

# Michigan Journal of Gender & Law

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Volume 26 | Issue 1

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2019

## Contracting Around Gender Constructs: Transgender Men at Women's Colleges

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### Recommended Citation

Elizabeth A. Heise, *Contracting Around Gender Constructs: Transgender Men at Women's Colleges*, 26 MICH. J. GENDER & L. 175 (2019).

Available at: <https://repository.law.umich.edu/mjgl/vol26/iss1/4>

<https://doi.org/10.36641/mjgl.26.1.contracting>

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CONTRACTING AROUND GENDER  
CONSTRUCTS: TRANSGENDER MEN AT  
WOMEN'S COLLEGES

*Elizabeth A. Heise\**

ABSTRACT

*As the transgender community gains increasing visibility in society, women's colleges have begun to address new questions about who is eligible to attend. One such question is whether students who come out as transgender men after matriculation are eligible to remain enrolled and graduate from these institutions. The main claims relevant to this discussion are (1) colleges' right to retain their identity as all-women's institutions; (2) the parallel rights of cisgender female students who explicitly choose to attend an all-women's institution, and (3) transgender students' competing right to avoid arbitrary or capricious dismissal based on gender identity. This Note posits that contract law provides a useful framework for colleges to evaluate this question, since both express and implied contracts form the basis of the student-college relationship. Ultimately, this Note argues that, although solutions that satisfy all parties are impossible, harms can be minimized if transgender students are permitted to graduate and given appropriate support throughout the transition process, and other policies are adapted to address the concerns of cisgender female students.*

TABLE OF CONTENTS

INTRODUCTION • 176

I. HISTORY AND DEVELOPMENT OF SINGLE-SEX INSTITUTIONS • 179

II. TRANSGENDER STUDENTS' CLAIMS; COLLEGES' DEFENSES AND COUNTERCLAIMS • 186

A. *Policies that are Unclear or not Explicitly Stated* • 187

B. *Policies that Unambiguously Require Dismissal* • 193

1. Public Policy Arguments • 196

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2. Unconscionability Arguments • 198
III. NOT WHAT WE SIGNED UP FOR: THE CIS STUDENT'S CLAIMS • 200
CONCLUSION • 207

## INTRODUCTION

The relationship between all-women's colleges and their transgender students<sup>1</sup> has only recently come to the forefront of academic discussion.<sup>2</sup> Gender was once viewed as intrinsically linked with biological sex, and this perceived relationship made it clear who was eligible to be admitted to single-sex institutions. For many individuals, however, sex and gender do not align, and the increased visibility of transgender individuals has forced women's colleges to confront these questions more directly. Women's colleges' decisions on whether to admit transgender students have been hotly debated by college administrators, and the issue has become increasingly imperative over the past few years with the increased visibility of the transgender community in society.<sup>3</sup> For instance, Mills College became the first women's college to

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1. Throughout this Note, I refer to transgender men who begin to transition after matriculation at college as "transgender students;" I recognize the various and complex identities of students who are currently attending women's colleges, but this Note is primarily about these students. I also abbreviate "transgender" as "trans" at certain points.
  2. See, e.g., Rebecca Brenner, *Women's Colleges Should Admit Trans Students. It's Wholly Consistent with Their Mission*, WASH. POST (Jan. 10, 2019), [https://www.washingtonpost.com/outlook/2019/01/10/womens-colleges-should-admit-trans-women-its-wholly-consistent-with-their-mission/?utm\\_term=.15331456f555](https://www.washingtonpost.com/outlook/2019/01/10/womens-colleges-should-admit-trans-women-its-wholly-consistent-with-their-mission/?utm_term=.15331456f555); Avi Cummings & Dean Spade, *Women's Colleges Are on the Wrong Side of History on Transgender Women*, TIME (June 9, 2014), <http://time.com/2848822/womens-colleges-transgender-women/>; Paul G. Lannon, *Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World*, BOSTON BAR J. (Apr. 22, 2015), <https://bostonbarjournal.com/2015/04/22/transgender-student-admissions-the-challenge-of-defining-gender-in-a-gender-fluid-world/>; Katy Waldman, *The Wellesley Man*, SLATE (June 5, 2014), <https://slate.com/human-interest/2014/06/transgender-students-at-womens-colleges-wellesley-smith-and-others-confront-their-limits.html>.
  3. See e.g., Lannon, *supra* note 2; Katherine Kraschel, *Trans-Cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463 (2012); Laura MinSun Brymer, "Better Dead Than Co-Ed"? *Transgender Students at an All-Women's College*, 18 WM. & MARY J. RACE GENDER & SOC. JUST. 134 (2011).

explicitly include transgender women in its written admission policy in 2014.<sup>4</sup> Many women's colleges have followed its lead since then.<sup>5</sup>

Questions surrounding gender and belonging do not disappear once admitted students have enrolled, as many students transition during college. There is a complicated relationship between women's colleges and students who matriculate as their assigned birth sex and subsequently come out as transgender while in college.<sup>6</sup> While there are a few dozen four-year women's colleges in the United States, only three non-religious four-year men's colleges remain. Because of their small number, and a significant dearth of available research about transgender students at men's colleges, this Note focuses exclusively on women's colleges. This Note examines the complicated relationship between women's colleges and their transgender students and explores equitable solutions in light of the parties' goals and obligations.

The main policies at issue in this Note are colleges' right to retain their identity as all-women's institutions and the parallel right of female students who chose to attend this type of school, weighed against transgender students' right to avoid arbitrary or capricious dismissal based on gender identity. Also relevant to the discussion are the tremendous harms that transgender students will inevitably face if

4. Deana Mitchell, *Mills College Takes on the Nuances of Transgender Admits*, OAKLAND N. (Oct. 2, 2014), <https://oaklandnorth.net/2014/10/02/mills-college-takes-on-the-nuances-of-transgender-admits/>.
5. See, e.g., Mary S. Campbell, *Spelman Admissions and Enrollment Policy Update*, SPELMAN C. (Sept. 5, 2017), <https://www.spelman.edu/about-us/office-of-the-president/letters-to-the-community/2017/09/05/spelman-admissions-and-enrollment-policy-update>; Laura Daignault Gates & H. Kim Bottomly, *Reaffirmation of Mission and Announcing Gender Policy*, WELLESLEY C. (Mar. 2015), <http://www.wellesley.edu/news/gender-policy/communityletter>; *Admission of Transgender Students*, MOUNT HOLYOKE C., <https://www.mtholyoke.edu/policies/admission-transgender-students> (last visited Jan. 24, 2019).
6. While this Note focuses primarily on the presence of transgender men at women's colleges, not all transgender students at women's colleges necessarily identify as male. Women's colleges are equally confused about how to formulate policies surrounding nonbinary and genderqueer students at women's colleges, both for the purpose of admissions and for whether they are categorized as "women" throughout their time in college. See generally, Nora Caplan-Bricker, *Who is a Women's College For?*, THE CHRONICLE REVIEW [https://www.chronicle.com/interactives/caplan-bricker?cid=at&utm\\_source=at&utm\\_medium=en&elqTrackId=93fb6da6423b4ab092e65098fdb1889d&elq=cf5980eab2e64c15bfadc940a06764a4&elqaid=22084&elqat=1&elqCampaignId=10822&fbclid=IwAR29yPDHpsJ8NWGcW0QAVRvv86lrYBA92VAgJ3wXbbnbnmRu3n9YF09sYHns](https://www.chronicle.com/interactives/caplan-bricker?cid=at&utm_source=at&utm_medium=en&elqTrackId=93fb6da6423b4ab092e65098fdb1889d&elq=cf5980eab2e64c15bfadc940a06764a4&elqaid=22084&elqat=1&elqCampaignId=10822&fbclid=IwAR29yPDHpsJ8NWGcW0QAVRvv86lrYBA92VAgJ3wXbbnbnmRu3n9YF09sYHns) (last visited Mar. 5, 2019); Ruth Padawer, *When Women Become Men at Wellesley*, THE NEW YORK TIMES (Oct. 15, 2014), <https://www.nytimes.com/2014/10/19/magazine/when-women-become-men-at-wellesley-college.html>.

required to choose between leaving their schools and being permitted to stay under the condition that they remain closeted.<sup>7</sup> These harms should be critically examined and weighed when considering the rights, obligations, and interests of each party.

Scholars have not yet viewed the relationship between women's colleges and their transgender students through the lens of contract law, which may be helpful for a better understanding of the parties and their interests. Lack of scholarship in this area may be because the relationship between colleges and their students has not always been viewed as contractual. Historically, colleges and universities were understood to be *in loco parentis*, and were given a wide range of deference over their students.<sup>8</sup> The ability to attend university was considered a "privilege," rather than a "right," and could be revoked at any time.<sup>9</sup> As such, students' complaints over either academic concerns or dismissal due to disciplinary measures were not considered adjudicable in court, regardless of whether these actions were arbitrary and capricious.<sup>10</sup>

Over time, the understanding of the student-university relationship has evolved to give a greater number of rights to students, fueled by "a revolution in the relationship between academia and the law" during the second half of the twentieth century.<sup>11</sup> Today, our understanding of the student-university relationship is much closer to that of other contractual relationships,<sup>12</sup> and since "[i]t is generally accepted that the terms and conditions for graduation are those offered by the publications of the college at the time of enrollment . . . they have some of the characteristics of a contract between the parties, and are sometimes subject to civil remedies in courts of law."<sup>13</sup> Although "most courts agree that the contract law of the commercial world cannot be imported wholesale into the academic environment"<sup>14</sup> because the terms of the contract may be difficult to identify, or too vague to enforce,<sup>15</sup> students are nonetheless

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7. See *infra* Section III.B.

8. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 17 (5th ed. 2014).

9. Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 254 (1973).

10. See Kaplin & Lee, *supra* note 8, at 16–18 (discussing the virtually unlimited power of universities to dictate terms of contract law).

11. See *id.* at 17.

12. See generally Buchter, *supra* note 9; see also KAPLIN & LEE, *supra* note 8, at 44–45.

13. Jallali v. Nova Se. Univ., Inc., 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008) (internal citations omitted).

14. KAPLIN & LEE, *supra* note 8, at 45.

15. *Id.* (citing the college catalog as an example of an academic document that may or may not constitute a contract).

protected by “contract law’s implied obligations of good faith and fair dealing, [which] hold tremendous potential to accord deference, to preserve institutional autonomy, and to protect students.”<sup>16</sup> Express contracts, such as housing forms and financial aid agreements, and implied contracts, such as college websites and course catalogs, can both give rise to causes of action under contract law.<sup>17</sup> Even though the model is not perfect, viewing the student-college relationship through contract law can make it easier to understand the remedies available and the nature and weight of the interests at stake for women’s colleges and transgender students.

Section I of this Note discusses the development of women’s colleges in the United States and the various approaches women’s colleges have taken toward transgender students. Section II analyzes contractual claims that transgender students have against women’s colleges in the event of dismissal, for both colleges with ambiguous policies and colleges with policies that explicitly require transgender students to withdraw. It also examines claims that the contract between a women’s college and its transgender students should not be enforced either due to unconscionability or public policy constraints, and addresses colleges’ possible defenses and counterclaims. Next, Section III identifies the possible contractual claims that cisgender female students could have against women’s colleges with ambiguous or inclusive policies toward transgender students. Finally, the Note weighs these claims against each other in consideration of the totality of the circumstances, and concludes that possible harms posed by transgender students to women’s colleges and their cisgender students are minimal, while the consequence of dismissal has the potential for much greater harm to transgender students.

## I. HISTORY AND DEVELOPMENT OF SINGLE-SEX INSTITUTIONS

For much of United States history, colleges and universities were open only to men.<sup>18</sup> Women’s colleges were created in the late

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16. Hazel G. Beh, *Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 196–197 (2000).

17. See KAPLIN & LEE, *supra* note 8, at 345.

18. See *The Seven Sisters*, MOUNT HOLYOKE C., [https://www.mtholyoke.edu/about/history/seven\\_sisters](https://www.mtholyoke.edu/about/history/seven_sisters) (last visited Jan. 24, 2019) (noting that the first women’s college, Mount Holyoke College, was established as Mount Holyoke Female Seminary in 1837); *Oberlin History*, OBERLIN C. & CONSERVATORY, <https://www.oberlin.edu/about-oberlin/oberlin-history> (“First in Academia: Oberlin was the first college in

nineteenth century so that women would be able to access an education comparable to that available to men.<sup>19</sup> From the time of their founding, these colleges purported to provide women with an equal education. They hoped to “provide women with opportunities to be exposed to both classical democratic ideas and pragmatic skills,”<sup>20</sup> but they were also steeped in stereotypes about what it meant to be a woman. For instance, “college-educated women were considered more likely to be engaging wives and better mothers, who would raise informed citizens.”<sup>21</sup>

The number of male-only colleges dwindled as elite men’s colleges became coeducational, with the last of the Ivy League universities beginning to admit women in 1983.<sup>22</sup> Fewer women attended women’s colleges as the options available to them increased.<sup>23</sup> As Equal Protection doctrine in the United States expanded to include sex as a protected class, the permissible purposes of single-sex institutions changed as well, as they were no longer allowed to rely on sex stereotypes.<sup>24</sup> The most famous Supreme Court cases that dealt with single-sex education, *Mississippi University for Women v. Hogan*<sup>25</sup> and *United States v. Virginia*,<sup>26</sup> struck down impermissible models for single-sex education. In 1982, the Court in *Hogan* held that although “single-sex education affords unique benefits to students,”<sup>27</sup> it is important to closely examine the school’s reason for applying a gender-based classification.<sup>28</sup> If the goal is

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America to adopt a policy to admit black students (1835) and the first to grant bachelor’s degrees to women (1841) in a coeducational program.”).

19. *About*, VASSAR, <https://www.vassar.edu/about/> (“Founded in 1861 to provide women an education equal to that once available only to men.”); It became the first of the colleges known as the “Seven Sisters,” which were considered the female equivalent to the all-male Ivy League. Of the Seven Sisters, only five remain women’s colleges today. See *The Seven Sisters*, MOUNT HOLYOKE COLLEGE, [https://www.mtholyoke.edu/about/history/seven\\_sisters](https://www.mtholyoke.edu/about/history/seven_sisters) (last visited Jan. 24, 2019).
20. Susan B. Marine, “*Our College Is Changing*”: *Women’s College Student Affairs Administrators and Transgender Students*. 58 J. OF HOMOSEXUALITY 1165–66 (2011).
21. Padawer, *supra* note 6.
22. Shira Boss-Bicak, *25 Years of Coeducation*, COLUM. C. TODAY (Jul./Aug. 2009), [https://www.college.columbia.edu/cct/archive/jul\\_aug09/features1](https://www.college.columbia.edu/cct/archive/jul_aug09/features1).
23. Scott Jaschik, *Can Women’s Colleges Attract Women? Can Ex-Women’s Colleges Attract Men?*, INSIDE HIGHER ED (June 19, 2017), <https://www.insidehighered.com/admissions/article/2017/06/19/another-womens-college-shifts-coeducation-institutions-consider>.
24. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).
25. *Hogan*, 458 U.S. at 718.
26. *Virginia*, 518 U.S. at 515.
27. *Hogan*, 458 U.S. at 721.
28. *Hogan*, 458 U.S. at 724.

to “exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”<sup>29</sup> Nearly fifteen years later in *Virginia*, the Court acknowledged that “[p]roviding the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education,”<sup>30</sup> and that “the physical differences between men and women are enduring.”<sup>31</sup> It held, however, that “such classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”<sup>32</sup> Both cases rejected the idea that sex stereotypes were a legitimate proxy for qualifications, although neither went so far as to claim that single-sex institutions should cease to exist entirely.

The institutions considered in these cases, of course, were public institutions. Their actions were state actions for the purpose of the Fourteenth Amendment. State public accommodation and anti-discrimination laws, which became increasingly common during the Civil Rights movement, expanded similar protections into the private sphere.<sup>33</sup> Toward the end of the twentieth century, the Supreme Court grappled with exclusionary policies and the associational rights of organizations, recognizing that groups have interests that may require exclusion, but that individuals also have fundamental associational rights.

In *Roberts v. Jaycees*, two Minnesota chapters of the Jaycees, a national business organization exclusively for young men, began to admit women in compliance with a Minnesota anti-discrimination law.<sup>34</sup> The chapters were subsequently expelled from the Jaycees for violating the organization’s national charter.<sup>35</sup> In this case, the Court clarified: “We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,”<sup>36</sup> and that “freedom of association therefore plainly presupposes a freedom not to

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29. *Hogan*, 458 U.S. at 725.

30. *United States v. Virginia* 518 U.S. at 528 (quoting *United States v. Virginia*, 44 F.3d 1229, 1238 (4th Cir. 1995)).

31. *Virginia*, 518 U.S. at 533.

32. *Virginia*, 518 U.S. at 534.

33. *State Public Accommodation Laws*, NAT’L CONF. OF ST. LEG. (Jul. 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

34. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

35. *Roberts*, 468 U.S. 609.

36. *Roberts*, 468 U.S. at 622.



associate.”<sup>37</sup> The Jaycees’ associational claim was found to be invalid because, as a broad social organization committed largely to civic engagement, the organization lacked the “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” which the Court found inherently required protection.<sup>38</sup> Conversely, private women’s colleges have largely avoided legal challenges based on their exclusion of men.<sup>39</sup> They are, by nature, smaller and more selective than the Jaycees and, as communities, they share the common goal of educating women within a patriarchal society.

Today, of course, women’s reasons for choosing a women’s college look very different than they did a century ago. Women’s colleges attract students by claiming to provide “a unique environment where every student leader [is] a woman, where female role models [are] abundant, where professors [are] far more likely to be women and where the message of women’s empowerment pervade[s] academic and campus life.”<sup>40</sup> Alumnae of women’s colleges “say their experiences gave them a singular benefit: learning and living among a select group of intelligent, ambitious women.”<sup>41</sup> They often cite tangible benefits as well: a greater proportion of women’s college graduates become entrepreneurs than their peers who attend coeducational colleges, a higher percentage go on to earn their PhDs, and they are several dozen times more likely to earn degrees in math and hard science—fields traditionally dominated by men.<sup>42</sup> Unlike in *Hogan*, where the all-women’s university reinforced the stereotype that nursing was a career exclusively for women, women’s colleges today hope to defy pervasive stereotypes that women are less capable of achievements in science, technology, engineering, and math-related fields than men.

Students who identify as transgender cite unique reasons for choosing women’s colleges. Many choose women’s colleges because they be-

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37. *Roberts*, 468 U.S. at 623.

38. *Roberts*, 468 U.S. at 620.

39. Katherine Doering Custis, *Are Women’s Colleges Necessary—or Even Legal?* CAMPBELL L. OBSERVER (Jul. 2, 2014), <http://campbelllawobserver.com/are-womens-colleges-necessary-or-even-legal/>.

40. See Padawer, *supra* note 6 (edited for tense).

41. Heidi Brown, *Why Women’s Colleges are Still Relevant*, FORBES (Aug. 12, 2009), <https://www.forbes.com/2009/08/12/womens-colleges-student-forbes-woman-leadership-graduate.html#6b7c219d5aa6>.

42. *Id.*; Carrie Wofford, *Why You Should Consider a Women’s College*, U.S. NEWS & WORLD REP. (Oct. 24, 2013), <https://www.usnews.com/opinion/blogs/carrie-wofford/2013/10/24/why-you-should-consider-a-womens-college>.

lieve them to be “both psychologically and physically more safe than other colleges.”<sup>43</sup> This belief is supported by statistics indicating that a significant portion of violence against transgender people is perpetrated by men.<sup>44</sup> Women’s colleges have the reputation of being “liberal, seemingly open-minded space[s]” with a “focus on social justice activism,” and are thus appealing to students who are beginning to question their gender identity.<sup>45</sup>

The foregoing benefits are tied to colleges maintaining a single-sex status. The importance of maintaining a single-sex status has posed problems, however, for colleges that must interpret evolving societal norms about gender and womanhood alongside historic college policies to determine who is eligible to attend their institutions. This determination has proven difficult not only for deciding whether transgender students are eligible to be admitted into these schools, which is a hotly debated topic in its own right,<sup>46</sup> but also for whether students who transition after matriculation should be allowed to remain enrolled and graduate.<sup>47</sup> Attitudes toward transgender men who attend women’s colleges range from hostile to welcoming. One administrator expressed her confusion about the presence of transgender men at her college: “I believe we have a pretty clear statement of mission here, and for the life of me, I don’t know why anyone would want to be here who isn’t a part of it. Or why they’d want to stay once they decided to change.”<sup>48</sup> A more sympathetic administrator spoke of a positive interaction with a trans student at graduation and understanding that he belonged: “So I am sitting by this student at graduation, and it occurred to me that he had made more of a difference than anyone, just by being here, just by staying . . . . And in the moment I realized yeah, he is, just as much as everyone else . . . he’s one of ours too.”<sup>49</sup>

There is also confusion, both for students and administrators, when colleges’ policies toward transgender students are vague or not explicitly stated. Students are not sure whether it is safe for them to identify themselves as transgender to college administrators, and

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43. See Marine, *supra* note 20 (edited for tense).

44. See *id.* at 1177.

45. Raquel Willis, *Admitting Trans Students to Single-Sex Colleges: Is Current Law on Their Side?*, HOWSTUFFWORKS (Mar. 15, 2016), <https://people.howstuffworks.com/trans-students-at-single-sex-colleges.htm>.

46. See *supra* note 2.

47. See Marine, *supra* note 20, at 1172.

48. See *id.* at 1171.

49. See *id.* at 1176.

administrators are unsure of how to respond to individual transgender students' concerns.<sup>50</sup>

To remedy this confusion, individual colleges have begun to create their own policies to address transgender students, and these policies vary tremendously from school to school. A small percentage are fully committed to maintaining their status as a single-sex institution by requiring transgender men to either withdraw or face expulsion from the college. For instance, Bennett's policy tells students: "If a student decides to self-identify as male, the student will no longer be eligible to receive a degree from the college."<sup>51</sup> The language used is noteworthy, as it frames transition entirely as the choice of each individual student.

Other colleges, while sharing Bennett's view that only self-identified women belong at all-women's colleges, recognize the pragmatic challenges inherent in this view. Hollins University, for instance, defines "sex reassignment" only as when the student "1) undergoes hormone therapy with the intent to transform anatomically from female to male; 2) undergoes any surgical process (procedure) to transform from female to male; or, 3) changes legal name with the intent of identifying as a man."<sup>52</sup> This potentially leaves open the possibility that a transgender student could begin to transition socially, as long as he takes no legal or medical steps toward transition, but it is also incredibly invasive toward transgender students' privacy. Hollins also allows students to stay after beginning the process of "sex reassignment" until they have achieved 64 credit hours, the halfway point to a college degree.<sup>53</sup> Only three women's colleges—Hollins University, Converse College, and

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50. *See id.* at 1174–75.

51. BENNETT COLL., POLICIES AND PROCEDURES EMS 7.02 (Jan. 28, 2017), [http://www.bennett.edu/wp-content/uploads/2017/02/Transgender\\_Admissions\\_Policy.pdf](http://www.bennett.edu/wp-content/uploads/2017/02/Transgender_Admissions_Policy.pdf) ("If a student decides to self-identify as male, the student will no longer be eligible to receive a degree from the College."); *see also* CONVERSE COLL., STUDENT HANDBOOK 2017-2018 (2017), <https://my.converse.edu/ICS/icsfs/20172018ConverseCollegeUNDERGRADUATEStudentHandboo.pdf?target=153a0994-0fcb-4c22-9498-971d4406a3d3> ("the student will not be permitted to continue attending the undergraduate women's program at Converse beyond the conclusion of the term in which Converse determines that sex reassignment has occurred.").

52. *Policy on Transgender Issues*, HOLLINS UNIV., <https://www.hollins.edu/on-campus/student-life/new-student-info/policy-on-transgender-issues/> (last visited Mar. 7, 2019).

53. *See id.* (claiming the 64 credit limit is "intended to support the student's transfer to and success at another university.").

Bennett College—explicitly prohibit men, including transgender men, from graduating.<sup>54</sup>

Many other historically all-women's colleges, while continuing to prioritize women's education, have explicit policies that allow students who matriculated as female to obtain a degree regardless of their gender identity or expression.<sup>55</sup> Another common approach, however, is to remain silent on the issue entirely.<sup>56</sup>

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54. BENNETT COLL., *supra* note 51; CONVERSE COLL., *supra* note 51, HOLLINS UNIV., *supra* note 52.
55. Fifteen women's colleges explicitly state on their websites that they confer degrees regardless of student's gender identity or expression: Agnes Scott, Alverno, Barnard, Bryn Mawr, Cedar Crest, College of St. Benedict, Mills, Mount Holyoke, Russell Sage, St. Catherine University, Scripps, Simmons, Smith, Wellesley, Wesleyan College. See ALVERNO COLL., BUILDING A COMMUNITY OF LEARNERS: A COMMUNITY GUIDE & STUDENT HANDBOOK 10 (2016). <https://www.alverno.edu/campuslife/studentaffairs/civility/Student%20Handbook%202018-2019.pdf>; *Admission of Transgender Students*, *supra* note 5; *Admission Policy for Transgender Applicants*, SIMMONS UNIV., <http://www.simmons.edu/admission-and-financial-aid/undergraduate-admission/how-to-apply/admission-requirements-and-deadlines/admission-policy-for-transgender-students-faq> (last visited Mar. 7, 2019); *Agnes Scott College Statement on Gender Expression and Gender*, AGNES SCOTT COLL., <https://www.agnesscott.edu/president/presidential-committee-diversity/statement-on-gender-expression-and-gender-identity.html> (last visited Mar. 7, 2019); *Applying for Admission*, MILLS, <https://catalog.mills.edu/undergraduate/admission/applying-admission/index.html> (last visited Mar. 7, 2019); *Gender Identity and Expression*, BRYN MAWR COLL., [https://www.cedarcrest.edu/cdi/transgender\\_resources.shtm](https://www.cedarcrest.edu/cdi/transgender_resources.shtm) (last visited Mar. 7, 2019); *Gender Identity & Expression*, SMITH COLL., <https://www.smith.edu/about-smith/diversity/gender-identity-expression> (last visited Mar. 7, 2019); *Scripps College Admission Policy FAQ*, INSIDE SCRIPPS, <http://inside.scrippscollege.edu/admissionpolicy> (last visited Mar. 7, 2019); *Transgender Admissions Policy & FAQ*, BARNARD, <https://www.brynmawr.edu/pensby/gender-identity-and-expression> (last visited Mar. 7, 2019); *Transgender and Non-Binary Students*, CATHERINE UNIV., <http://catalog.stkate.edu/policies/stu-non-acad/transgender-non-binary/> (last visited Mar. 7, 2019); *Trans\* and Gender Inclusion Campus Policy: The Sage Colleges*, SAGE COLLS., <https://www.sage.edu/wp-content/uploads/2017/10/Transgender-and-Gender-Inclusive-Policy-EFFECTIVE-10-2017.pdf> (last visited Mar. 7, 2019); *Transgender Resources*, CEDAR CREST COLL., <https://www.csbsju.edu/human-rights/policies-violations-forms/transgender-students> (last visited Mar. 7, 2019); *FAQ*, WELLESLEY COLL., <https://www.wellesley.edu/news/gender-policy/faq> (last visited Mar. 7, 2019); *Undergraduate Admission*, WESLEYAN, <https://www.wesleyancollege.edu/registrar/catalog/Undergraduate-Admission.cfm> (last visited Mar. 7, 2019).
56. Sixteen women's colleges do not have a clear policy on transgender students readily available on their websites: Brenau, Bay Path, College of St. Mary, Columbia College, Cottey College, Judson College, Meredith College, Moore College of Art and Design, Mount Mary University, Mount Saint Mary's LA, Notre Dame of Maryland, St. Mary's College, Salem College, Stephens College, Sweet Briar College, and Trinity Washington University. See *infra* Section III A. See JUDSON COLL., 2018-2019

Schools' policies on transgender students, when explicitly stated either on college websites or in their handbooks, form the basis for colleges' contracts with their students, and are enforceable against both parties in court.

## II. TRANSGENDER STUDENTS' CLAIMS; COLLEGES' DEFENSES AND COUNTERCLAIMS

Like all other students, transgender individuals enter college with the belief that if they “abide by and adhere to the disciplinary regulations and the academic standards established by the faculty and the university . . . upon the satisfactory completion of their studies, they will be awarded a degree in their chosen field.”<sup>57</sup> Status as female is generally a requirement for admissions into women's colleges,<sup>58</sup> and transgender students have met this requirement by applying and matriculating as female. It is reasonable for transgender students to believe that, once admitted, they will continue to be treated the same as any other student hoping to receive a degree.

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JUDSON COLLEGE STUDENT HANDBOOK (2018), <https://www.judson.edu/wp-content/uploads/2018/08/2018-2019-Judson-College-Student-Handbook.pdf> (last visited Mar. 7, 2019); *Admissions Policy Development: A Timeline*, STEPHENS COLL., <https://www.stephens.edu/about-stephens/admissions-policy-development-timeline/> (explicitly stating that a policy is in progress but not developed yet) (last visited Mar. 7, 2019); BRENAU UNIV., <https://www.brenau.edu/admissions/womenscollege/> (last visited Mar. 7, 2019); <http://www.csm.edu/> (last visited Mar. 7, 2019); COLUMBIA COLL., <https://www.columbiasc.edu/> (last visited Mar. 7, 2019); *Student Handbook 2018-2020*, COTTLEY COLL., [https://www.cottey.edu/pdf/studenthandbook/Handbook.pdf?yr=2018\\_20](https://www.cottey.edu/pdf/studenthandbook/Handbook.pdf?yr=2018_20) (last visited Mar. 7, 2019); MEREDITH COLL., <https://www.meredith.edu/> (last visited Mar. 7, 2019); MOORE COLL., <https://moore.edu/> (last visited Mar. 7, 2019); MOUNT MARY UNIV., <https://www.mtmary.edu/> (last visited Mar. 7, 2019); MOUNT ST. MARY'S UNIV., <https://www.msmu.edu/> (last visited Mar. 7, 2019); NOTRE DAME OF MD. UNIV., <https://www.ndm.edu/> (last visited Mar. 7, 2019); SAINT MARY'S COLL., <https://www.saintmarys.edu/> (last visited Mar. 7, 2019); SALEM COLL., <https://www.salem.edu/> (last visited Mar. 7, 2019); SWEET BRIAR COLL., <http://sbc.edu> (last visited Mar. 7, 2019); TRINITY, <https://discover.trinitydc.edu> (last visited Mar. 7, 2019).

57. *Sharick v. Se. Univ. of Health Scis. Inc.*, 780 So. 2d 136, 139 (Fla. Dist. Ct. App. 2000) (citing *Bilut v. Nw. Univ.*, 269 Ill. App. 3d 125, 206 (1994)).

58. This is not universally true, as certain women's colleges, such as Mount Holyoke and Scripps, admit students who were assigned female at birth but have already begun the transition process. See *Admission of Transgender Students*, *supra* note 5; *Scripps College Admissions Policy FAQ*, *supra* note 55.

This implied contractual understanding is foundational to the relationship between the student and the college or university because the “provision of an educational experience designed to lead to a college degree” in a particular field is what makes college valuable.<sup>59</sup> Courts are aware of the material value of college degrees and have taken the potential of future lost earnings resulting from dismissal into account in cases where the college was found to have acted in an arbitrary or capricious manner, or in bad faith, when dismissing a student.<sup>60</sup> The standard for proving that a dismissal was arbitrary, capricious, or resulted from bad faith is relatively high, but the student can succeed in proving a breach of contract if he can show that the college did not follow its own policies or procedures.<sup>61</sup> Even when the college has followed its own policies and procedures in dismissing a student, that student can succeed in an action against the college if he can show that the college’s policies are unconscionable or in violation of public policy. Each of these scenarios is discussed in more detail below.

#### A. *Policies that are Unclear or not Explicitly Stated*

In instances where a college expels a transgender student, but that college’s policies toward students who begin to transition while already enrolled are either unclear or not explicitly stated, the courts must determine the basis for the dismissal. With regard to a dismissal based on academics, colleges are generally afforded high levels of deference; with regard to a dismissal for a discriminatory purpose, colleges are not afforded deference.<sup>62</sup>

The school would most likely argue that the dismissal of a transgender student is an academic decision. There are numerous, well-documented academic advantages to graduates of an all-female environment;<sup>63</sup> a policy decision that attempts to maintain this specific academic environment can therefore be viewed as an academic decision. In academic cases, the case law favors the college or university: “The United States Supreme Court has written that ‘[u]niversity faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion

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59. *Sharick*, 780 So. 2d at 139 (emphasis removed) (internal citation omitted).

60. *Sharick*, 780 So. 2d at 139–40.

61. See KAPLIN & LEE, *supra* note 8, at 344.

62. See *id.*, at 77–78.

63. See generally Brown, *supra* note 41; Wofford, *supra* note 42.

or graduation.”<sup>64</sup> This level of deference is given to colleges because college administrators are presumed to know more about academic issues than the courts.<sup>65</sup> This deference also means that a transgender student’s claim will be incredibly unlikely to succeed if the court determines that the dismissal was made for academic reasons.

When a decision is determined to be academic, the student must show that it was “arbitrary and capricious, irrational, made in bad faith, or in violation of constitution or statute” to succeed on the claim.<sup>66</sup> In making an arbitrary and capricious determination, the court “does not substitute its judgment” for that of the decision-making body (in this case, the college) and “where there is room for two opinions, action is not arbitrary or capricious if exercised honestly and upon due consideration.”<sup>67</sup> This is a very high standard for a plaintiff to meet. A wide range of policies toward transgender students exists, and many women’s colleges draft their policies toward transgender students after years of deliberation.<sup>68</sup> Even colleges without policies that explicitly address transgender students could cite their general mission and goals as a women’s college as an implicit contract by which students are bound. A court would be unlikely to find that colleges have acted in an arbitrary or capricious manner in such a case. Similarly, plaintiffs will not succeed

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64. *Jallali v. Nova Se. Univ., Inc.*, 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985)).

65. *Jallali*, 992 So. 2d at 342.

66. *Sharick*, 780 So. 2d at 138 (citing *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 518–19 (1924)).

67. *Equitable Shipyards, Inc. v. Wash. St. By & Through Dep’t of Transp.*, 93 Wash. 2d 465, 475 (1980).

68. See ALVERNO COLL., *supra* note 55; *Policy on Transgender Issues*, *supra* note 52; *supra* notes 53–56. Many colleges’ transgender policies explicitly outline the thought processes and reasoning behind the development of their policies. Additionally, since I began my research for this Note, at least two colleges have significantly altered their transgender policies: St. Catherine University now has a transgender policy available on his website, *see supra* note 55, and Alverno College has fully reversed its former policy requiring transgender students to withdraw, and now explicitly allows all students to graduate regardless of their gender identity or expression, *compare* ALVERNO COLL., *supra* note 55, at 18 (“However, your decision will mean that you will no longer qualify to earn an undergraduate degree from Alverno or live in the residence halls because we offer degrees to individuals who identify as women”), *with* ALVERNO COLL., *BUILDING A COMMUNITY OF LEARNERS: A COMMUNITY GUIDE & STUDENT HANDBOOK 10* (2018–2019 ed. 2018), <https://www.alverno.edu/campuslife/studentaffairs/civility/Student%20Handbook%202018-2019.pdf> (“students whose gender identity changes after admission are encouraged to persist through graduation, experiencing the personal and academic support each student deserves from an Alverno education”).

on a bad faith argument absent fraud or misrepresentation on the part of the college.<sup>69</sup>

The high level of deference traditionally given to colleges' expulsion decisions is avoidable if the court determines that the college's decision was not academic, but rather, made for a discriminatory purpose. The decision at issue in such a case is not purely academic, as it is unrelated to the student's academic performance. Instead, it involves an otherwise qualified student who is dismissed solely on the basis of his gender identity. In such a case, the schools attempt to discriminate against transgender students because of their gender identity, essentially requiring that they remain closeted until graduation and punishing them for coming out as transgender if they do not. Colleges have no control over whether their students are transgender; their options are either to expel students who do not conform to sex stereotypes or make changes to their policies to be more inclusive of them.

Dismissed transgender students' most viable claim that their college breached its contractual duties may be to argue that the college's dismissal of a student on the basis of gender identity is a violation of federal or state law. If the student can make this showing, he can succeed regardless of whether the decision was made for an academic reason, because colleges are required to follow relevant state and federal laws.<sup>70</sup> The most likely possibilities for laws upon which a transgender student could rely for this argument are Title IX, which prevents educational institutions from discriminating based on sex, and state and local anti-discrimination laws, some of which explicitly prohibit discrimination based on gender identity. With regard to Title IX, multiple circuits have ruled that discrimination against transgender individuals is impermissible sex discrimination under federal anti-discrimination laws such as Title VII and Title IX, but these rulings are not unanimous and the Supreme Court has yet to speak on this issue.<sup>71</sup> Certain states and municipalities have anti-discrimination provisions

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69. See Beh, *supra* note 16, at 216.

70. See Sharick, 780 So. 2d at 139.

71. See, e.g., EEOC v. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (holding that the firing of a transgender woman who wanted to present as a woman at work as impermissible sex discrimination); G. G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 727 (4th Cir. 2016) (finding discrimination against a transgender boy who was not allowed to use sex-segregated boys' bathrooms at school); Etsitty v. Utah Transit Auth., 502 F. 3d 1215 (10th Cir. 2007) (finding that discrimination based on an employee's status as trans was not discrimination "because of sex" under Title VII).



that explicitly prohibit discrimination based on gender identity.<sup>72</sup> Women's colleges, of course, are in various jurisdictions, and most states do not protect students from discrimination based on gender identity.

A transgender student's Title IX claim would rely on a *Price-Waterhouse* theory of sex discrimination, which is about sex stereotyping as discrimination. In *Price-Waterhouse v. Hopkins*, the Supreme Court held that employment discrimination based on the plaintiff's failure to comply with social stereotypes about her sex violated Title VII.<sup>73</sup> Similar claims have been successful in Title VII litigation, on the basis that Title VII's protections extend to

transgender plaintiffs who have endured adverse employment action due to the employer's perception that they failed to conform to stereotypes in behavior and appearance that are consistent with the plaintiff's birth sex . . . a plaintiff's non-stereotypical presentation of one's biological sex can be the basis of protection, and have been able to fit transgender plaintiffs into this mold.<sup>74</sup>

A parallel argument that colleges are prohibited from discriminating against transgender students could be made under Title IX, since transgender students, by existing as trans men, necessarily fail to conform to stereotypes about their birth sex, such as the stereotype that all individuals who are assigned female at birth will continue to identify as female throughout their lives.<sup>75</sup> One scholar has argued that Title IX protects all current students, regardless of their gender identity, even at women's colleges, and that if a women's college expelled a student for being transgender, "it would clearly violate Title IX, which permits private institutions to refuse to admit male students, but does not permit lawfully expelling them."<sup>76</sup> The Title IX exemption for private colleges that take federal funds is limited to admissions; as such, discrimination against current students is impermissible. Making a claim that the im-

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72. *State Maps of Laws and Policies*, HUMAN RIGHTS CAMPAIGN (Dec. 1, 2017), <https://www.hrc.org/state-maps/education>.

73. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

74. Erin Buzuvis, *On the Basis of Sex: Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC'Y 219, 231 (2013) (internal citations omitted).

75. Title IX, 20 U.S.C. § 1681 (1972).

76. *Sharick v. Se. Univ. of Health Scis. Inc.*, 780 So. 2d 136, 139 (Fla. Dist. Ct. App. 2000).

plied or explicit contract is illegal under Title IX provides an additional avenue of redress for dismissed transgender students.

The college's likely response to a claim that its contract is illegal under Title IX would be that, rather than being discriminatory, dismissal of transgender students is the college's way of recognizing and accepting transgender students' gender identities. In fact, some colleges' policies have explicitly made this argument.<sup>77</sup> Transgender men, by arguing that they should remain at women's colleges, are claiming that they should be allowed to remain at spaces which explicitly exclude cis-gender men.<sup>78</sup>

This response puts the transgender student in a double-bind. For a transgender student to argue that he should be legally protected based on his status as transgender, he must make clear that he wishes to be recognized as transgender and treated in accordance with his gender identity. Previous transgender litigants hoped to be treated in accordance with their gender rather than the sex they were assigned at birth, and their discrimination claims arose from the treatment they faced as a result of their failure to conform with their birth sex.<sup>79</sup> The problem with drawing a parallel between such cases and a transgender student's claim in this instance is that transgender men attending women's colleges, on the one hand, wish to be treated in accordance with their birth sex rather than their gender for purposes of attendance. On the other hand, they also require accommodations such as housing, bathrooms, and name and pronoun usage in accordance with their gender. The college may argue that it is unable to honor both wishes simultaneously.

The Obama administration's updated *Dear Colleague* letter on Title IX lists the accommodations that schools are expected to put into place for trans students.<sup>80</sup> These include allowing a student to participate in and access "sex-segregated activities and facilities . . . consistent

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77. See, e.g., ALVERNO COLL., *supra* note 55, at 18 ("When persons take decisive steps to change their identity . . . we will recognize the integrity of your self-expression as male. . . However, your decision will mean that you no longer qualify to earn an undergraduate degree from Alverno.") (this is from the 2016-2017 handbook, and is no longer the policy of Alverno College); *Policy on Transgender Issues*, *supra* note 52 ("in an effort to recognize and honor the choices of individual students . . .").

78. ALVERNO, *supra* note 51; HOLLINS UNIV., *supra* note 52.

79. See, e.g., *EEOC v. Harris Funeral Homes*, 884 F.3d (where the litigant was successful in proving discrimination); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1047 (7th Cir. 2017) (holding that a transgender student was not barred from bringing a Title IX case under a *Price-Waterhouse* theory).

80. Dear Colleague Letter on Transgender Students from the U.S. Dep't of Just. & U.S. Dep't of Educ. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

with their gender identity.”<sup>81</sup> At coeducational institutions, equal accommodations for both sexes presumably already exist, as mandated under Title IX. At a college designed entirely for one sex, creating equitable accommodations for all genders is more difficult because accommodations for both sexes do not already equitably exist at single-sex institutions. Furthermore, at an institution that is founded specifically for the education, growth, and leadership of women, accommodation of male students seems antithetical to the mission. The Trump administration, of course, has rescinded this guidance, and leaves much more discretion up to local schools and states, so the accommodation argument may be moot.<sup>82</sup> The rescinded guidance may also mean that transgender students who remain at women’s colleges will entirely lack support and accommodation, since colleges are no longer required to consider the specific needs of transgender students under the new guidelines.

Despite the debate about the logistics of accommodations, a number of students have brought up the argument that trans men have had very different experiences than cis men, and thus may have a place at a women’s college. One anonymous student at Smith College argued:

For many trans men, sexism and misogyny does not end once they come out . . . Allowing trans men access to this space does not detract from Smith’s emphasis on women. I suggest that any person who has experienced womanhood, regardless of current gender identity, should be welcome here.<sup>83</sup>

Another sought a more inclusive definition of the concept of women’s colleges:

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

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81. *Id.*

82. Dear Colleague Letter from the U.S. Dep’t of Just. & U.S. Dep’t of Educ. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

83. *Open Letter from Anonymous to Q&A*, THE SOPHIAN, THE INDEPENDENT NEWSPAPER OF SMITH COLLEGE (Oct. 30, 2014), <http://www.thesmithsophian.com/open-letter-to-qa/>.

us, we now have the opportunity to pick the definition that fits us.<sup>84</sup>

Many trans men would reject being described as former women,<sup>85</sup> but to argue that transgender men are the same as cisgender men in every respect would ignore the reality of each group's lived experience. One anonymous trans man at Wellesley College explained: "We were raised female, we know what it's like to be treated as females and we have been discriminated against as females. We get what life has been like for women."<sup>86</sup> Women's colleges exist to "dissipate . . . traditional gender roles,"<sup>87</sup> and transgender students may uniquely benefit from, and contribute to, this environment.<sup>88</sup>

### B. Policies that Unambiguously Require Dismissal

Traditionally, expulsions are upheld when the grounds for dismissal are reasonable as defined by the college, and the burden is on the student to show that expulsion was unreasonable.<sup>89</sup> Reasonableness can be found even if the cause for dismissal is not stated anywhere in the college's written materials.<sup>90</sup> This level of deference from the courts incentivizes colleges to create vague policies, which makes it even more difficult for transgender students to make a claim. A significant number of women's colleges have chosen not to articulate any policy toward

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84. Brymer, *supra* note 3, at 159.

85. *See generally*, Jean-Marie Navetta, *Tips for Allies of Transgender People*, GLAAD (2016), <https://www.glaad.org/transgender/allies>; PFLAG, *GUIDE TO BEING A TRANS ALLY*, <https://bolt.straightforequality.org/files/Straight%20for%20Equality%20Publications/2.guide-to-being-a-trans-ally.pdf>.

86. *See* Padawer, *supra* note 6.

87. Katherine Kraschel, *Trans-Cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J. L. & GENDER 463, 465 (2012) (citing Brief for Twenty-Six Private Women's Colleges as Amici Curiae Supporting Petitioner at 5, *United States v. Virginia*, 518 U.S. 515 (1996)).

88. *See* Padawer, *supra* note 6; Brown, *supra* note 41; Wofford, *supra* note 42; *infra* Section II for discussion of the unique role of transgender students who attend women's colleges.

89. *See* Buchter, *supra* note 9, at 264. ("The second major divergence from general contract law occurs when there are either no written provisions governing discipline or else the provisions are unclear or ambiguous. In these situations, courts have required the student to prove that the university's unilateral action was not within the terms of his agreement, as interpreted by the university.")

90. *Id.* at 265; *see also id.* at 263–64 (discussing courts' tendencies to uphold waiver clauses even if they had not been read or understood by the student, in contrast to other contracts).

transgender students whatsoever,<sup>91</sup> which could result in expulsion decisions being left up to the whims of individual college administrators, as there is a wide range of ways to reasonably interpret the absence of a policy.

It is more difficult to make the argument that a college has breached an implied or express contract with a student when the text of the contract is unambiguously in the college's favor; for instance, when the college explicitly states that it only confers degrees upon women.<sup>92</sup> In this case, not only will the college argue that it has not breached its contractual obligations to transgender students by requiring them to withdraw, but the college is likely to have a persuasive counterclaim that the student has breached the contract. The policy's explicit terms make clear that, by beginning the process of transitioning, the trans student has broken the rules. The 2015–2016 version of Converse College's handbook makes its policy clear: "Since Converse College holds students accountable to the established Honor Code, misrepresentation of any application materials or attempts to conceal sex reassignment, is considered to be fraud; thus, the matter will be considered a violation of the honor tradition."<sup>93</sup> It would be nearly impossible for a transgender student to argue there is any way to interpret the contract in his favor when the language is that clear.

Courts may also treat dismissal of transgender students similar to dismissal for misconduct. Colleges can prescribe standards for social misconduct within legal and constitutional limits,<sup>94</sup> but colleges should feel uncomfortable with this line of argument because it requires telling someone that his very existence, including an aspect of his life that he has no control over, is misconduct. Framing transition as the choice of an individual student, as Bennett College's handbook does,<sup>95</sup> rather than recognizing gender identity as an innate characteristic, allows colleges to feel more comfortable treating transition as misconduct. This is problematic because gender identity is not a choice.

In circumstances where a college's policy unambiguously requires dismissal, a transgender student could still have a claim against his col-

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91. See, e.g., Marine, *supra* note 20, at 1172; see also, *supra* note 56.

92. See e.g., Brenner, *supra* note 2; Cummings & Spade, *supra* note 2; Waldman, *supra* note 2; Willis, *supra* note 45, at 5.

93. CONVERSE COLL., STUDENT HANDBOOK 2015–2016 (2015), <http://www.converse.edu/wp-content/uploads/2016/01/2015-2016-converse-college-student-handbook-rev0915.pdf>. For the most recent version of the handbook, which excludes this language, see CONVERSE COLL., *supra* note 51.

94. See KAPLIN & LEE, *supra* note 8, at 571–72.

95. See BENNETT COLL., *supra* note 51.

lege, but he would need to make a persuasive argument that the contract should not be enforced at all. There are two major avenues that a transgender student could use to void any sort of implied contract that would prevent him from coming out while in college. First, the contract could be deemed void as a matter of public policy. Second, the terms of the contract could be considered unconscionable. In either of these cases, which are discussed in more detail below, the transgender student would be permitted to remain at the college until graduation regardless of an explicit statement to the contrary on the college's website.

Alternatively, the student could argue that monetary relief, rather than specific performance, may be appropriate for expulsion cases based on a student's gender identity or perceived transition. Monetary compensation would allow the college to enforce policies that it believes to be appropriate, while recognizing the high cost that enforcement has on transgender students. Monetary relief has been successfully granted in prior expulsion cases. For instance, in *Russell v. Salve Regina College*, a nursing student was unable to complete her nursing degree in four years because she was expelled for failure to comply with a weight loss program, and the institution to which she transferred required her to complete an extra year of studies.<sup>96</sup> The court required the college that expelled her to compensate her for one year of lost wages.<sup>97</sup>

Transgender students may have a similar claim. Colleges have degree requirements that vary tremendously,<sup>98</sup> and students who are forced to transfer may be required to take additional general education or other required classes in order to graduate,<sup>99</sup> which may require more time in school than if the student had been able to remain at his initial college. This extra time has a high marginal cost to students, not only because of high tuition and living costs, but because of the opportunity cost of having to spend an extra semester or year in school rather than being able to earn money working full time.

Additional costs may be accrued due to loss of scholarships, whether need-based or merit-based. In the 2016–2017 school year, only 66 colleges, including seven women's colleges, reported meeting

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96. *Russell v. Salve Regina Coll.* 890 F.2d 484, 486 (1989), *rev'd on other grounds*, 499 U.S. 225 (1991).

97. *Russell*, 890 F.2d at 490.

98. *See What is a Bachelor's Degree?*, GETEDUCATED, <https://www.geteducated.com/career-center/detail/what-is-a-bachelors-degree> (comparing various requirements at different colleges).

99. *Id.*

students' full financial need.<sup>100</sup> That means transgender students from lower income backgrounds face an added disadvantage if they are required to withdraw from college, since there is no guarantee that they will be able to transfer to a college that will continue to meet their financial need at the same level.

### 1. Public Policy Arguments

For a contract to be void as a matter of public policy, “the contract must have a bad tendency or contravene the established interests of society.”<sup>101</sup> Contracts found void as against public policy are unenforceable because “they have no legal sanction and establish no legal bond between the parties.”<sup>102</sup> There are several factors that should be examined to determine whether a contract meets these criteria. Established law that contradicts the terms of the contract is one indication that a contract cannot be enforced.<sup>103</sup> Enforcement of Title IX, as discussed above, may be relevant to public policy arguments here. Additionally, a contract can be voided if the interest in enforcement is clearly “outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>104</sup> This type of balancing test is incredibly fact-specific. Although laws regarding protections of transgender individuals vary by jurisdiction, preventing harm against one of the most marginalized groups of people in society may well be an established interest. To determine whether the contract should be enforced, the actual and anticipated harms to both sides should be examined.

The harms of enforcing exclusionary contracts against transgender students are not hypothetical. One area where this is apparent is in campus mental health services. Transgender students are nearly five times as likely as their peers to report feeling frequently depressed, and 74.6 percent reported a “good chance they would seek counseling” in college.<sup>105</sup> Students who know that coming out of the closet and begin-

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100. Farran Powell, *Colleges that Claim to Meet Full Financial Need*, U.S. NEWS (Sept. 21, 2017, 10:01 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-21/colleges-that-claim-to-meet-full-financial-need>.

101. *Neiman v. Provident Life & Accident Ins. Co.*, 217 F. Supp. 2d 1281, 1286 (S.D. Fla. 2002).

102. *Neiman*, 217 F. Supp. 2d at 1286.

103. 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12:4 (4th ed. 2009).

104. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981)).

105. Ellen Bara Stolzenberg & Bryce Hughes, *The Experiences of Incoming Transgender College Students: New Data on Gender Identity*, 103 ASS'N OF AM. COLL. AND UNIV.

ning the process of transitioning will result in exclusion from their chosen college may be less likely to disclose relevant information to school counselors, who will then be unable to provide them with the support they need.

Mental health support is not limited to school counseling, but extends to the entire college environment. Transgender students are more likely than other students to be the victims of verbal and physical harassment, and students who experience high levels of harassment often suffer academically as well.<sup>106</sup> A study of transgender college students found that

resources, such as gender-neutral restrooms and recreational facilities, knowledgeable faculty and staff . . . student groups for transgender students, a well-funded GLBT [gay, lesbian, bisexual, and transgender] center, and responsive student affairs professionals, are important for transgender students to feel welcomed on campus, as well as for non-trans people to educate themselves about the issues confronting transgender students.<sup>107</sup>

Women's colleges can be very supportive, open environments, and college is a formative time for young adults, often the first time they have lived away from their parents. Dismissing a transgender student may rob him of the only support system that he has at a critical period of his life, not only because of the networks he will have developed while at college, but because parents and family members are not necessarily supportive.

A policy that inherently requires students to remain closeted has other implications. The college is able to exert a huge amount of control over transgender students because of the leverage it has over their future. Controlling students' ability to come out of the closet is especially intrusive, and incompatible with colleges' obligations of good faith and fair dealing, which requires behavior consistent with "common standards of decency, fairness, and reasonableness, and with the parties' agreed-upon common purposes and justified expectations."<sup>108</sup> Voiding a

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(Spring 2017), [https://www.aacu.org/liberaleducation/2017/spring/stolzenberg\\_hughes](https://www.aacu.org/liberaleducation/2017/spring/stolzenberg_hughes).

106. Katherin Kraschel, *Trans-Cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 HARV. J.L. & GENDER 463, 467–68 (2012).

107. Jeffrey S. McKinney, *On the Margins: A Study of the Experiences of Transgender College Students*, 3 J. GAY & LESBIAN ISSUES IN EDUC. 63, 73 (2005).

108. *Id.*



college's policy based on public policy is a way that courts can intervene and try to reduce the leverage colleges have over their students.

## 2. Unconscionability Arguments

A similar but distinct claim expelled transgender students could make is that the contract should be voided due to unconscionability. For a contract to be unconscionable, it must “includ[e] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>109</sup> The Uniform Commercial Code specifically allows courts to refuse enforcement of contracts that were unconscionable at the time they were made.<sup>110</sup> Contracts must be both procedurally and substantively unconscionable to be unenforceable.<sup>111</sup> Procedural unconscionability means that problems arose from the bargaining process and the formation of the contract, suggesting a “lack of a real and voluntary meeting of the minds,” whereas substantive unconscionability refers to “unfairness in the terms of the contract itself.”<sup>112</sup>

There is a very wide knowledge gap and power imbalance between the college and its prospective students. Since colleges create the terms of the contract, the student entirely lacks bargaining power and can simply choose to accept or reject the terms of the contract as outlined by the college. That a contract is one of adhesion is not, itself, sufficient to prove unconscionability,<sup>113</sup> but it is an important element when combined with other factors. The information available to each party is also relevant. For instance, if students do not know of their identity as transgender upon entering into the contract, then they are not able to make a meaningful choice when considering the full implications of an exclusionary policy. Their inability to make a meaningful choice suggests that the contract lacks a meeting of the minds.

Not every transgender person knows of their gender identity from a young age, and many come out later in life. According to a survey of self-identified transgender individuals, 29 percent of individuals first began to question their gender identity between age 16 and 20, 10 percent when they were between 21 and 25, and 8 percent when they were 26

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109. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 488 (D.C. Cir. 1965).

110. 18 A.L.R.3d 1305 (originally published in 1968) citing UCC § 2-302(1).

111. 8 WILLISTON & LORD, *supra* note 103, § 18:10 (4th ed. 2018).

112. *Id.* (quoting *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550 (W. Va. 2012)).

113. *See Buchter, supra* note 9, at 265.

or over.<sup>114</sup> These numbers indicate that a significant number of trans people are not aware of their transgender status when they first enter college, given that most people begin college around age 18. The same survey asked respondents when they first began the process of transitioning, which it defined as beginning to live “full-time in a gender other than that on their original birth certificate.”<sup>115</sup> Forty-three percent of respondents reported they began to transition between the ages of 18 and 24.<sup>116</sup> The majority of college students fall within this age range.<sup>117</sup> While these statistics may not be entirely accurate because of selection bias and a small sample size, they suggest that there is significant procedural unconscionability in the contract. The process can hardly be fair to transgender students when they lack the information necessary to make an informed decision.

Colleges’ transgender policies, when they exist at all, are not necessarily readily available to prospective students.<sup>118</sup> And, given that a large percentage of incoming students who later come out as transgender have not yet begun to question their gender identity, they are unlikely to look for this information. Current students and alumnae have a certain amount of power over college policies, but there is often very little that current students can do to change college policy at the moment they face expulsion.

The substantive unconscionability argument rests on the unfairness of the terms of the contracts themselves, which mandate excluding otherwise qualified students based solely on their gender identity or perceived transition. To prove substantive unconscionability, students would likely make the same claims regarding anti-discrimination laws and Title IX as under a public policy or illegality claim.

In sum, there is a wide range of contractual claims that transgender students can bring against their colleges’ exclusive policies. They could argue that the college violated a state or federal law, or that the contract itself was unconscionable or violated public policy. These claims have varied possibilities of success.

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114. SANY E. JAMES ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 46 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

115. *Id.* at 48.

116. *Id.*

117. *Fast Facts*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372>.

118. *See, e.g.*, CONVERSE COLLEGE, *supra* note 51. While the student handbook is available on the website, it is explicitly intended for current students.

## III. NOT WHAT WE SIGNED UP FOR: THE CIS STUDENT'S CLAIMS

From the perspective of some female students who specifically chose a women's college, either for academic or for personal reasons, a college's decision to allow students to remain after beginning to transition to male can meaningfully alter both the academic environment and the entire concept of what it means to attend a women's college. Like their transgender peers, cisgender female students who attend women's colleges maintain a contractual relationship with the college, and those students may also face harms if these contractual terms are breached. As such, the same analysis as that given to transgender students' claims should be applied to a contractual breach claim made by cisgender students. This Section analyzes the claims that cisgender female students have against women's colleges that confer degrees upon transgender men as well as colleges' defenses to these claims.

Courts have held that certain advertisements made to students, either on college websites or through college brochures, can be considered implied-in-fact contracts, and that colleges can be held to these terms.<sup>119</sup> Oral representations made by college officials can be binding on colleges as well.<sup>120</sup> Emphasizing the benefits of women's education by extolling the inherent value of sisterhood and leadership, both in the conversations that often occur between admissions counselors and prospective students and in literature that is sent to high school girls to encourage them to apply, would certainly meet this criteria. One woman explained her reasoning for attending an all-women's college:

Sisterhood is why I chose to go to Wellesley . . . You come here thinking that every single leadership position will be held by a woman: every member of the student government, every newspaper editor, every head of the Economics Council, every head of the Society of Physics. That's an incredible thing! This is what they advertise to students. But it's no longer true. And if all that is no longer true, the intrinsic value of a women's college no longer holds.<sup>121</sup>

If administrators of women's colleges erase and ignore the presence of trans students who attend their colleges, have leadership roles, and graduate from women's colleges, they are being dishonest not only to

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119. KAPLIN & LEE, *supra* note 8, at 344; *see, e.g.*, Buchter, *supra* note 9, at 258.

120. *See* KAPLIN & LEE, *supra* note 8, at 347–48.

121. *See* Padawer, *supra* note 6.

current students who care about trans visibility and transgender issues on campus, but to all prospective students who are interested in attending a women's college. Colleges have an obligation of good faith and fair dealing inherent to implied contract law.<sup>122</sup> By minimizing or deliberately refusing to acknowledge the presence of transgender men on campus and claiming to be a college exclusively for women, colleges have materially misrepresented important aspects of their campus to female students who wish to attend a college exclusively for women.

In rebuttal, colleges will likely point out the flexibility that courts have afforded them in revising and modifying the terms of implied contracts, consistent with the high level of deference given to them for academic purposes.<sup>123</sup> Information available in college handbooks and on college websites changes often with updated policies and when new information becomes available, and handbooks often explicitly state that they are subject to change at any time.<sup>124</sup> They may further argue that multiple women's colleges have become completely coeducational, even within the past few years.<sup>125</sup> Students at these colleges may well have chosen a women's college for very specific reasons, but changing circumstances required a change in policy.

The economics of higher education often require colleges to make difficult, and sometimes unpopular, decisions. One study estimates that only three percent of female high school seniors even consider applying to an all-women's college,<sup>126</sup> and women's colleges are feeling the effects of their declining popularity. In 2015, Sweet Briar College, a women's college in Virginia, nearly had to close its doors.<sup>127</sup> It was only due to tremendous alumnae support and the outreach efforts of women's colleges across the nation that Sweet Briar was able to remain open.<sup>128</sup> Other colleges want to avoid similar events occurring at their schools.<sup>129</sup>

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122. See Beh, *supra* note 16, at 195–96.

123. See Jallali v. Nova Se. Univ., 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008) (allowing the college to alter its handbook at any time subject to good faith limitations).

124. *Jallai*, 992 So. 2d at 342.

125. Chatham University went coeducational in 2015 and University of Saint Joseph in Hartford, Connecticut, transitioned to be fully coeducational beginning in fall 2018.

126. See Marine, *supra* note 20, at 1166.

127. Susan Svrluga, *Alumnae Vowed to Save Sweet Briar from Closing Last Year. And They Did.*, WASH. POST (Mar. 3, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/03/03/alumnae-vowed-to-save-sweet-briar-from-closing-last-year-and-they-did/?utm\\_term=.041c5296a1cc](https://www.washingtonpost.com/news/grade-point/wp/2016/03/03/alumnae-vowed-to-save-sweet-briar-from-closing-last-year-and-they-did/?utm_term=.041c5296a1cc).

128. *Id.*

129. Bennett College, a historically black women's college, is struggling to stay afloat as well. See Zipporah Osei, *For Alumnae, the Fight to Keep Bennett College Open Is a Fight for Black Academe*, CHRONICLE OF HIGHER EDUC.,

Opening their doors to double the potential applicants may prevent colleges from being forced to close entirely.

There is, however, a significant difference between altering terms of an agreement and simply breaching the initial agreement. Changing the terms of an agreement because of unanticipated circumstances is not a breach of good faith and fair dealing, as it does not result from dishonesty during the formation process. Misrepresenting the current conditions of the college to prospective students, on the other hand, does.

When a cisgender student, relying upon false information that was provided to her by the college, enters into an agreement to her detriment, she may meet the legal requirements for promissory estoppel, even lacking a formal contract. The concept of promissory estoppel can be explained thus: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”<sup>130</sup> For the student to prevail against the college, she must prove both that she has been induced to take action based on a promise that the college has made and that lack of enforcement is in some way unjust. The first element is relatively easy to satisfy, as the student can most likely argue that she was induced to apply to college based on the promise that it existed exclusively for the education of women, and that single-sex colleges confer unique benefits on their students. To claim that lack of enforcement of the college’s promise is unjust, the cisgender student must be able to prove that she is harmed in some way by her reliance on this promise.

Cisgender female students likely have a stake in material aspects of the women’s college experience in addition to the notion of sisterhood cited by the frustrated Wellesley student. Women’s colleges tout their longstanding traditions and robust alumnae networks, but students at women’s colleges also benefit from a unique academic environment, where their voices are more likely to be amplified than in traditional co-educational classrooms. They may also have concerns about the effects of transgender students on programs such as housing.

One area that cisgender female students may claim harm is by the presence of male-identified transgender students in the classroom. To prove this, they must be able to show that the educational experience has been meaningfully altered. In *United States v. Virginia*, the court de-

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<https://www.chronicle.com/article/For-Alumnae-the-Fight-to-Keep/245488/?fbclid=IwAR2nHIvyohnLrfd-85eEG2Kc0KzVN8JqlDnIq73GtMLjZpQiLjwrNjKpLLY#.XECqOGSCoWE>.

130. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).

terminated that, “‘with recruitment,’ VMI could ‘achieve at least 10 percent female enrollment’—a sufficient ‘critical mass’ to provide the female cadets with a positive educational experience.”<sup>131</sup> Presumably, this meant that if fewer than 10 percent students at VMI were female, the environment would still be viewed as entirely male-dominated, and the small number of female students would not make the university meaningfully coeducational. The scientific basis for the 10 percent threshold is unclear, but the idea that there is a tipping point that fundamentally changes the nature of a single-sex institution seems plausible.

Assuming, *arguendo*, that a critical mass of men is required to materially alter the women’s college environment, the presence of a small number of transgender men will not achieve this tipping point. The exact number of transgender men currently attending women’s colleges is unknown, as most individual colleges do not collect this data and there has been no national attempt to gather this information. According to one study conducted at Mills College, however, only three to five out of every 1,000 enrolled students identify either as transgender or as something other than the gender they were assigned at birth.<sup>132</sup> If the numbers are anywhere close to this at other colleges, it comes nowhere near the tipping point recognized in *Virginia*.

Additionally, a significant number of women’s colleges already allow men to take classes there as part of exchanges or consortia.<sup>133</sup> This factual distinction is part of why the university’s argument failed in *Hogan*, where men at the Mississippi University for Women were permitted to audit nursing classes but were not allowed to receive degrees, which undermined the university’s claim that the women in the nursing school were “adversely affected by the presence of men.”<sup>134</sup> A classroom need not be necessarily be made up of 100 percent women to gain the benefits of women’s colleges. Some studies have found that even having a classroom of “mainly” women “result[s] in those students participating more actively in the classroom, and reporting higher levels

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131. *United States v. Virginia*, 518 U.S. 515, 523 (1996) (quoting *United States v. Virginia* 766 F. Supp. 1407, 1437–38 (W.D. Va. 1991)).

132. See James Nichols, *Mills College Changes Policy to Allow Transgender Students to Enroll*, HUFFINGTON POST (Aug. 25, 2014, 3:30 PM), [https://www.huffingtonpost.com/2014/08/25/mills-college-transgender-students\\_n\\_5710441.html](https://www.huffingtonpost.com/2014/08/25/mills-college-transgender-students_n_5710441.html).

133. For instance, the five-college consortium includes both Smith and Mount Holyoke Colleges as well as three coeducational universities; Barnard and Columbia have a closely-knit partnership; Scripps is part of the Claremont consortium. Alternatively, Bennett College, Converse College, and Hollins University neither participate in exchange programs or consortia nor allow transgender men to remain enrolled. These examples are not exhaustive.

134. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982).

of active learning, higher order thinking, and more academic challenge throughout their four years than women in coeducational settings report.”<sup>135</sup> The benefits of single-sex education to young women are numerous and well-documented.<sup>136</sup> Logically, the removal of these benefits can cause harm, but there does not seem to be a clear line where these benefits cease to exist. For this reason, harm would be difficult for a cisgender student to prove.

A more practical concern is that of housing. Women’s colleges are specifically designed to house only one gender, and traditional dorm set-ups include shared hallway bathrooms, which are also traditionally segregated by sex. One transgender man at Bryn Mawr admitted that his presence in the dorm hallways after he began using masculine pronouns and taking hormones made other students uncomfortable.<sup>137</sup> A student at Wellesley similarly noted that he stood out significantly on campus:

When he swiped his Wellesley ID card to get into friends’ dorms, the groundskeepers would stop him and say, “You can’t go in there without a woman to escort you.” Residential directors who spotted him in the dorm stairwells told him the same thing . . . . When he tried to explain he *was* a Wellesley student, people sometimes thought he was lying.<sup>138</sup>

Cis female students may feel uncomfortable sharing spaces with students who identify as male, and transgender men similarly feel uncomfortable being treated as though they do not belong in their living spaces and on campus. Discomfort surrounding the presence of transgender men also makes roommate assignments more difficult. It is ostracizing to tell transgender students they need to live in single dorm rooms when this is not required of other students, but it is also problematic to tell cisgender women that they are required to share their dorm rooms, which are by nature very intimate shared spaces with little privacy, with transgender men, when they would never be required to do so with cisgender men.

In *Hack v. the Presidents and Fellows of Yale College*, Orthodox Jewish students sued Yale College for requiring unmarried freshman and sophomore students to live in coeducational student housing, which they claimed was a violation of their sincerely-held religious beliefs.<sup>139</sup>

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135. Wofford, *supra* note 42.

136. *Id.*

137. Brymer, *supra* note 3, at 155.

138. Padawer, *supra* note 6, at 38.

139. *Hack v. President of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000).

Although the plaintiffs lost in this case, it was only because Yale was deemed not to be a state actor.<sup>140</sup> A student at a women's college with a similar claim may be able to make a different argument, such as the promissory estoppel argument outlined above, if she relied on the existence of single-sex housing at a women's college, whereas the plaintiffs in *Yale* had no such expectation at a coeducational institution. The harm in both cases may be the same, since women with similar sincerely-held religious beliefs that require sex segregation may choose to attend women's colleges.

In colleges where living on campus is not mandatory and off-campus housing is readily available, the harm to students is likely to be minimal. Cisgender women are easily able to move elsewhere if they are uncomfortable with the concept of living with transgender men, and transgender men who are uncomfortable with the way they are perceived by their fellow students are similarly able to move somewhere that may better accommodate their individual needs. A significant number of women's colleges that allow transgender men to remain enrolled require their students to live in on-campus housing for all or part of their time as students.<sup>141</sup> A policy that limits students' ability to move off-campus and also allows transgender men to remain enrolled forces students into a coeducational housing environment. Many students, both cis and trans, may be uncomfortable in such an environment. Depending on whether a court determines that a female student is harmed by these policies, she may be able to succeed on a promissory estoppel claim.

The idea that women's colleges have unique cultures and environments may seem insignificant, but this idea merits discussion because it is often an important factor for the women who choose to attend these colleges. Transgender students often feel hostility toward language used by their colleges that excludes them as members of their communities.<sup>142</sup> Female students at women's colleges that explicitly allow transgender men to graduate feel unable to talk about the uniqueness of their experience attending a women's college for fear of alienating their transgender classmates.<sup>143</sup> There is incredible pressure for them to deemphasize the women's college experience in favor of more inclusive language.<sup>144</sup>

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140. *Hack*, 237 F.3d at 90–91.

141. These include Agnes Scott, Brenau, Bryn Mawr, Cedar Crest, College of St. Benedict, College of St. Mary, Columbia College, Judson, Mount Holyoke, St. Mary's College, Salem, Scripps, and Smith.

142. Padawer, *supra* note 6, at 39.

143. *Id.* at 37.

144. *Id.*



Transgender alumni may feel disconnected from their alma maters because of their identity as women's colleges. One transgender Bryn Mawr graduate wished to distance himself from Bryn Mawr because he wanted to live "normally" without having to explain his gender identity.<sup>145</sup> Although he chose to remain at Bryn Mawr rather than transferring to another college, he found it difficult to "come to terms" with his status as a graduate of a women's college.<sup>146</sup> A trans student may feel uncomfortable with his degree from a women's college because it outs him as transgender in perpetuity. Job applicants almost always include educational background on their resumes, and there is no way for a transgender man to list his degree from a women's college in a job application without opening himself up to the possibility of awkward questions or harassment.

Similarly, women's colleges try to distance themselves from their transgender graduates because they wish to maintain their image as a women's college.<sup>147</sup> Expelling transgender students would not prevent the same problems from occurring when graduates come out as trans men after graduation. It would, however, maintain the campus culture for current students.

Cisgender students and alumnae may not necessarily be materially harmed by these tensions, but the college's reputation may be damaged by accommodating and granting degrees to people who might become openly hostile toward their stated mission and purpose and have no desire to be affiliated with it after graduation. For transgender men to truly be accommodated, they must be accepted as members of the community for who they are, and not as "interchangeably female."<sup>148</sup> Women's colleges are designed specifically for women. For this reason, they may not be the best places for transgender men to begin the transition process. Many women's colleges, regardless of whether they explicitly require transgender students to transfer, have policies that state that they will assist students in the process of transferring to another school.<sup>149</sup> Helping students transfer also seems to be a major conflict of interest for a college that cares about its reputation. Colleges' rankings often include factors such as four-year graduation rates, so students transferring out at

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145. Brymer, *supra* note 3, at 155.

146. *Id.*

147. *Id.*

148. See Marine, *supra* note 20, at 1175.

149. For example, Hollins University, Alverno College, and Wesleyan College allow students to graduate after beginning the transition process, but still say they will assist with the transfer process.

high rates may damage the college as well as its alumnae and the students that remain.<sup>150</sup>

The remedies available to cisgender students are also unclear, because much of their claimed harm does not seem readily monetizable. When a student is expelled, as is the case for transgender students at some women's colleges, tuition differences and opportunity costs of being required to transfer are relatively easy to calculate. Losing the unique aspects of being educated at a women's college, on the other hand, cannot be easily measured. There is not sufficient data comparing trans-inclusive women's colleges with trans-exclusive women's colleges, nor would such a comparison be helpful given the large number of independent variables. It is also not clear what exactly cisgender female students want from the schools. A remedy of specific performance would require immediate expulsion of all transgender students. Such a remedy seems not only drastic, but incredibly unlikely.

The main areas where harm to cisgender students has been shown are most likely remediable with a less drastic solution. Students should either be permitted to live off campus or in single-person dorm rooms, or a policy should be enacted that allows students more freedom in choosing their roommates. Information about the college's transgender policy and the presence of transgender students should be available and accessible, and administrators should avoid misleading prospective students about the existence of trans students. These solutions would address the cisgender student's claims without unduly burdening an incredibly vulnerable population.

#### CONCLUSION

The interests of a women's college to remain single-sex inherently conflict with the interests of transgender students who attend these colleges. Cisgender students who feel strongly about attending a women's college may have competing interests as well. A solution that fully satisfies all parties involved does not appear to exist, and all parties are harmed to a certain extent regardless of the college's policy, or lack thereof. Weighing these harms against each other and evaluating them through the lens of existing contract law is not an easy task. We should not discount the frustration that cisgender female students feel when,

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150. See, e.g., Robert Morse et al., *How U.S. News Calculated the 2019 Best Colleges Rankings*, U.S. NEWS & WORLD REP. (Sept. 9 2018, 9:00 PM), <https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings>.

after living in a patriarchal society for their entire lives and entering an environment that they have been told is solely for women, they are once again pushed to the side to accommodate men.

With that said, the small number of transgender students who attend women's colleges is unlikely to create a tipping point that materially alters the stated purposes and goals of women's colleges. Colleges can maintain their focus on women and retain their unique traditions without a blanket exclusionary policy toward transgender students, and many women's colleges have successfully embraced the presence of transgender students on campus without becoming fully coeducational or sacrificing their reputation as a women's college. Colleges can also encourage transgender students to evaluate whether their own goals align with those of the college, which is easier to do when students feel able to be open and transparent about their gender identity with college administrators without fear of dismissal.

Women's colleges today face a strange reality. They must balance their public reputation as women's colleges against internal conflict between students, while attempting to remain relevant in the 21<sup>st</sup> century. Their duties to cisgender alumnae who have the potential to donate substantial amounts of money to the college, current students, and prospective students often conflict. Furthermore, they struggle to create a supportive and inclusive environment for all students while remaining true to their purpose as colleges designed solely for women. Colleges also need to understand the consequences of their choices; the reality is that transgender men will not cease to exist no matter how strictly their presence is policed. Colleges may be able to better balance their obligations if they understand the possible contractual claims against them and the outcomes of these claims.

Unlike the possible harms facing women's colleges and cisgender female students at women's colleges from the presence of transgender men on campus, the harms that transgender students face when they are required to withdraw from college are tangible, measurable, and monetary. For this reason, their claim comes out stronger in the balancing test. Colleges should not require transgender students to transfer as soon as they come out as transgender or soon thereafter, nor should they be required to meaningfully alter their purpose or mission to deemphasize the education of women. §