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"Better Dead than Co-ed"? Transgender Students at an All-Women's College

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“BETTER DEAD THAN CO-ED”?
TRANSGENDER STUDENTS AT AN
ALL-WOMEN’S COLLEGE

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INTRODUCTION

Sex defines us. Often interchanged with gender, it is one of the first identifications a person receives at birth.¹ Sex also divides us; society has created two categories seen as mutually exclusive. Although most people are not troubled by this binary division, transgender people are keenly aware of the distinction that society has traditionally held to be immutable.²

People today are arguably acclimating to less restrictive views of sexuality and sexual orientation. Sex itself, however, is still seen as definitive and binding once attributed.³ People may feel uncomfortable with those who do not accept gender and sex as binary givens. This results in derogatory, yet popular, slang terms, such as shman,⁴

1. Kristin Wenstrom, Comment, “*What the Birth Certificate Shows*”: *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 L. & SEXUALITY 131, 134 (2008). For example, one of the first questions new and expecting parents are asked is whether the child is a boy or a girl. *Id.*

2. James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 377 (2009).

3. Katherine A. Womack, Comment, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1380 (2010) (quoting Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 778 (2008)).

4. *Shman*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=shman> (last visited Nov. 2, 2011).

chick with a dick,⁵ and heshe.⁶ Aside from the cultural animus against nontraditional sex identification, legal uncertainty surrounds sex, its definition, and its interpretation.⁷ When a man or woman chooses to present as the opposite gender,⁸ both society and the legal community are unsure of how to approach the situation.

Sex, and being able to prove one's sex, is legally significant. Statutes and policies, however, vary widely across the nation.⁹ Because of their ambiguous social and legal status, transgender people are subject to discrimination in "employment, housing, public accommodations, credit, marriage, parenting, and law enforcement."¹⁰ Even events like renewing a driver's license or changing one's name can become legal ordeals. For transgender people, all of these ordinary events are complicated in part because their documents do not match the gender they present.

College campuses can be particularly challenging for transgender people. It is frequently the first time many people are living on their own. This also may be the first time people realize that they do not identify as their naturally born sex. While some become comfortable with expressing their gender identity, not everyone around them is equally comfortable with their challenge of sexual norms. Potential for conflict is further heightened by the lack of privacy on campus. Bathrooms, dorm rooms, and locker rooms are usually segregated by sex and shared among students. People gossip, and rumors spread quickly and viciously. There are also practical difficulties, such as determining which bathrooms or dorms to assign to a transgender person. Challenges for single-sex schools begin before a student is even admitted. By definition, a single-sex school is

5. *Chick with a dick*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=chick%20with%20a%20dick> (last visited Nov. 2, 2011).

6. *Heshe*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=heshe> (last visited Nov. 2, 2011).

7. Leslie Pearlman, Comment, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 864 (1995).

8. See *infra* Part I. "Gender" and "sex" are not interchangeable terms. This Note uses "gender" to refer to secondary characteristics commonly associated with femininity or masculinity. A naturally born man who identifies as a woman and dresses accordingly is presenting as the opposite gender. Unless she had undertaken medical steps to alter her physical characteristics, her sex theoretically remains the same.

9. See, e.g., Julie Shapiro, *Check Only One: M/F/Other*, 11 CARDOZO WOMEN'S L.J. 587, 588 (2005) (highlighting the irony that "it appears that some of us are men in some states while we are women in others").

10. Abigail W. Lloyd, Note, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 153 (2005) (quoting Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37-38 (2000)).

composed of students of one sex. Can someone who is anatomically male, yet identifies and presents as a woman, be admitted to an all-women's college?

Transgender students and applicants have forced all-women's colleges to reevaluate their approaches to admitting students and maintaining their single-sex environments. While "woman" is assumed to be a naturally born woman, transgender women are sometimes legally recognized as women too. If a woman student is in the process of becoming a man, has he given up his right to attend an all-women's college? Is a naturally born male who now identifies and presents as a woman eligible to attend an all-women's college? There are not concrete answers to these questions, and it is possible that, like gender and sex, there is no either/or.

This Note advocates for a looser definition of the terms "woman" and "all-women's college." Because "woman" is not clearly defined in the law, all-women's colleges can take advantage of this flexibility to craft policies that will enhance diversity and embrace the nontraditional. It will first cover important terminology and concepts. This Note will then look at situations where sex is legally significant and must be, and has been, interpreted and applied. The next section will specifically examine the purpose and culture of all-women's colleges by using Bryn Mawr College as a case study. Finally, this Note will extrapolate from Bryn Mawr to consider how all-women's colleges generally can integrate students whose sex is nontraditional.

I. TERMINOLOGY

Although sex and gender are often interchanged, they are not equivalent. "[S]ex' usually refers to an individual's biological identity (chromosomal composition and reproductive organs), while 'gender' usually refers to an individual's social identity (the culturally masculine or feminine characteristics the individual embraces)."¹¹ Sex is therefore a biological concept whereas gender is a social construct.¹² Yet now, with the ability to medically alter one's sex through hormone treatment and sexual reassignment surgery,¹³ sex does not have to be unalterably established at birth. In this Note, "sex" will refer to anatomical characteristics and "gender" to social and cultural manifestations of males and females.¹⁴

11. Womack, *supra* note 3, at 1371.

12. McGrath, *supra* note 2, at 377-78.

13. *Id.* at 378 n.58.

14. "Sex" has also been described as immutable because it is based on chromosomes which do not change, regardless of surgery or hormone supplements. Although this may be a valid interpretation of sex, most state laws do not appear to have embraced this definition. Many states today recognize that there is some method by which one can

The term “transgender” is broad, encompassing “preoperative, postoperative, and nonoperative transsexual people.”¹⁵ It can be understood to include people “whose identity or behavior falls outside of stereotypical gender norms.”¹⁶ Transgender people have also been described as those “who live, or seek to live, their lives as the opposite sex to which they were assigned at birth.”¹⁷ Like gender and sex, the terms “transgender” and “transsexual” are often interchanged. A transsexual has been described as one who believes that “a conflict exists between one’s physical sex and one’s gender identity as a man or woman.”¹⁸ It does not appear that the term “transsexual” only refers to people who take medical steps to bring their anatomical features into conformity with their gender identity, but many transsexuals will do so.¹⁹ This Note will use the broadest term “transgender” to include all people who feel conflicted between their birth sex and their gender identity.

The American Psychiatric Association recently recognized Gender Identity Disorder (GID) as a legitimate diagnosis defined in the *Diagnostic and Statistical Manual of Medical Disorders*.²⁰ There are four requirements for such a diagnosis: “[a] strong and persistent cross-gender identification”;²¹ “[p]ersistent discomfort with his or her sex”;²² that this belief does not exist simultaneously with an intersexual condition;²³ and that “[t]he disturbance causes clinically significant distress or impairment.”²⁴ To avail oneself of any legal protections such a diagnosis confers, however, a transgender person must essentially claim to be sick.²⁵ People are understandably hesitant to argue that they have a disorder; doing so implies that they are ill

change sex, thus implying that the definition of sex, in the legal context at least, is not based on chromosomes. Following this trend, if one understands “sex” as anatomical characteristics like a penis, a vagina, or breasts, these can be changed through surgery and hormones. This Note will use “sex” to denote the latter category, but it acknowledges that it could be considered to be based on chromosomes.

15. NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE* 172 (Eve Cary ed., 4th ed. 2004).

16. *Id.*

17. McGrath, *supra* note 2, at 377.

18. HUNTER ET AL., *supra* note 15, at 172.

19. *Id.*

20. Courtney J. Jefferson, Comment, *Gender Confusion: The Need for Effective Legislation to Protect Against Gender Identity Discrimination*, 39 U. BALT. L. REV. 137, 142 (2009) (citing AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS* 576–82 (4th ed., text rev. 2000)).

21. *Id.*

22. *Id.* at 143.

23. *Id.* An intersexed person is one who has both male and female anatomical features.

24. *Id.*

25. See Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 L. & SOC. INQUIRY 1, 18 (2003) (explaining that identifying as “suffering from [GID] places one in the protected class of disabled people”).

merely because they do not adhere to the male/female dichotomy.²⁶ Regardless of whether one thinks a clinical recognition of GID is a step in the right direction, it is nonetheless an academic concept used in discussing transgender people.

Sexual orientation is not the same as gender identity.²⁷ "Sexual orientation refers to whether a person is homosexual, bisexual, or heterosexual."²⁸ In other words, sexual orientation identifies what sex a given person finds attractive. For many people, gender influences sexual orientation.²⁹ It is important to remember, however, that sexual orientation is not completely defined by sex or gender.³⁰

For transgender people who want to use medical treatments to bring their anatomical sex more in line with their gender identity, they may undergo Sex Reassignment Surgery (SRS) and/or hormone therapy.³¹ States recognizing a sex change often require SRS.³² In performing SRS, doctors alter and adapt the genitals of the individual to resemble those of the opposite sex as best they can.³³ Unfortunately for female-to-male (FTM) transsexuals, the medical technology is less advanced, and building a functioning penis is nearly impossible.³⁴ FTM transsexuals will therefore undergo SRS less frequently than male-to-female (MTF) transsexuals.³⁵ People who have SRS also use hormone therapy to help the process.³⁶ Even those who choose not to have SRS performed may nevertheless participate in hormone therapy to manifest secondary sex characteristics to match their gender identity.³⁷

26. Samantha J. Levy, Comment, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 166 (2002).

27. HUNTER ET. AL., *supra* note 15, at 173.

28. *Id.*

29. *Id.* at 172. It is important to keep sexual orientation separate from sexual identity. Conflating the two can lead to further confusion in an area of analysis already replete with a plethora of pronouns.

30. *Id.* at 173.

31. *Id.* at 172.

32. *See infra* Part II.

33. Harper Jean Tobin, Note, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 399 (2006–2007). In many cases, even under the hands of a skilled surgeon, a patient may need "follow-up or 'revision' surgeries," adding to the expense and invasive nature of the surgeries. *Id.* at 399–400.

34. *Id.* at 424.

35. *Id.* at 401. The idea that it is easier to change male genitalia into female genitalia than to change female genitalia to male genitalia can be seen in a popular, if vulgar, expression: "It's easier to dig a hole than build a pole." *Law & Order SVU: Identity* (NBC television broadcast Jan. 18, 2005); *see also It's Easier to Dig a Hole Than Build a Pole*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=it%27s+easier+to+dig+a+hole+than+build+a+pole> (last visited Nov. 2, 2011). Although crude, this expression indicates how transsexuals are perceived and (mis)understood.

36. *Transgender Health*, HEALTHCOMMUNITIES.COM, <http://lgbthealth.healthcommunities.com/transgender/ht.shtml> (last visited Nov. 2, 2011).

37. *Id.*

II. LEGALLY SIGNIFICANT SEX

Sex is private and yet constantly scrutinized in public due to the close association between gender and sex. Gender is almost automatically noticed by the public, who then assume that the gender and sex match. Despite the private nature of sex, courts and legislatures regulate activities. Situations where they have interpreted or identified “sex” provide useful frameworks to consider how sex can be understood within the context of single-sex schools. A brief look at the lack of statutory definition and judicial interpretation suggests that all-women’s colleges could take advantage of the vagueness in the law to craft policies that fit the schools’ images and mission statements. This section looks briefly at the role sex plays in legal name changes, birth certificates, driver’s licenses, and marriage.

A. Legal Name Change

Because state law governs name changes,³⁸ the requirements vary widely. This Note will look at the Pennsylvania Consolidated Statutes and Pennsylvania case law because Bryn Mawr College is located there.³⁹ Pennsylvania law illustrates some of the difficulties transgender people must overcome in bringing their legal names into conformity with their gender identity.⁴⁰

Section 701 of the Pennsylvania Consolidated Statutes governs name changes.⁴¹ One must follow a specific procedure and provide the “reason for the name change.”⁴² A court publicizes the petition to see if there are objections.⁴³ If the court finds no lawful objection to the petition, “[t]he court *may* enter a decree changing the name as petitioned.”⁴⁴ The statutory use of the word “may” indicates that even where a petitioner has met all the requirements, a court hypothetically could deny the name change.⁴⁵

38. Sheila Lee Pearson, *In re McIntyre: A Victory for Pre-Operative Transgender Persons*, 8 L. & SEX 731, 731 (1998).

39. *Visiting Campus*, BRYN MAWR, <http://brynmawr.edu/campus/visiting.shtml> (last visited Nov. 2, 2011).

40. Because legal sex is defined and determined by state law, schools located in different states may be able to design different approaches under state law. It is unclear if the laws of the state of one’s legal residency, however, will be the dispositive law regarding sex change for a given individual.

41. 54 PA. CONS. STAT. ANN. § 701 (West 2011).

42. *Id.*

43. *Id.* If notice would put the petitioner in jeopardy, however, the court may waive the notice requirement. *Id.*

44. *Id.* (emphasis added).

45. *See, e.g., In re* Petition of Richardson to Change Name, 23 Pa. D. & C.3d 199, 200 (1982) (finding that even though the statutory requirements had been fulfilled, petitioner

Pennsylvania courts have found ways to avoid granting name changes to transgender people. In 1978, the court found in two separate cases that SRS was necessary to grant a transgender petitioner’s name change.⁴⁶ In *Dickinson*, the court ruled that there would be no reason to prevent “an individual from assuming legally the sex he or she has already acquired surgically and to a medical certainty.”⁴⁷ *Dickinson* had already successfully completed sex reassignment and surgically had the anatomical features of a female.⁴⁸ In *Dowdrick*, the court denied the name change even though petitioner was living and dressing as a woman, had taken hormone injections for two years, and was planning to eventually undergo SRS.⁴⁹ The court based its refusal on the fact that petitioner had not surgically *become* a woman.⁵⁰ Noting that name changes had been approved where SRS has already been completed, the court interpreted this to mean that SRS was required.⁵¹

Pennsylvania courts appeared less than enthusiastic to grant name changes based on sex change, and they used SRS as a threshold requirement to deny many petitions. In *Dowdrick*, the court found that a name change for petitioner “would not comport with good sense, common decency and fairness to all concerned, especially the public.”⁵² The court in *Richardson* picked up on that language, saying that in *Dowdrick*, “the individual’s sex remained unchanged” because petitioner had not had SRS.⁵³ The court found that allowing a male to use a female’s name was deceptive and that petitioner was asking the court “to lend the dignity of the court and the sanctity of the law to this freakish rechristening . . . and to do so legally is to pervert the judicial process, which is supposed to act in a rational manner.”⁵⁴

The Pennsylvania Supreme Court later held that SRS was not dispositive in determining whether to grant a name change.⁵⁵ The Court held that a petitioner only needed to comply with the statutory requirements to be given a name change.⁵⁶ “[B]ecause Appellant has

was still not entitled to a name change because petitioner was a male wishing to use a female name).

46. *In re Dickinson*, 4 Pa. D. & C.3d 678, 679–80 (1978); *In re Dowdrick*, 4 Pa. D. & C.3d 681, 684 (1978).

47. *Dickinson*, 4 Pa. D. & C.3d at 680.

48. *Id.* at 679.

49. *Dowdrick*, 4 Pa. D. & C.3d at 683–85.

50. *Id.* at 684.

51. *Id.* (citing *In re Anonymous*, 314 N.Y.S.2d 668, 669 (1970) and *In re Anonymous*, 293 N.Y.S.2d 834, 838 (1968)).

52. *Id.* at 685.

53. *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199, 200 (1982).

54. *Id.* at 201.

55. *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998).

56. *Id.*

satisfied the statutory requirements, the trial court abused its discretion in denying his name change petition.”⁵⁷ The Pennsylvania Superior Court found that a transgender person’s name change “must be evaluated on a case-by-case basis to determine whether allowance of the name change would comport with good sense and fairness to all concerned.”⁵⁸ In conducting its analysis, the court made clear that “a name change does not depend upon the completion of any specific surgical process.”⁵⁹ Rather than rely on SRS and physical change alone, a petitioner must “demonstrate that he or she is permanently committed to living as a member of the opposite sex.”⁶⁰

If transgender people are interested in passing as members of the other gender, having a name that matches their gender is an important part of the process. The Pennsylvania courts’ change in attitude may be partially due to society’s growing acceptance of fluid sexual identity. Even so, the courts seem to have trouble separating gender from physical sex.

B. Birth Certificates

Like legal name changes, amending sex on a birth certificate is governed by state law and thus is not uniform.⁶¹ Some states believe birth certificates are records of historical facts at the time of a person’s birth and will not allow changes to a birth certificate minus statutory language to the contrary.⁶² Forty-eight states currently allow transgender people to amend their birth certificates to reflect what they believe to be their accurate sexes.⁶³ As of this writing, Idaho and Ohio are the only two states that do not permit sex amendments to birth certificates.⁶⁴

Of the remaining states, most require SRS, a court order, or both.⁶⁵ Some states additionally require a legal name change.⁶⁶

57. *Id.*

58. *In re Harris*, 707 A.2d 225, 227 (Pa. Super. Ct. 1997).

59. *Id.* at 228.

60. *Id.* at 227.

61. Cathy Perifimos, Note, *The Changing Faces of Women’s Colleges: Striking a Balance Between Transgender Rights and Women’s Colleges’ Right to Exclude*, 15 *CARDOZO J.L. & GENDER* 141, 163 (2008).

62. Rebecca J. Moskow, Comment, *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 *U. CIN. L. REV.* 1421, 1423 (2003).

63. *Sources of Authority to Amend Sex Designations on Birth Certificates*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html> (last visited Nov. 2, 2011).

64. *Id.*

65. *Id.*

66. *Id.* States requiring name change include Alabama, Arkansas, Colorado, Georgia, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, and Oregon. *Id.*

Despite different procedures and wording, state laws equate legal recognition of sex with the physical manifestations of that sex. To be considered a man, though born female, states generally expect the person's sexual organs to match, as closely as possible, the organs of a naturally born male. States appear unconcerned with gender identity, choosing to focus on physiological indications that one has become male or female as defined by sexual organs. This is probably symptomatic of the historical tendency to equate sex with gender.

Reliance on genitalia and surgery to identify men and women is rooted in American history.⁶⁷ Thomas(ine) Hall was an English resident who had moved fluidly between presenting as a man and woman.⁶⁸ She wore dresses as a child before switching to boys' clothes and serving in the military.⁶⁹ After her time in the military, she changed back to women's clothing and began doing “women's work.”⁷⁰ At twenty, Hall again resumed men's clothes and sailed to America, where she regularly switched between presenting as a man and a woman.⁷¹ The court stepped in to resolve the colonists' questions by examining Hall's genitals and determining Hall's gender based on them.⁷² The court decided Hall was intersexed, having both male and female genitals, and ordered her to wear men's and women's clothing at all times.⁷³ History supports a physical determination of both sex and gender. If in order to be male, one must have male genitalia, then an SRS requirement to create male parts seems to follow logically.

Although people are not frequently asked to show their birth certificate, one's sex on a birth certificate influences how one's sex is defined on other documents such as driver's licenses, discussed below, and names, discussed above. As a result, sex designation on birth certificates has far-reaching effects. In many cases, transgender people do not undergo SRS due to personal choice, finances, or medical reasons.⁷⁴ Under most state laws, they are unable to amend their birth certificates.⁷⁵ As with name changes and driver's licenses, these hurdles to changing vital documentation make it more difficult for transgender people to live so-called normal lives as the gender of their choice.

67. Womack, *supra* note 3, at 1368–69.

68. *Id.* at 1368.

69. *Id.*

70. *Id.* at 1368–69.

71. *Id.* at 1369.

72. *Id.*

73. Womack, *supra* note 3, at 1369.

74. Tobin, *supra* note 33, at 426.

75. *Sources of Authority to Amend Sex Designations on Birth Certificates*, *supra* note 63.

C. Driver's Licenses

A driver's license is one of the most common forms of identification. Airports, bars, and some credit card transactions require them. They come complete with pictures and, in many states, the individual's sex. Some states use birth certificates to determine what sex should be included on a driver's license.⁷⁶ As with name changes and birth certificates, transgender people must follow specific steps which vary from state to state in order to change the sex on this primary form of identification.

As with birth certificates, states are more receptive to permitting those who have had SRS to change the sex on their driver's licenses.⁷⁷ Some require an amended birth certificate.⁷⁸ Interestingly, both Idaho and Ohio, which do not allow sex amendment on birth certificates,⁷⁹ permit sex changes to driver's licenses provided the applicant has undergone SRS.⁸⁰ Here again, states demonstrate that they put legal emphasis on physiology rather than on mindset. Although this is understandable in attempting to establish an objective, bright-line approach to sex designation, it creates a hardship for transgender people; they are often required to undergo invasive surgery if they want their documents to match their gender identity.

Some states do consider the mental element in addition to the physical aspect.⁸¹ Even where the statutes seem to focus more on a person's commitment to being a certain gender, however, states still often require documentation from doctors or counselors indicating that the transgender person has been medically advised and that he or she is committed to living as that sex.⁸²

76. *Driver's License Policies by State*, NAT'L. CTR. FOR TRANSGENDER EQUAL., http://transequality.org/Resources/DL/DL_policies.html (last visited Nov. 2, 2011).

77. Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 CARDOZO J.L. & GENDER 135, 141 (2005).

78. *Driver's License Policies by State*, *supra* note 76.

79. *Sources of Authority to Amend Sex Designations on Birth Certificates*, *supra* note 63.

80. *Driver's License Policies by State*, *supra* note 76.

81. *Id.* For example, Arizona does not require SRS, but does request doctor letters that a person is "irrevocably committed" to the gender change process. *Id.* It is unclear if that commitment would require hormone therapy or some form of physical treatment to qualify as irrevocably committed. Montana, on the other hand, makes no specific mention of doctors or surgery, requiring only "an amended birth certificate and a court order." *Id.* Yet the court order and birth certificate may themselves require doctor consultation and/or SRS, so this should not be interpreted as a particularly liberal or considerate policy. Pennsylvania, where Bryn Mawr is located, requires that an applicant fill out a form contending that the change would reflect his or her gender identity. *Id.* It must also be signed by a doctor. *Id.* This indicates that even where specific medical treatment is not required, states are more comfortable with permitting documentation changes when medical personnel have also been involved.

82. *Id.*

D. Marriage

Another crucial area of concern for transgender people is marriage. Although the current, popular debate tends to focus on same-sex marriage, transgender people face discrimination and prohibitions in marriage as well. While their struggles are premised on the same prejudice against same-sex unions, their difficulties are uniquely more complex. As with so much else, “[t]he prevailing view on marriage is premised on a binary conceptualization of the sexual characteristics of the two adults involved.”⁸³ If marriage is generally limited to a union between a man and a woman, what happens when one’s gender and sex are challenged?⁸⁴

As with other areas of the law discussed above, most states are not willing to entertain any claims of legal sex change unless some form of physical or surgical steps have been taken.⁸⁵ This creates an array of ironic situations.⁸⁶ For example, A is born male but is an MTF. She wants to marry B, who is born a female and identifies and presents as such. Many states would permit this, especially if A’s birth certificate still identifies her as a male. To the casual observer, however, it would appear that this is a same-sex marriage that many states and individuals oppose, and yet the state would grant a marriage license. Ironically, if C were born a female and is now an FTM, he might not be permitted to marry D, who is a female. Although this would look like a “traditional” binary marriage, the birth certificates would indicate that this was a same-sex marriage.

Further complicating the sex, gender, and marriage debate is the fact that marriage is controlled by state legislation and law.⁸⁷ As a married couple travels from state to state, it is possible for their marital status to change. Take, for example, the case of Christie Lee

83. Parker Thoeni, *Equal Marriage Rights for Transgendered Individuals*, 3 AM. U. MODERN AM., Summer–Fall 2007, at 66, 66.

84. See Teresa A. Zakaria, Note, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 AVE MARIA L. REV. 349, 349 (2005) (“[O]ur culture has reached a point where not only is the meaning of marriage hotly contested, but the very nature of the sexes as well. Indeed, the meaning of the terms ‘man’ and ‘woman,’ or ‘male’ and ‘female,’ is now susceptible to drastic alteration by the courts.”).

85. See *supra* Parts II.A–C.

86. See, e.g., Thoeni, *supra* note 83, at 69 (noting that “whether a change in sex is allowed or not, two individuals with the same sex characteristics may end up together in marriage if the government considers sex characteristics to be mutable and not locked at birth”); Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1042–43 (2001) (describing the changing marital status of Mrs. Littleton based on the state in which she is located).

87. *Marriage Laws*, CORNELL U. L. SCH., http://topics.law.cornell.edu/wex/table_marriage (last visited Nov. 2, 2011).

Littleton and Jonathan Mark Littleton.⁸⁸ Christie was born a male but had SRS and became a woman, including the ability to have penile-vaginal intercourse.⁸⁹ In considering Christie's right to sue for benefits after Jonathan's death, however, the court held that their marriage was not valid because Christie, as a naturally born man, could not marry another male.⁹⁰ In her petition for certiorari, Christie pointed out that:

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male.⁹¹

Because many benefits are conferred through marriage, the variation among states is disconcerting and potentially disastrous for a non-traditional couple. In the Littleton case, Christie was prevented "from suing for the alleged medical malpractice that caused her husband's death."⁹² That a court could find a marriage unlawful after the fact based on transgender issues seems unconscionable, but is obviously not unknown in American case law.⁹³

88. Frye & Meiselman, *supra* note 86, at 1032–33.

89. *Id.* at 1032.

90. *Id.*

91. *Id.* at 1042–43 (quoting Petition for Writ of Certiorari at 11, 12, Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (No. 00-25)).

92. *Id.* at 1033.

93. See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 251–57 (1998). This article considered several cases in which American courts considered transgender marriages. In *Anonymous v. Anonymous*, the court granted a marriage annulment on two grounds: 1) fraud because the husband was not aware of his wife's male parts and 2) that his wife was a man, and two men could not marry. *Id.* at 251 (citing 325 N.Y.S.2d 499, 499–501 (1971)). In *M.T. v. J.T.*, M.T. was a MTF and J.T. was a man who knew of M.T.'s transsexual nature and even helped pay for the SRS. *Id.* at 253 (citing 355 A.2d 204, 205 (N.J. Super. Ct. 1976)). Although the two had been married for over two years and had regular penile-vaginal intercourse, when M.T. filed for divorce, J.T. claimed that the marriage was void because M.T. was a man. *Id.* The court found that M.T. was in fact a woman because she had "fully transitioned," had "sex as a woman," and had not deceived her husband about her sex prior to the marriage. *Id.* In *Vecchione v. Vecchione*, "a FTM transsexual, underwent sex reassignment surgery nearly twenty years [prior]. He changed legal documents, to the extent possible, to reflect his current name and sex, but New York, where he was born, [did] not permit a change of sex on birth certificates." *Id.* at 254 (citing No. 95D003769 (Orange Co. filed Apr. 23, 1996)). The wife sought to have the marriage declared void based on the argument that

Although some transgender people transition prior to marriage,⁹⁴ others do not realize that they want to transition until sometime during their marriage or long-term monogamous relationship, thereby facing additional legal and personal consequences.⁹⁵ For example, some women who marry men who later become women may not want to remain in a relationship with someone who identifies and presents as a female.⁹⁶ Others worry about job security and benefits based on the sex change.⁹⁷ Sex change and transgender identities are incredibly complex and personal decisions, but when other loved ones are added into the mix, they become even more convoluted. The laws of the various states further complicate this already hazy area of law.

E. Sex, Law, and Education

"Male," "female," "man," and "woman" have become increasingly difficult to interpret, despite being based on physiological characteristics that only allow for two options. Although the binary construct may have worked historically when roles were strictly defined, in today's society, "what you were born as" is not a sufficient legal definition. Transgender people are engaged in a struggle to have the same rights granted to stereotypical heterosexuals. That the battle starts so early, in some cases before they are even legally adults, adds further stress. This is especially true when it is time to choose a college.

The remainder of this Note will discuss the presence of transgender students at all-women's colleges, using Bryn Mawr as an example. Although each single-sex institution has a distinct personality and unique approach to education, an in-depth examination of one school will provide insight into the challenges faced by these schools as a category. Like many other colleges and universities, Bryn Mawr must determine how best to accommodate students who do not fit the historical definition of "man" and "woman." Bryn Mawr, like other all-women's colleges, must also reconcile its desire to be open and accepting with a mission statement that highlights the college's long and successful history as an all-women's school.⁹⁸

both parties were female. *Id.* The request was denied, however, because "a California statute recognized the validity of one's post-operative sex by providing for a change of gender designation . . . following sex reassignment surgery." *Id.* at 256.

94. *Id.* at 244.

95. *Id.* at 243.

96. *Id.*

97. *Id.*

98. *Bryn Mawr College Mission Statement*, BRYN MAWR, <http://www.brynmawr.edu/about/mission.shtml> (last visited Nov. 2, 2011) (including language that its undergraduate programs are "for women").

III. BEING AN ALL-WOMEN'S COLLEGE

A. *Mission Statement and Purpose*

Bryn Mawr College is one of the Seven Sister Colleges.⁹⁹ Although some of these have become coeducational over the years, Bryn Mawr has remained an all-women's institution.¹⁰⁰ It advertises itself very clearly as a college for the development and growth of an independent and intellectual woman.¹⁰¹ The Admissions home page makes its audience very clear: "A Bryn Mawr woman."¹⁰² There is no reference to male students within the undergraduate community.

Bryn Mawr's purpose is unambiguous: "[t]he mission of Bryn Mawr College is to provide a rigorous education and to encourage the pursuit of knowledge as preparation for life and work. Bryn Mawr teaches and values critical, creative and independent habits of thought and expression in an undergraduate liberal arts curriculum for women."¹⁰³ This statement leaves no question that the college was designed as, and remains committed to being, a single-sex educational environment for undergraduate women. The mission statement indicates that the college is a co-educational environment for its limited graduate studies.¹⁰⁴ By clearly distinguishing between its single-sex and co-educational programs, Bryn Mawr emphasizes its dedication to single-sex education for undergraduates.

In addition to highlighting faculty, facilities, and academics, Bryn Mawr is proud of the environment it cultivates.¹⁰⁵ This atmosphere is critically shaped by the fact that it is an all-women's college and can count renowned alumnae in its ranks, further emphasizing the advantages of a single-sex environment.¹⁰⁶ In her inaugural address, Bryn Mawr's current President Jane McAuliff said that:

[T]his College has sought to offer the most rigorous education to those who were otherwise excluded from the best undergraduate colleges and the most challenging graduate programs. With each successive generation, the College has expanded this originating

99. *Seven Sisters*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/536520/Seven-Sisters> (last visited Nov. 2, 2011).

100. *Bryn Mawr College Mission Statement*, *supra* note 98.

101. Interview with Anonymous Bryn Mawr Student 5 (2010) [hereinafter Interview with 5].

102. *Admissions and Financial Aid*, BRYN MAWR, <http://brynmawr.edu/admissions> (last visited Nov. 2, 2011).

103. *Bryn Mawr College Mission Statement*, *supra* note 98.

104. *Id.*

105. *See Admissions and Financial Aid*, *supra* note 102.

106. *Notable Graduates*, THE SISTERS, <http://www.thesistercolleges.org/res/index.php> (last visited Nov. 2, 2011).

mandate as it seeks to enroll the most qualified women from all parts of this country and throughout the world.¹⁰⁷

Like other women's colleges, everything that Bryn Mawr has historically championed revolved around women's education and women's rights.¹⁰⁸ When founded, such emphasis was a liberal approach during a time when higher education was dominated by male students.¹⁰⁹ Bryn Mawr offered a rigorous academic program and refused to be limited by a system predominantly aimed at educating men.¹¹⁰ Regardless of whether all-women's colleges are still more liberal than the average post-secondary institution, they are often perceived as being more accepting of nontraditional students.¹¹¹ The issues they face today are different than when founded, and some, such as transgender students, challenge the very foundation of the college.

In 2007, then-President Nancy Vickers asked a committee to consider "how Bryn Mawr College could become more inclusive regarding its transgender community members."¹¹² Students who are admitted to Bryn Mawr and subsequently choose to undergo medical options to become men are not asked to leave.¹¹³ The trickier issue is the initial admission of women who are in the process of transitioning to men, have already made the transition, or identify as other than women. The Policies Committee on the Transgender Task Force proposed the following to explain Bryn Mawr's position on admissions:

Our admissions policy as a women's college is to admit female students only. If it is not clear that an applicant to the College is female, we would approach the situation on an individual basis to gain a better understanding of the student's circumstances. However, our policy to admit female students only would not change.¹¹⁴

107. Jane McAuliffe, Inaugural Address as President of Bryn Mawr (Oct. 4, 2008), quoted in *A Brief History of Bryn Mawr College*, BRYN MAWR, <http://www.brynmaur.edu/character/history.shtml> (last visited Nov. 2, 2011).

108. *A Brief History of Bryn Mawr College*, *supra* note 107.

109. Patricia Albjerg Graham, *Expansion and Exclusion: A History of Women in American Higher Education*, 3 *SIGNS* 759, 764 (1978) (explaining that "[b]y 1880[,] women constituted 32 percent of the undergraduate student body," leaving women solidly in the minority amongst their undergraduate peers). Bryn Mawr was founded in 1885. *A Brief History of Bryn Mawr College*, *supra* note 107.

110. *A Brief History of Bryn Mawr College*, *supra* note 107.

111. Alissa Quart, *When Girls Will Be Boys*, N.Y. TIMES, Mar. 16, 2008, <http://www.nytimes.com/2008/03/16/magazine/16students-t.html?pagewanted=6&ei=5087&em&en=fe370680a8332b10&ex=1205812800> (citing "their reputation as safe harbors for exploring [transgender] identities" as a reason why transgender students are attracted to all-women's colleges).

112. Transgender Task Force Recommendations (2007) (on file with author).

113. *See infra* Part III.D.

114. Transgender Task Force Recommendations, *supra* note 112.

This proposed policy language unequivocally reaffirms Bryn Mawr's dedication to remaining an all-women's college. It does not, however, provide any guidance on whether the college would admit someone who did not identify as female even if they were anatomically female. Nor does it make it clear if the determination of an individual's personal circumstances would turn on whether the student was legally recognized as a woman.

B. Categorizing Students

There are several categories of students, and of people, in the transgender context: (1) born female and identifying as female; (2) born male and identifying as male; (3) born male and identifying as female without having undergone physical or medical changes; (4) born female and identifying as male without having undergone physical or medical changes; (5) born male, identifying as female, and having started physical or medical procedures to alter sex; and (6) born female, identifying as male, and having started medical or physical procedures to alter sex. Clearly the first category would be admitted to Bryn Mawr. Equally obviously, the second category would not be admitted to Bryn Mawr. The fate of the remaining four categories is undecided.

Issues of timing may further affect a student's admission to Bryn Mawr. Although an enrolled female student who transitions during her time at Bryn Mawr would not be asked to leave, the same student might not have been admitted had the transition started before the admission offer. A person born female and identifying as a man who has not undergone any sort of physical or medical alterations might be admitted in spite of his gender identity. On the other hand, a student born male and identifying as a woman probably would not be admitted to Bryn Mawr. The most guidance that the school has given is that admission would be determined on a case-by-case basis.¹¹⁵ As in other areas of the law, being born female is the only guarantee of being treated legally and socially as a woman.

For students who have already been admitted, a decision to transition from female to male presents its own unique difficulties. FTM students can be confronted with hostility from other students while in school.¹¹⁶ Post-graduation, an FTM student could face discrimination and confusion. Bryn Mawr is a well-known, all-women's college, and anyone who receives an undergraduate degree from the institution is assumed to be female. For someone interested in passing

115. *Id.*

116. *See infra* Part III.C.

as a man, without raising questions about his sex, this degree could essentially "out" him.

Bryn Mawr's proposed policy as described in Part II.A offers no concrete answers. It merely puts into words what its unofficial policy appears to be and what many states' policies toward sex change appear to be. Such a policy, though admirably open-minded, provides no guidance for prospective students. A clearer definition of "woman" would enable colleges to craft particularized policies that would clarify the situation for applicants.

C. Social and Cultural Environment

Bryn Mawr is a tightly knit community in the suburbs of Philadelphia.¹¹⁷ The environment is fondly referred to as the "bubble" because many students rarely leave campus despite its proximity to a major city.¹¹⁸ Academics, socializing, and jobs are predominantly confined to the campus.¹¹⁹ As a result, Bryn Mawr has a distinct culture which, though it may adjust year to year to accommodate the personalities of its current students, has remained insular and relatively stable.

Advertised as an all-women's college,¹²⁰ most if not all incoming students assume that the campus will be composed solely of women students and any Haverford and Swarthmore students who wish to take classes at Bryn Mawr.¹²¹ Some incoming students know that they want to attend an all-women's college to avoid the distractions present in co-educational institutions.¹²² Others may not be as enthused about or committed to the prospect of attending a single-sex school. Anonymous Student 2 said that she had previously "never considered an all women's college, it was more or less out of the question."¹²³ Another wanted to attend a specific program, which happened to be offered at Bryn Mawr and, at the time, was not invested in the idea of an all-women's college.¹²⁴ One student, who loved the academic offerings, the location, and the campus, hesitated to enroll solely because the school was single-sex.¹²⁵

117. Interview with 5, *supra* note 101.

118. Questionnaire Response of Anonymous Bryn Mawr Student 3 (2010) (on file with author) [hereinafter Response of 3] ("Bryn Mawr is intense, and it totally envelops you while you're there. The 'bubble' is totally true.").

119. Interview with 5, *supra* note 101.

120. *Bryn Mawr College Mission Statement*, *supra* note 98.

121. Interview with 5, *supra* note 101.

122. Questionnaire Response of Anonymous Bryn Mawr Student 1 (2010) (on file with author) [hereinafter Response of 1].

123. Questionnaire Response of Anonymous Bryn Mawr Student 2 (2010) (on file with author) [hereinafter Response of 2].

124. Response of 3, *supra* note 118.

125. Interview with 5, *supra* note 101.

Regardless of their initial views on Bryn Mawr as an all-women's college, most Bryn Mawr students firmly support the view that Bryn Mawr should remain an all-women's college.¹²⁶ Anonymous Student 3 claims that "Bryn Mawr would not be Bryn Mawr if it were co-ed. Not at all."¹²⁷ One alumna points out that "[s]o many of the legendary seven sister schools have gone co-ed."¹²⁸ Bryn Mawr students tend to be fiercely protective of its all-women's status.¹²⁹ An example is a well-known, albeit unofficial, t-shirt that read "Better Dead Than Co-Ed."¹³⁰ Although indicating that the wording was very strong and perhaps exaggerated, the students interviewed for this Note agreed with the sentiment. Student 1 interpreted it to mean that "if Bryn Mawr isn't going to be a single sex school, then it's better to have the school end with dignity and respect so that it will not compromise its mission."¹³¹ Others were less sure that the slogan literally meant that the school should close down instead of yielding to pressure to permit men to matriculate.¹³² The consensus, regardless, is that Bryn Mawr is an all-women's college and should remain so. Among Bryn Mawr students, as among state laws, what it means to be a woman remains contested.

The students interviewed for this Note were asked what it means to be an "all-women's college."¹³³ Although some said it suggests that the students have physically female characteristics at birth,¹³⁴ others clearly disapproved of defining it solely by physical traits.¹³⁵ Student 1 defined an all-women's college as "a community

126. See, e.g., Response of 1, *supra* note 122 (showing the preference of Bryn Mawr students for a single-sex school); Response of 2, *supra* note 123 (same); Response of 3, *supra* note 118 (same); Interview with 5, *supra* note 101 (same).

127. Response of 3, *supra* note 118.

128. Response of 1, *supra* note 122.

129. Interview with 5, *supra* note 101.

130. *Id.*

131. Response of 1, *supra* note 122 (internal quotation marks omitted).

132. See, e.g., Response of 2, *supra* note 123 ("I think the slogan is a joke. Or at least I take it that way. I am very serious about my opposition to the institution ever being co-ed, but the 'better dead' portion of the saying comes off as a [sic] humorous to me."); Response of 3, *supra* note 118 (indicating that she doesn't "feel that strongly" about it, but does support the message).

133. Questionnaire for Bryn Mawr College Students (2010) (on file with author).

134. See, e.g., Response of 2, *supra* note 123 (explaining what an "all-women's college" means to her, a Bryn Mawr student). Although the student's response states that she believes it refers to those who "are or were female in gender," it is unclear if she means to differentiate between physical characteristics versus identity, or if she is conflating sex and gender as used in this note. *Id.*

135. See Response of 1, *supra* note 122; Questionnaire Response of Anonymous Student 4 (2010) (on file with author) [hereinafter Response of 4]. Student 3 wrote that she saw the term "all-women's" as a description more than a definition, but that she saw "merit (in a way) of having it be strictly defined . . . [because m]any women choose to go to BMC and the sister schools because they are women's colleges, and that should be respected." Response of 3, *supra* note 118.

of women focused on the betterment of women.”¹³⁶ She went on to urge that “[t]he term all-women goes far beyond the strict distinction that all member[s] be born with and maintain a vaginal [sic] to participate.”¹³⁷ Student 4 was even more specific in explaining what she meant by woman.¹³⁸ To her, “women” included both those who are physically female and identify as women and “those who are physically women but identify as male, or other.”¹³⁹

The students do not, for the most part, appear to have overt issues with nontraditional students at Bryn Mawr.¹⁴⁰ It would seem that, on paper at least, Bryn Mawr only admits naturally born female students, whether they remain so or not, and that all of the students on campus are women in some manner. In practice, however, Bryn Mawr has men on campus at almost any given moment.

D. Men on Campus

Male students are present every day on campus. They take classes with Bryn Mawr students,¹⁴¹ eat in the dining halls, and occasionally live in the dorms.¹⁴² Bryn Mawr is part of the Tri-College Consortium (TriCo), along with Haverford College and Swarthmore College.¹⁴³ Students may take courses at all three.¹⁴⁴ Most, if not all, Bryn Mawr students have at least one course with Haverford men during their undergraduate years.¹⁴⁵ It is arguable that the presence of men on campus and in the dorms undercuts Bryn Mawr’s claim to be an all-women’s college. If that is the case, it may strengthen transgender students’ argument that they should be allowed to attend

136. Response of 1, *supra* note 122.

137. *Id.*

138. Response of 4, *supra* note 135.

139. *Id.*

140. The students interviewed for this Note were all born female and identified as women, and so it is not surprising that they were not particularly bothered by the definition, or lack thereof, of “woman.” In stark contrast, transgender students who would be particularly affected by the lack of a definition may have a strong interest in seeing the issue resolved.

141. *TriCollege Course Guide*, <http://www.trico.haverford.edu/cgi-bin/courseguide/cgi-bin/search.cgi> (last visited on Nov. 2, 2011).

142. Kathy Boccella, *Lone Male Student Adjusts at Bryn Mawr College*, REPORTER (Feb. 8, 2009), <http://www.thereporteronline.com/articles/2009/02/08/life/doc498ef1dcbaf7f1639484119.txt>.

143. *Planning Your Coursework at Bryn Mawr*, 2 (Fall 2010), <http://www.brynmawr.edu/enteringstudents/documents/GuidebookforWebsite15jun10.pdf>.

144. *Id.* at 5.

145. *See, e.g.*, Response of 1, *supra* note 122 (indicating what percentage of the student’s classes have contained male students); Response of 2, *supra* note 123 (same); Response of 3, *supra* note 118 (same); Response of 4, *supra* note 135 (same); Interview with 5, *supra* note 101 (same).

an all-women's college, despite not being naturally born women who identify as women.

Bryn Mawr and Haverford have a reciprocal program that enables students to live on the other college's campus so long as there are equal numbers from each wishing to do so.¹⁴⁶ James Merriam, a Haverford male student, began living in one of Bryn Mawr's dorms.¹⁴⁷ The rest of the residents in the dorm were women.¹⁴⁸ He used one of the bathrooms designated as co-ed.¹⁴⁹ He took classes on both campuses.¹⁵⁰ In short, he behaved like a Bryn Mawr student—he just happened to be a male identifying as a man. Although this situation is the exception rather than the rule, it questions Bryn Mawr's all-women status. Here, then, was a man participating in the social and residential culture of a college that advertises and highlights the qualities and benefits of having an all-women's residential and academic experience. Although having a diverse environment is promoted, the special appeal is its single-sex focus.

This does not suggest that Bryn Mawr students are averse to men as a concept or hate the idea of sharing space with men. Bryn Mawr has a relatively liberal overnight visitor policy that enables students to have friends, male or female, spend the night.¹⁵¹ The Residential Life administration explains that although the dorms "are not available to accommodate spouses, partners, family members, children or other dependents" of students, overnight guests are permitted for up to three nights, assuming any roommates consent to the visit.¹⁵² Some students remember that Bryn Mawr students' boyfriends were around so often that they felt that men might as well have been living in the hall.¹⁵³ Assuming the guests were respectful, students were generally not bothered by this.¹⁵⁴ It did, however, necessitate a discussion on practical issues regarding bathrooms.

Recognizing that it would not be unusual for a man to be in any of the dorms, each dorm has at least one restroom that men can use.¹⁵⁵

146. *Frequently Asked Questions*, BRYN MAWR, <http://www.brynmawr.edu/residentiaallife/roomdraw/faq.shtml> (last visited Nov. 2, 2011).

147. Boccella, *supra* note 142.

148. *Id.*

149. *Id.* At the beginning of the academic year, each floor in every dorm meets and votes on the status of the bathrooms: women only, co-ed, or flip-sign. It is also tradition to ensure that at least one bathroom in each dorm is accessible to men. *Honor Code*, BRYN MAWR COLL. HONOR CODE, <http://honorcode.blogs.brynmawr.edu/code/> (last visited Nov. 2, 2011).

150. Boccella, *supra* note 142.

151. Interview with 5, *supra* note 101.

152. *Residential Life Policies*, BRYN MAWR, <http://www.brynmawr.edu/residentiaallife/policies/#guests> (last visited Nov. 2, 2011).

153. Response of 1, *supra* note 122, Response of 2, *supra* note 123.

154. Response of 2, *supra* note 123.

155. Interview with 5, *supra* note 101.

There are three types of bathrooms: women only, co-ed, and flip sign.¹⁵⁶ Acknowledging that women would not want to unknowingly encounter a man shaving at the sink when she is walking into the bathroom in only a towel, these designations give men access to bathrooms without shocking the female students at seven in the morning. When using a co-ed bathroom, one is consistently on notice that a man could be present. With flip sign, the man flips the sign upon entering the bathroom to indicate that a man is there and changes it back when he leaves.¹⁵⁷ Whether a transgender student should be restricted to co-ed bathrooms or be required to flip the sign is less clear.

Bryn Mawr has had, and may still have, transgender students in attendance. Alex was admitted and began school as a woman.¹⁵⁸ During his freshman year, however, he realized that he did not identify as a woman.¹⁵⁹ He began using masculine pronouns and taking hormone treatments in his senior year.¹⁶⁰ Alex recalls that some students were "uncomfortable with the idea of a boy living on their halls."¹⁶¹ While he clearly and publicly identified as a man during his time at the school, he believed that he should be allowed to remain at Bryn Mawr.¹⁶² He received his diploma from Bryn Mawr.¹⁶³ Post-graduation, he says he wants to live normally, by which he means not being required to explain his gender.¹⁶⁴ To do so, however, he has to come to terms with his Bryn Mawr degree. Bryn Mawr's strong reputation as a women's college brands any of its undergraduate degree holders as a woman in no uncertain terms. As Alex feels the need to distance himself from Bryn Mawr to enable him to pass as a man, Bryn Mawr simultaneously enforces its own status as a women's college by distancing itself from nontraditional graduates who might undermine its all-women image.¹⁶⁵

Alex's story suggests that while it is fine to have nontraditional women in attendance, it is best not to talk about the situation. If true, this is unfortunate. Most Bryn Mawr alumnae are proud of their alma mater and vice versa. On the one hand, it is a shame that either

156. *Id.*

157. *Id.* Residents vote on the restroom issue at the first hall meeting of the year. Majority rules, so long as at least one bathroom in the dorm is available to men.

158. Anna White-Nockleby, *Gender and Identity at a Women's College*, NPR PUBLIC RADIO INTERN EDITION (2009), available at <http://www.prx.org/pieces/42546-gender-identity-at-a-women-s-college1>.

159. *Id.*

160. *Id.*

161. *Id.* This even included signs posted on doors "reminding" people that Bryn Mawr was a women's college. *Id.*

162. *Id.*

163. *Id.*

164. White-Nockleby, *supra* note 158.

165. *Id.*

should have to declaim the other because of categorical divides. At the same time, choosing an all-women's college does suggest that a student has an investment and interest in a women's environment. Until it becomes clear, however, what is meant by man, woman, and all-women's college, this appears to be the unavoidable result for those wishing to maintain their reputations: one of being a certain gender and the other as an all-women's college.

IV. DEFINING SEX FOR AN ALL-WOMEN'S COLLEGE

Many colleges and universities across the nation are beginning to formulate accommodations and policies about transgender students and those who do not conform to gender expectations.¹⁶⁶ Single-sex colleges are faced with a unique challenge: how and when to admit someone in transition. Everyone assumes that students admitted to Bryn Mawr are women. Although many would probably interpret a "Bryn Mawr woman" to be a naturally born female, no one actually seems to know whether a "Bryn Mawr woman" could be more inclusive. One of the deans of Bryn Mawr explained the admission policy by saying that "[a]t the point of admission, we are, you know, assuming that everybody that applies and that we admit is a woman, identifies as a woman."¹⁶⁷ She then acknowledges that college is a time when one's identity may change.¹⁶⁸

As seen in Part I, sex and gender are legally significant in many situations. For the most part, though, interpreting "man," "woman," and "sex" has been left to the discretion of the states, resulting in disparate treatment across the nation.¹⁶⁹ Although such an approach provides no clear guidance, it does have the benefit of giving an institution, like Bryn Mawr, more flexibility in interpreting "woman" and "all-women's college."

Understanding "all-women" to mean limited admission to those who are born biologically female would give single-sex schools a bright-line test. Unfortunately, it could have detrimental effects on both the reputations of all-women's colleges and their actual environments. A strict "woman means naturally born female" standard would be too harsh and would result in loss to the single-sex education communities.

166. Brett-Genny Janiczek Beemyn, *Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Nov. 2, 2011).

167. White-Nockleby, *supra* note 158 (quoting Karen Tidmarsh).

168. *Id.*

169. That the issue belongs to the states is not shocking because many sensitive and personal issues, including marriage, are left in the hands of the states.

On the other hand, defining “all-women” to encompass both naturally born women and men who have taken medical steps to “irrevocably” live as women will generate further questions. For example, how does one show a commitment to live irrevocably as a woman? Does it require SRS, or will hormone therapy suffice?¹⁷⁰ If students, like Alex, are naturally born women but no longer identify as women, are their places at all-women’s colleges assured? In advertising itself as an all-women’s college, does the school create an obligation to provide a campus composed of very strictly defined women? Should alumnae who no longer present as women dissociate themselves from the college, both for their own sake and to uphold Bryn Mawr’s reputation as an all-women’s college?¹⁷¹

Bryn Mawr and other single-sex educational institutions should interpret the “all-women’s college” description broadly as opposed to narrowly. This is not to suggest that women’s colleges should in any way consider becoming co-educational institutions. This would be a loss to women students, the academic community,¹⁷² and the national community.¹⁷³ A college devoted to the education and excellence of women can still attain its goals and maintain its level of excellence with looser interpretations of “woman” and “all-women.”

At the same time, colleges must consider students who have matriculated with the expectation of attending an all-women’s college composed of students who were born female, identify as women, and present as such. These students could conceivably, and perhaps understandingly, be discombobulated by the presence of non-stereotypical women. Being made aware in advance that the college is home to non-traditional women students would certainly ensure that no student

170. Again, although one’s chromosomes could be interpreted as committing one to living as a certain sex forever, the irrevocability standard is based on a conscious desire to live as a certain gender. In requiring medical and physical actions to transfer from one sex to another, however, states appear to conflate gender and sex. One can be committed to living as one gender while being completely uninterested or unwilling to take medical steps to change one’s sex. This is further evidence that states accept stereotypes that sex is indivisibly tied to gender.

171. See, e.g., White-Nockleby, *supra* note 158 (discussing Alex’s experience as a transgendered alumnus of Bryn Mawr College). Alex discusses his concerns when going to job fairs. *Id.* He feels the need to claim to be a Haverford College graduate as opposed to a Bryn Mawr one. This cuts against both Bryn Mawr and its alumnae, as people interested in passing as men would be “outed” by Bryn Mawr being their alma mater. At the same time, men with Bryn Mawr degrees can undercut Bryn Mawr’s claim to being an all-women’s college and may affect future admissions.

172. There have been many impressive academic alumnae, such as the current President of Harvard University. *Drew Gilpin Faust ’68 to Lead Harvard*, BRYN MAWR NOW (Feb. 11, 2007), <http://www.brynmawr.edu/news/2007-02-11/faust.shtml>.

173. Not every alum stays in the political or academic world, but rather makes her presence known in other areas, such as Katharine Hepburn, who attended Bryn Mawr. *Biography for Katharine Hepburn*, IMDB, <http://www.imdb.com/name/nm0000031/bio> (last visited Nov. 2, 2011).

arrives unprepared. Although this would create a college campus that might not be considered strictly all-women, it would still provide an environment that caters to women students.¹⁷⁴

On a practical level, if Bryn Mawr and other all-women's colleges were to officially adopt a looser interpretation of "woman" and "all-women," they would then need to address issues co-educational universities are facing. Can an MTF share a dorm room with a traditional woman student? Does she use a male or female bathroom? Bryn Mawr has an easier task in that precedent exists for male students and female students living on the same floor and sharing the same bathroom.

Bryn Mawr is arguably a co-educational campus, with men in classes, in the campus center, and in the dorms as visitors or residents.¹⁷⁵ It is highly likely that there is at least one man on Bryn Mawr grounds at any given moment. Regardless, Bryn Mawr is geared toward creating alumnae, not alumni. The school was founded to "offer[] women a more ambitious academic program."¹⁷⁶ It has advertised itself as a women's school.¹⁷⁷ Its students have embraced the view that they are a single-sex school, a women's college.¹⁷⁸ Many support the motivating sentiment behind the motto "better dead than co-ed."¹⁷⁹ Bryn Mawr and its sister colleges' missions are admirable, and the colleges live up to their promises. They are academically rigorous and provide safe environments where students can develop into intellectual and independent women.¹⁸⁰ The presence of nontraditional women students can strengthen these colleges and provide a diversity that will benefit their students.¹⁸¹

174. By admitting only naturally born female students or those who identify as women, all-women colleges can maintain their focus on women.

175. See, e.g., Boccella, *supra* note 142 (explaining that James Merriam, a male, is a student at Bryn Mawr); *College as Community*, BRYN MAWR, http://www.brynmawr.edu/catalog/2010-11/about/college_as_community.html (last visited Nov. 2, 2011) (referring to the close relationship and shared facilities of Bryn Mawr and Haverford, a co-ed college).

176. *A Brief History of Bryn Mawr College*, *supra* note 107.

177. *Admissions and Financial Aid*, *supra* note 102.

178. See, e.g., *About Us*, BRYN MAWR, <http://about.blogs.brynmawr.edu> (last visited Nov. 2, 2011) (quoting a Bryn Mawr student who believes that the environment is enhanced by being populated by intelligent women).

179. See *supra* Part III.C.

180. See *Bryn Mawr College Mission Statement*, *supra* note 98 (indicating that the "[c]ollege . . . provide[s] a rigorous education . . . as preparation for life and work").

181. Bryn Mawr is obviously not the only all-women's college in existence in America today. A unique institution, it still shares similar advantages and disadvantages with other all-women schools. Each college has its own character, and as such each must approach their interactions with transgender students and prospectives in a way that best suits its mission statement, personality, and reputation. Although some colleges may have a more liberal and accepting reputation, such as Bryn Mawr, others may pride themselves on conservative values and discipline. Thus their approaches to transgender people may be incredibly different.

This Note would encourage, however, that only those who were either naturally born female or those who identify as female be admitted to the school.¹⁸² Although the standard that a student has "irrevocably" committed to living as a woman is fuzzy at best, this seems to be the best option for guaranteeing that the college can retain its focus on women's education and issues. Bryn Mawr should consist of students who are women in some identifiable manner, which many states have recognized in some form or another.¹⁸³

CONCLUSION

Because determination of gender and sex essentially rests in the hands of the states, much confusion surrounds the subject. All-women colleges, however, are not meant to be bureaucratic pools where innovation and growth are stifled. In being able to take advantage of the vague laws on sex change, schools like Bryn Mawr are able to make decisions that will benefit the all-women environment they desire to foster. By accepting transgender students, the college is not becoming a co-educational institution. All of its students were, or still are, women. They are invested in the rights and education of women, and they deserve the ability to attend a college that caters to such interests. Although sex may still define us, we now have the opportunity to pick the definition that fits us.

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182. This Note has not specifically addressed the possibility of admitting MTF applicants. Although it is possible that a high-school senior would have taken steps to become a woman, most of the situations have arisen when women who are admitted to Bryn Mawr realize afterwards that they identify as men.

183. *See supra* Part III.

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