is a need for a clear admissions policy regarding transsexual applicants. The Dean stated, “I guess I’m not a big one for pushing policy measures when they’re not necessary,”¹³⁹ and the Associate Director of Residential Life stated that he does not believe that the college will ever adopt such a policy.¹⁴⁰ When women complain that they cannot live on a floor with a man, special accommodations are made on a case-by-case basis.¹⁴¹ However, a case-by-case handling of the complaint still exposes the transgender students to the risk of unequal treatment based on the subjective opinions of the college administration.

¹³⁷ Metz, note 112, at 1. In the context of articles written on Mount Holyoke’s transgender situation, this seems to mean that the college admits biological women and maintains a hands-off policy towards students who become FTM. *See, Id.* at 2. The Dean of the College has said, “we admit women and after that God Bless them all.” *Id.* Similarly, the President of the College has stated that “[the school’s] policy is to admit women and support them in their intellectual and personal development. We expect that students will explore a wide range of issues of identity.” *Id.*

¹³⁸ Lambda Legal, Amending Birth Certificates to Reflect Your Correct Sex, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31991108>. Lambda Legal, a national organization committed in part to the civil rights of transgender individuals, reports that most states accommodate transgender people’s requests to amend their birth certificates to reflect their change in gender. *Id.* However, states have different policies regarding how a person should go about changing the gender on their birth certificate and what requirements they must fulfill to do so. *Id.* A few states refuse to alter the birth certificate gender, which operates as an absolute restriction on transgender students from these states to apply to women’s colleges. *Id.* Some states, like Virginia, specify that applicants for gender changes must have undergone medical procedures, but do not specify exactly what those medical procedures include. *Id.* This lack of specificity may expose applicants to the subjectivity of the officials reviewing their application to determine which medical procedures satisfy the requirement. Lambda Legal, *supra*. Dean Spade, a trans-lawyer, explains that, when people refer to legal gender, “they’re thinking something about genital surgery, . . . [which is] a common misperception; sex change surgery is not necessarily genital surgery.” Isolde Raftery, *Can a Man Attend Barnard College?*, COLUMBIA SPECTATOR, Nov. 17, 2003, available at <http://www.columbiaspectator.com>.

¹³⁹ Metz, *supra*, note 112, at 3.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.* at 3.

c. Barnard

In November 2003, The Spectator, Columbia University's daily paper, published an article by student Isolde Raftery that queried the implications of transgender students at Barnard.¹⁴² This article sparked serious discussion of the issue on campus and was even quoted in a similar New York Times article.¹⁴³ As recently as March 16, 2008, the New York Times reported on a former Barnard student named Rey who entered Barnard in September 2007.¹⁴⁴ Rey was born a woman, but began identifying himself as transgender in his early teenage years, and he intended to begin testosterone treatments during his freshman year of college.¹⁴⁵ Early in the semester, Rey's roommates complained about sharing their rooms with a man.¹⁴⁶ Because Barnard does not house freshman in single rooms, Rey and the Dean of the College decided that Rey would transfer to the Columbia School of General Studies.¹⁴⁷

Barnard's Dean of Admissions states that, for the purposes of reviewing applications, her office adheres to "what the government says is a legal definition of a woman."¹⁴⁸ She admits that the government's definition is "a little fuzzy."¹⁴⁹ As discussed above and in Raftery's article, "the 'legal' definition of a woman or man varies by state"¹⁵⁰ and is thus not an indicator on which women's colleges can rely. To the knowledge of its Dean of Admissions, Barnard, has not yet been faced with an application that revealed a student's transgender identity as of the 2007-2008 admissions season, and thus the College does not have a stipulated procedure or opinion on the matter.¹⁵¹ The Dean of Admissions does note, however, that she relies on certain cues in the application, such as the social security number, essays and teacher recommendation letters to provide some idea of the applicant's gender identity.¹⁵²

¹⁴² Barnard College is affiliated with Columbia University as one of the University's four undergraduate colleges. Barnard College Today, <http://www.barnard.edu/about/btoday.html#liberal>. Barnard has its own independent administration, faculty, board of trustees, operating budget, endowment and campus, but students earn the degree of the University. *Id.* Cross-registration exists between Barnard and the University, so that Barnard students may take advantage of the same courses offered to Columbia undergraduates and vice versa. *Id.* Barnard students may also participate in many Columbia-sponsored clubs and organizations, as well as the Columbia athletics program. *Id.*

¹⁴³ See Isolde Raftery, *Can a Man Attend Barnard College*, COLUMBIA SPECTATOR, Nov. 17, 2003; Fred A. Bernstein, *On Campus, Rethinking Biology 101*, N.Y. TIMES, Mar. 7, 2004, at 4.

¹⁴⁴ Quart, *supra* note 2, at 2.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *Id.*

¹⁴⁸ Interview with Jennifer Fondiller, Dean of Admissions, Barnard College, in N.Y., N.Y. (Nov. 9, 2005).

¹⁴⁹ *Id.*

¹⁵⁰ Raftery, *supra* note 138, at 2.

¹⁵¹ Interview with Jennifer Fondiller, Dean of Admissions, Barnard College, in N.Y., N.Y. (July 9, 2008).

¹⁵² Interview with Jennifer Fondiller, Dean of Admissions, Barnard College, in N.Y., N.Y. (Nov. 9, 2005).

Judith Shapiro, President of Barnard, narrows the College's definition of a woman when she explains, "I think we define the term [woman] the same way our society does . . . and it's usually based on anatomy."¹⁵³ Shapiro also adds that Barnard's definition of "woman" takes into account an agreement between anatomy and formal documentation.¹⁵⁴ That is, if fully transitioned MTFs applied to Barnard, they "would simply be women" in the eyes of the college.¹⁵⁵ Of course, the College's policy to use anatomy as a factor in gender determination is problematic when the College is not privy to information about an applicant's anatomy. Further, a reliance on anatomy will lead to obstacles in the handling of an inter-sex applicant who possesses genitalia characterized by both male and female attributes. Also, if a transgender applicant has only partially changed his or her anatomy to reflect the new identity, it remains unclear whether this would satisfy the College's standard.

No policy is in place for biologically female applicants who identify themselves as male, and President Shapiro questions their placement at a women's college.¹⁵⁶ She would encourage them to apply to coeducational colleges that are "highly liberal and sort of free-wheeling on issues of gender and sexuality" and provide the same type of education and open-mindedness that Barnard provides.¹⁵⁷ Trans students have countered that they chose Barnard because it was founded on ideals that challenged traditional gender boundaries.¹⁵⁸ President Shapiro objects to the suggestion that FTM students have a "right" to apply to Barnard and exploit its traditionally liberal and queer-friendly environment: "[t]hat you have a sort of sacred right to go wherever you want to go and have the institution accommodate to [sic] you when you, in fact, have many other choices, strikes me as a misplaced sense of entitlement."¹⁵⁹ President Shapiro further explains that transgender students are "not a category of student[s] that we feel it appropriate to accommodate" because accommodations for transgender students cannot be made without accepting men as well.¹⁶⁰

Although President Shapiro opposes the idea of Barnard wholeheartedly embracing a transgender population, she pledges commitment to the individual needs of students who, once at Barnard, undergo a gender transition.¹⁶¹ In fact, that seems to be Barnard's unofficial policy; a dedication to individual needs on a

¹⁵³ Interview with Judith Shapiro, President of Barnard College, in N.Y., N.Y. (Nov. 14, 2005). Coincidentally, President Shapiro was one of the first anthropologists to write about transsexualism. See JUDITH SHAPIRO, *TRANSSEXUALISM: REFLECTIONS ON THE PERSISTENCE OF GENDER AND THE MUTABILITY OF SEX* (Julia Epstein and Kristina Straub eds., 1991).

¹⁵⁴ Interview with Judith Shapiro, President of Barnard College, in N.Y., N.Y. (Nov. 14, 2005).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Raftery, *supra* note 139, at 2.

¹⁵⁹ Interview with Judith Shapiro, President of Barnard College, in N.Y., N.Y. (Nov. 14, 2005).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

case-by-case basis, but a refusal to acknowledge transgender students as an official group or distinct problem within the school.

In 2005, an FTM student graduated from Barnard.¹⁶² In recalling the experience of this student, Shapiro notes that he had a deep respect for Barnard's all-female identity.¹⁶³ Although he adopted male pronouns and a different name, he waited to complete the surgery until after he graduated.¹⁶⁴ According to Barnard's General Counsel, the College would most likely have the right to ask students who undergo a sex change to leave.¹⁶⁵ However, he stresses that the school would not take any punitive action.¹⁶⁶ Barnard, he assures, will always act sensitively and in conjunction with the student.¹⁶⁷

President Shapiro assures that the presence of a few transgender students will not detract from the work of women's colleges, nor should it signal the eradication of single-sex education. Barnard women commonly share classes with Columbia men and there are even coeducational dormitories. Since the presence of men on Barnard's campus has not hampered Barnard's mission to date, she says, neither will the presence of a few transgender students.¹⁶⁸ One cannot draw an effective comparison, however, between Barnard's transgender students and the men who share classes and living quarters with Barnard women. The Columbia men who take part in Barnard's classes and enjoy use of its facilities ultimately will not carry the badge of a Barnard graduate wherever they go in the future. They also cannot hold influential positions within the Barnard community. Additionally, *MUW v. Hogan* may work to contradict President Shapiro's sentiments because Justice O'Connor held that the presence of male students at MUW, even though they were only auditing, detracted from the College's argument that men ought to be excluded to preserve the mission of the school. The same might be true of transgender students at Barnard.

IV. CONCLUSION

a. What Will Happen to Jane?

Jane decides to submit her response letter in person. She is meeting with the Dean of Students to explain her situation in the hopes that the college will help her to be comfortable there. As she walks through the gates, she feels nervous thinking about the prospect that the validation of her identity was at the mercy of a school

¹⁶² *Id.*

¹⁶³ Interview with Judith Shapiro, President of Barnard College, in N.Y., N.Y. (Nov. 14, 2005).

¹⁶⁴ *Id.*

¹⁶⁵ E-mail from Michael Feierman, General Counsel, Barnard College, to the Author, (July 10, 2008, 2:57 p.m. EST) (on file with author).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Interview with Judith Shapiro, President of Barnard College, in N.Y., N.Y. (Nov. 14, 2005).

administrator. She feels pangs of resentment that she will have to justify her lifestyle and gender identity in ways that students with matching sex and gender do not, and because, even with the growing transgender movement, women's colleges are hesitant to address the situation. However, Jane knows that her case is a rare one and she is prepared to make herself vulnerable to the college so that she may be able to fulfill her dream of attending that school.

b. The Need for College Policies

Jane's feelings of isolation, resentment and vulnerability as a result of her transgender status have been unnecessarily exacerbated by her college's lack of a formal policy on transgender students. As exemplified in the above section, women's colleges lack formal procedures in handling transgender applicants and determining the status of students who transition while attending the school. Although some schools, such as Smith and Mount Holyoke, have chosen to remove gendered pronouns from their constitution, this change has little practical effect on the treatment of transgender students on the campuses. Colleges need to form committees—perhaps comprised of administrators, transgender experts, transgender students, students born and identifying as female and other representatives from the college community—and hold open discussions on campus to take into consideration various points of view in formulating a workable policy.

To the extent that women's colleges are adopting gender neutrality in their constitution and working to accommodate matriculated FTM students, they should also accept and accommodate MTF students like Jane. Although MTFs are not raised as women they should have the same opportunity to attend women's colleges as biological women, because they identify and present themselves as women. The identity and lifestyle of an MTF student like Jane is arguably more compatible with the mission of a women's college than that of her FTM counterpart who rejects her identity as a woman. For this reason, limiting admission to women born women, as Smith does, seems illogical.

Further, the predominantly, case-by-case method of addressing the issues pertaining to transgender students places these students at risk of unequal treatment. It exposes students to inconsistent and unfair treatment and creates a feeling of uneasiness for trans and non-trans students alike. Without a clear policy, rumors spread and unformed judgments about the actions and behaviors of trans students prevail, creating a divide between transgender students and the rest of the student body.

Similarly, women's colleges should cease relying on inconsistent state standards and the so-called "legal" definition of womanhood as guidance for their own practices. Perhaps, each college should formulate its own working definition of "woman." Although this may be a seemingly conservative, and undoubtedly controversial, approach, an institution that purports to advance the causes of

women by only admitting women should have a clear explanation of how it defines “woman.” Even though a uniform, consistent definition at each institution is likely to be imperfect, it will provide notice to students and prevent a system of unfair privileges that can emerge in a case-by-case treatment or an application of state legal standards. Women’s colleges must directly address the status of transitioning FTM students and look toward the next frontier—the potential matriculation of MTF applicants. Taking a proactive role will ensure that colleges preserve their own missions as well as the dignity of transgender students.