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Embracing Out Values: Title IX, the "Single-Sex Exemption," and Fraternities' Inclusion of Transgender Members

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NOTE

EMBRACING OUR VALUES: TITLE IX, THE “SINGLE-SEX EXEMPTION,” AND FRATERNITIES’ INCLUSION OF TRANSGENDER MEMBERS

I. INTRODUCTION

Eileen graduated from the University of Pennsylvania in the 1950s.¹ She rushed “the most popular fraternity on campus” and “graduated President of her . . . chapter.”² After graduation, Eileen transitioned³ and has been living as a woman for over forty years.⁴ She owes her successful transition and her ability to search for the necessary support to the skills she learned as a brother, stating, “When life got tough, it was the lessons I learned from my brothers that kept me strong, focused, and ultimately able to be successful.”⁵

Eileen continues to stay in close contact with her fraternity’s national office and supports her brothers in any way she can, including making regular financial contributions, writing articles, and serving as an online resource.⁶ Unfortunately, Eileen does not use her name in fraternity communications.⁷ She is also no longer comfortable supporting her brothers in person.⁸ She has to “keep a safe distance”

1. SARAH FIELDING & JESSICA PETTITT, LAMBDA 10 PROJECT, “BEGINNING THE CONVERSATION...”: FRATERNITY & SORORITY TRANSGENDER RESOURCE GUIDE 30 (2008) [hereinafter FIELDING & PETTITT], available at http://www.iamsocialjustice.com/images/transgreek_L10TransGuide.pdf.

2. *Id.*

3. Transitioning is an individualized process by which a person alleviates the distress between his or her brain sex and physical sex. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 26 (2011); see also *infra* Part II (discussing the transgender identity).

4. Jessica Pettitt, *Brotherhood and Sisterhood Reconsidered: Transgender Resource Guide and Inclusion*, ESSENTIALS (Ass’n of Fraternity/Sorority Advisors, Fort Collin, Colo.), May 2009, at 1, 1, available at http://www.afa1976.org/Portals/0/documents/Essentials/Pettitt_TransGuide%20Essentials_Final.pdf.

5. FIELDING & PETTITT, *supra* note 1, at 30; Pettitt, *supra* note 4, at 1.

6. FIELDING & PETTITT, *supra* note 1, at 30; Pettitt, *supra* note 4, at 1.

7. FIELDING & PETTITT, *supra* note 1, at 30.

8. *Id.*

because losing her brothers and her sense of belonging to her fraternity would be devastating.⁹

Her transition, however, is not the only thing that Eileen has kept from her fraternity.¹⁰ Eileen has her estate—the entirety of which she is bequeathing to her fraternity—listed in her former, pre-transition name.¹¹ It is only a matter of time before her fraternity will receive a multi-million dollar endowment from a woman who is a brother.¹² When that time comes, how will the fraternity treat Eileen, a woman who has dedicated so much of herself to her brothers?

Today, college campuses are very different than when Eileen was a student. Colleges across the country are becoming increasingly transgender-inclusive.¹³ Fraternities, however, along with collegiate athletics, have remained the two areas on college campuses largely inaccessible to transgender students.¹⁴ That reality is starting to change. Recently, the National Collegiate Athletic Association (the “NCAA”) acknowledged that the majority of intercollegiate athletic programs lack a policy governing the inclusion of transgender student-athletes.¹⁵ Although transgender issues remain controversial, the NCAA recognized “that the time ha[d] come to examine this issue.”¹⁶ As a result, in August 2011, the NCAA enacted a nationwide policy to ensure opportunities for transgender students to participate in athletic competitions in accordance with their gender identity.¹⁷

9. *Id.*

10. See Telephone Interview with Jessica Pettitt, Soc. Justice & Diversity Consultant & Facilitator (Jan. 4, 2012) [hereinafter Pettitt Telephone].

11. *Id.*

12. *Id.*

13. See PAT GRIFFIN & HELEN CARROLL, NAT’L COLLEGIATE ATHLETIC ASS’N OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 5, 28 app. c (2011) [hereinafter GRIFFIN & CARROLL, NCAA INCLUSION] (compiling state and federal laws and regulations).

14. See FIELDING & PETTITT, *supra* note 1, at 8 (noting the “glaring omission” of transgender inclusion from the discussion within athletics and fraternities).

15. GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 13, at 4. Most programs are not even educated on how to address the basic accommodations for transgender students, including the use of correct names and pronouns, as well as locker rooms, bathrooms, and showers. *Id.*

16. Allie Grasgreen, *Inclusive Athletics*, INSIDE HIGHER ED (Sept. 16, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/09/16/ncaa_clarifies_policies_on_transgender_student_athletes (quoting Helen Carroll, director of the National Center for Lesbian Rights Sports Project, who worked closely with the NCAA to develop its transgender-inclusive membership policy). Carroll explained that “[t]he NCAA ha[d] been looking at transgender athletes—the issues, the situations—for a number of years.” *Id.* However, “[t]here just was not pullback. There was an acknowledgement that the time ha[d] come to examine this issue.” *Id.*

17. Marta Lawrence, *Transgender Policy Approved*, NAT’L COLLEGIATE ATHLETIC ASS’N (Sept. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved>. In November 2010, the issue of transgender

The NCAA wanted to do "the right thing," consistent with the core values of equal opportunity and inclusion.¹⁸ Schools have realized the value of including student-athletes of color, with disabilities, who are women, and who identify as lesbian, gay, and bisexual.¹⁹ As a result, the NCAA acknowledged that fairness and equal access "demand the expansion of our thinking about equal opportunity in sports" to recognize the right of transgender students to participate.²⁰ The NCAA also sought to be consistent with a growing number of states, localities, and schools that are including "gender identity and expression" in their nondiscrimination policies, especially as more courts hold that nondiscrimination laws protect transgender people.²¹

This monumental NCAA policy leaves fraternities²² as the "last frontier" for transgender inclusion on college campuses.²³ With an undergraduate membership of well over 653,500 students,²⁴ fraternities

student-athletes finally "came to the forefront" because Kye Allums, a George Washington University Division I basketball player, publicly announced that he is a transgender man. Grasgreen, *supra* note 16. In December 2010, the NCAA proposed to offer guidance on transgender student-athletes, which ultimately culminated in the adoption of its 2011 policy. *Id.* "There was pretty much unanimous endorsement." *Id.* (quoting Mary Wilfert, NCAA Associate Director in Health and Safety).

18. GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 13, at 5.

19. *Id.*

20. *See id.*

21. *Id.*; see sources cited *infra* note 112 (compiling statutes from sixteen states and the District of Columbia that prohibit discrimination on the basis of "gender identity and expression").

22. "Fraternity" is an inclusive term encompassing both fraternities and sororities. See Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?*, 18 J.C. & U.L. 419, 421 n.1 (1992). Women's organizations use the words "fraternity" and "sorority" interchangeably. See BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES, at 1-12 (Jack L. Anson & Robert F. Marchesani, Jr. eds., 20th ed. 1991) [hereinafter BAIRD'S MANUAL]. The original Greek women's organizations were officially known as fraternities. *Id.*

23. See FIELDING & PETTITT, *supra* note 1, at 8.

24. This number includes only the National APIA Panhellenic Association ("NAPA"), the North-American Interfraternity Conference (the "NIC"), and the National Panhellenic Conference (the "NPC"). NAPA, founded in 2006, represents twelve fraternal organizations and includes approximately 3,500 undergraduate members. See E-mail from Brain Gee, Exec. Chair, Nat'l APIA Panhellenic Assoc., to author (Feb. 4, 2013, 1:59 EST) (on file with *Hofstra Law Review*); *Members*, NAT'L APIA PANHELLENIC ASS'N, http://www.napa-online.org/index.php?option=com_content&view=article&id=47&Itemid=53 (last visited Mar. 29, 2013); *NAPA History*, NAT'L APIA PANHELLENIC ASS'N, http://www.napa-online.org/index.php?option=com_content&view=article&id=49&Itemid=56 (last visited Mar. 29, 2013). The NIC, founded in 1909, represents seventy-five international and national men's fraternities and includes approximately 350,000 undergraduate members across the United States and Canada. *About the North-American Interfraternity Conference*, N.-AM. INTERFRATERNITY CONF., <http://www.nicindy.org/about/> (last visited Mar. 29, 2013). The NPC, founded in 1902, represents twenty-six member international and national women's fraternities and includes over 300,000 undergraduate members. See NAT'L PANHELLENIC CONFERENCE, *THE VOICE FOR SORORITY ADVANCEMENT: 2011-2012 ANNUAL REPORT* 4-5 (2012), available at <https://www.npcwomen.org/resources/pdf/2012%20Annual%20Report.pdf>. Undergraduate numbers were not available for the National Association of Latino

significantly outnumber the approximately 400,000 student-athletes associated with the NCAA.²⁵ Based on membership size alone, fraternities will inevitably encounter transgender members and the resulting challenges of inclusion more often than the NCAA.²⁶ The recent discussions within the NCAA on transgender inclusion, therefore, should reasonably suggest that fraternities are having similar conversations on an identical—if not greater—national scale.²⁷ Unfortunately, those conversations are not happening, and few resources on transgender fraternity members exist.²⁸ Therefore, in light of the NCAA's express inclusion of transgender students, how should fraternities respond to this issue?

The purpose of this Note is to contribute to a conversation that began in 2008²⁹ and to provide information to support fraternities with their decision to discuss the issue of transgender inclusion. This Note will demonstrate that the law does not prohibit fraternities from deciding where they stand on the issue of transgender membership. Rather, a strong legal foundation exists that empowers them to decide. Part II of this Note examines the complex issues surrounding the transgender identity and the resulting struggle to fall within an inconsistent web of federal, state, and local legal definitions of "sex" and "gender." Part III then sets forth the historical background of fraternities and the centuries-old right of fraternities to define membership requirements. Part IV dispels the foggy legal arguments used by fraternities to deny membership to transgender students because of perceived threats to their legal existence as single-sex organizations and identifies examples of

Fraternal Organizations, Inc.; the National Multicultural Greek Council; or the National Pan-Hellenic Council, Inc. *See, e.g.*, E-mail from Christianne I. Medrano, President, Nat'l Multicultural Greek Council, to author (Oct. 13, 2011, 7:31 EST) (on file with *Hofstra Law Review*) ("However, at this time the [National Multicultural Greek Council] does not collect this type of data from its members . . .").

25. *Who We Are*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are+landing+page> (last visited Mar. 29, 2013).

26. *See infra* text accompanying notes 46-51 (noting the statistics on the prevalence of transsexual people); *see also* David L. Westol, *Gender Then and Gender Now: What Happens if, FRATERNAL L.* (Manley Burke, Cincinnati, Ohio), Jan. 2009, at 4, 4, available at <http://www.manleyburke.com/wp-content/themes/manleyburke/inc/107---January-2009.pdf> ("[M]ost chief executive officers and executive directors of men's national fraternities have encountered the situation in which an alumnus has written a letter to the headquarters to announce that he has undergone a gender change and is now legally recognized as a woman.").

27. *See* Grasgreen, *supra* note 16; *supra* text accompanying notes 24-25.

28. *See* FIELDING & PETTITT, *supra* note 1, at 8 ("Greek life is the last frontier for the conversation to take hold."); Westol, *supra* note 26, at 4 ("It is not a topic that is often discussed at conferences or interfraternal gatherings.").

29. *See* FIELDING & PETTITT, *supra* note 1.

organizations that have already adopted inclusive policies. Finally, Part V proposes a solution to transgender membership that comports with current federal, state, and local laws—guided by the purposes and creeds of fraternities.

II. A DICHOTOMY IN DENIAL: "MAN," "WOMAN," AND THE TRANSGENDER EXPERIENCE

Although the transgender identity is complex, recognition of transgender people and their experiences is growing. Evidence from recent studies suggests that this identity is not merely a societal label. Rather, it may have a biological basis. However, the law—federal, state, and local—has not been as successful in its understanding of transgender people. As a result, transgender people must navigate through a minefield to seek protection and recognition under the law.

"Transgender" is a broad, umbrella term that is often used for individuals whose brain sex, gender identity, or gender expression either does not or is perceived not to match the physical sex they were assigned at birth.³⁰ "Brain sex" or "gender identity" is an intrinsic, internal sense of one's physical sex—the sex of a person's brain.³¹ Transgender people

30. See Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 399 n.1 (2012); see also FIELDING & PETTITT, *supra* note 1, at 12 ("An 'umbrella' term for someone whose self-identification, anatomy, appearance, manner, expression, behavior, and/or other's perceptions of challenges traditional societal expectations of congruent gender expression and designated birth sex."); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581, 597, 616 (2009) (criticizing current understandings of "sex" and "gender" and use of both terms by courts). Although challenging its definition may prove helpful in the long run, this Note seeks to honor the preference of transgender advocates that "transgender" be given a broad meaning as an "umbrella" term. See Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 652 n.8 (2009). The transgender person's experience may overlap with that of an intersex person. See AM. PSYCHIATRIC ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT INDIVIDUALS WITH INTERSEX CONDITIONS 3 (2006), available at <http://www.apa.org/topics/sexuality/intersex.pdf>. Intersex is a condition where people are born with "abnormalities of the external genitalia, internal reproductive organs, sex chromosomes, or sex-related hormones." *Id.* at 1. About one in 1500 babies are born with genitals that are not easily classified as male or female. *Id.* The two identities, however, contrast in significant ways. See *What's the Difference Between Being Transgender or Transsexual and Having an Intersex Condition?*, INTERSEX SOC'Y N. AM., <http://www.isna.org/faq/transgender> (last visited Mar. 29, 2013). For this reason, intersex people are beyond the scope of this Note.

31. See Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 829 (2005) (discussing multiple scientific studies, one of which concluded that "brain sex may not comport with genital sex due to neurobiological factors that exist during development"); Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J.L. & MED. 625, 629-30 (2007) ("It is difficult to imagine any sexually differentiated organ more important to sexual identity than the brain.").

are acutely aware of their brain sex because of the mismatch between their brain sex and their body.³² Gender is distinct from both an individual's brain sex and physical sex and refers to the socially determined characteristics generally attributed to a particular sex.³³ "Gender expression" describes an individual's "external characteristics and behaviors that are socially defined as either masculine or feminine," including dress, mannerisms, hairstyles, voice, speech patterns, and social interactions.³⁴

Transgender people commonly experience the mismatch between their brain sex and physical sex as a feeling that they should be the other sex or that something is wrong with the physical sex into which they were born.³⁵ This mismatch may—but does not always—develop into "gender dysphoria," which is a "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth"³⁶ Some people experience gender dysphoria to such an extent that they seek treatment to alleviate the distress—a

32. See Gurney, *supra* note 31, at 629-30.

33. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 274 (1999).

34. AM. PSYCHIATRIC ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2011) [hereinafter AM. PSYCHIATRIC ASS'N, ANSWERS], available at <http://www.apa.org/topics/sexuality/transgender.pdf>; PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3 (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>.

35. See AM. PSYCHIATRIC ASS'N, ANSWERS, *supra* note 34, at 2.

36. Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7, 13 INT'L J. TRANSGENDERISM 165, 168 (2011). Until 2012, the American Psychiatric Association diagnosed transgender people with "gender identity disorder." See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: TEXT REVISION 576-82 (4th ed. 2000). On December 1, 2012, the American Psychiatric Association approved the fifth edition of the *Diagnostic and Statistic Manual of Mental Disorders*, which replaced "gender identity disorder" with "gender dysphoria." Press Release, Am. Psychiatric Ass'n, American Psychiatric Association Board of Trustees Approves DSM-5 (Dec. 1, 2012), <http://www.psych.org/File%20Library/Advocacy%20and%20Newsroom/Press%20Releases/2012%20Releases/12-43-DSM-5-BOT-Vote-News-Release--FINAL--3-.pdf>; Dani Heffernan, *The APA Removes "Gender Identity Disorder" from Updated Mental Health Guide*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION (Dec. 3, 2012, 11:38 AM), <http://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide>.

process commonly known as "transitioning."³⁷ Transitioning does not consist of only one procedure.³⁸ Rather, it is a process that is individual to each person: "What helps one person alleviate gender dysphoria might be very different from what helps another person."³⁹ Some examples of treatment that transgender people may seek are to legally change their name, correct the sex designation on legal documents, develop a gender expression that aligns with their gender identity, begin hormone therapy, start psychotherapy, or undergo surgery.⁴⁰

In certain circumstances, surgery can be essential and medically necessary to alleviate the distress associated with a transgender person's body incongruity.⁴¹ Transgender people often experience beneficial effects after undergoing surgical procedures, especially in their subjective well-being.⁴² Surgery includes a wide range of individual procedures.⁴³ Most insurance policies, however, do not cover transition-related care, meaning that transgender people must pay for almost all surgery on their own.⁴⁴ Moreover, barriers to healthcare are not limited to the substantial financial costs. Transgender people face discrimination, widespread provider ignorance, disrespect, harassment, violence, and outright denial of services when trying to access

37. See AM. PSYCHIATRIC ASS'N, ANSWERS, *supra* note 34, at 3; GRANT ET AL., *supra* note 3, at 26; Coleman et al., *supra* note 36, at 168. A diagnosis of gender dysphoria "is not a license for stigmatization or for the deprivation of civil and human rights." *Id.* Gender dysphoria is diagnosable and often facilitates access to healthcare, which can guide additional research into effective treatments. *Id.* at 169.

38. See GRANT ET AL., *supra* note 3, at 77-79; Coleman et al., *supra* note 36, at 168.

39. Coleman et al., *supra* note 36, at 168.

40. See AM. PSYCHIATRIC ASS'N, ANSWERS, *supra* note 34, at 3; Coleman et al., *supra* note 36, at 170-72.

41. Coleman et al., *supra* note 36, at 199.

42. *Id.* at 199, 229 app. D (collecting studies measuring outcomes of transition-related surgeries and noting that "[t]he vast majority of follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery").

43. See GRANT ET AL., *supra* note 3, at 79 (listing breast augmentation, orchiectomy, vaginoplasty, facial feminization surgery for male-to-female ("MtF") transgender people; and chest reconstruction, hysterectomy, metoidioplasty, and other genital surgeries for female-to-male ("FtM") transgender people).

44. *Id.* at 26, 77 ("The *desire* to medically transition and the *ability to afford* to do so are entirely different and should not be conflated or confused."); see also Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 782-88 (2008) (discussing the difficulty in obtaining insurance coverage).

preventive, routine, emergency, and transition-related care.⁴⁵ Surgery, therefore, is not always an option for transgender people.

Efforts to estimate the incidence and prevalence of transgender and gender-nonconforming identities “are fraught with enormous difficulties.”⁴⁶ As a result, studies have focused on transsexual⁴⁷ people—“the most easily counted subgroup of gender-nonconforming individuals”—because they seek transition-related care from clinics.⁴⁸ Studies suggest that the prevalence of male-to-female (“MtF”) transsexual people ranges from one in 11,900 to one in 45,000 and that the prevalence of female-to-male (“FtM”) transsexual people ranges from one in 30,400 to one in 200,000.⁴⁹ More recent reports from Thailand, the United Kingdom, and the United States, however, suggest that the prevalence of transsexual people may be as high as one in 500.⁵⁰

45. GRANT ET AL., *supra* note 3, at 26; see JAIME M. GRANT ET AL., NATIONAL TRANSGENDER DISCRIMINATION SURVEY REPORT ON HEALTH AND HEALTH CARE (2010), available at http://ngltf.org/downloads/reports/reports/ntds_report_on_health.pdf (“Respondents in our study reported significant barriers to health care and outrageous frequencies of anti-transgender bias in care, from disrespect to refusal of care, from verbal harassment to physical and sexual abuse.”); see also Elanie J. Cintron, Note, *Transformation: The Progression of Immigration Petitions for Transgender Spouses*, 50 FAM. CT. REV. 666, 670-71 (2012) (discussing in-depth the difficulties in accessing transition-related healthcare, including discrimination and denial of care, financial costs, uneducated healthcare providers, serious health risks and complications after surgery, and limited access to proper care—with approximately “a dozen surgeons in the United States who are competent to perform sex reassignment surgery”); Laura Rena Murray, *The High Price of Looking Like a Woman*, N.Y. TIMES, Aug. 21, 2011, at MB1 (discussing “pumping”—an underground practice involving silicone injections that desperate transgender people seek because they cannot afford gender reassignment surgery—and its tragic consequences).

46. Coleman et al., *supra* note 36, at 169; see also Sam Winter & Lynn Conway, *How Many Trans* People Are There? A 2011 Update Incorporating New Data*, U. HONG KONG, <http://web.hku.hk/~sjwinter/TransgenderASIA/paper-how-many-trans-people-are-there.htm> (last visited Mar. 29, 2013) (noting the difficulties in counting such “a broad spectrum of identity and expression”).

47. The term “transsexual” is narrower than “transgender” and is defined as “a person who desires to alter bodily sex characteristics through hormone treatment or sex reassignment surgery.” Tran & Glazer, *supra* note 30, at 400 n.1 (quoting Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1152 (2010)). “Transsexual” may be further narrowed with the requirement of self-identification. See Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 2 (2003) (defining transsexual people as those “who identify as such and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status” (emphasis added)).

48. Coleman et al., *supra* note 36, at 169.

49. *Id.* (concluding from ten studies spanning thirty-nine years and eight countries).

50. See Femke Olyslager & Lynn Conway, *On the Calculation of the Prevalence of Transsexualism* 23 (Sept. 6, 2007) (unpublished manuscript), available at <http://ai.eecs.umich.edu/people/conway/TS/Prevalence/Reports/Prevalence%20of%20Transsexualism.pdf>. Lynn Conway notes that this number is merely a “lower bound”—a lower limit for transsexual prevalence; “the actual numbers in various cultures could be (and often are) much larger.” *Id.*; E-Mail from Lynn Conway to author (Jan. 9, 2013, 8:19 EST) (on file with Hofstra Law Review).

Because transsexual people are only one subgroup under the transgender "umbrella," the prevalence of transgender people may be substantially higher—at least one in 100.⁵¹ Despite the difficulty in ascertaining an accurate estimate of the transgender population, prominent national medical organizations have recognized and affirmed the transgender identity.⁵²

A. *Beyond the Labels: Evidence of the Transgender Identity*

The American Medical Association, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers all recognize and affirm the experience of transgender people.⁵³ Each organization has established guidelines and policies that promote inclusive approaches to healthcare.⁵⁴ Moreover, recent scientific studies reveal that the transgender identity may extend beyond societal constructs and definitions.⁵⁵

In two separate studies, Spanish scientists examined brain matter patterns of MtF and FtM transsexual people before they began hormone treatments to determine whether these patterns were more similar to those of their biological sex or to those of their brain sex.⁵⁶ They

51. Olyslager & Conway, *supra* note 50, at 23.

52. See *infra* text accompanying note 53-54.

53. See AM. MED. ASS'N, PROCEEDINGS OF THE AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES: 157TH ANNUAL MEETING, JUNE 14-17, 2008, at 487-89 (2008), available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/house-delegates/meeting-archives/2008-annual-meeting.page>; AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON ACCESS TO CARE FOR TRANSGENDER AND GENDER VARIANT INDIVIDUALS 1 (2012) [hereinafter AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON ACCESS TO CARE], available at http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderCare.pdf; AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON DISCRIMINATION AGAINST TRANSGENDER AND GENDER VARIANT INDIVIDUALS 1 (2012), available at http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2012_TransgenderDiscrimination.pdf; AM. PSYCHOLOGICAL ASS'N, APA POLICY STATEMENTS ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER CONCERNS 25-27 (2011), available at <http://www.apa.org/about/policy/booklet.pdf>; NAT'L ASS'N OF SOCIAL WORKERS, SOCIAL WORK SPEAKS: NATIONAL ASSOCIATION OF SOCIAL WORKERS POLICY STATEMENTS, 2012-2014, at 340-43 (9th ed. 2012).

54. See AM. MED. ASS'N, *supra* note 53, at 487-89; AM. PSYCHIATRIC ASS'N, POSITION ON ACCESS TO CARE, *supra* note 53, at 1; AM. PSYCHOLOGICAL ASS'N, *supra* note 53, at 26; NAT'L ASS'N OF SOCIAL WORKERS, *supra* note 53, at 340-43.

55. See generally Guisepina Rametti et al., *The Microstructure of White Matter in Male to Female Transsexuals Before Cross-Sex Hormonal Treatment. A DTI Study*, 45 J. PSYCHIATRIC RES. 949 (2011) [hereinafter Rametti et al., *MtF Transsexuals*]; Guisepina Rametti et al., *White Matter Microstructure in Female to Male Transsexuals Before Cross-Sex Hormonal Treatment. A Diffusion Tensor Imaging Study*, 45 J. PSYCHIATRIC RES. 199 (2011) [hereinafter Rametti et al., *FtM Transsexuals*].

56. See Rametti et al., *MtF Transsexuals*, *supra* note 55, at 950; Rametti et al., *FtM Transsexuals*, *supra* note 55, at 200.

concluded that brain patterns in MtF transsexual people did not complete the masculinization process during brain development, falling between male and female controls.⁵⁷ They also concluded that brain patterns of FtM transsexual people were closer to males, who share their brain sex, than females, who share their biological sex.⁵⁸ What is important to note from these studies is that, even *before* any hormone treatment and any physical transition, transsexual people have detectable differences in their brains.⁵⁹ These studies suggest that the transgender identity may be more than a political and societal label. Rather, it may have strong biological underpinnings.⁶⁰

Unfortunately, the evidence for the transgender identity is relatively new. Long before medical organizations affirmed the existence of transgender people, litigants have forced courts to confront the struggle to define “transgender,” most often in the form of employment discrimination suits on the basis of “sex.”⁶¹ As a result, courts have established a confused and inconsistent maze through which transgender people must now navigate.⁶²

B. Federal, State, and Local Laws: An Inconsistent Framework with Few Answers

As science has made progress toward understanding the transgender identity, the law has languished in a state of confusion, unable to clearly distinguish between physical sex and gender expression. American jurisprudence may owe the lack of clarity between “sex” and “gender” to Justice Ruth Bader Ginsburg’s secretary.⁶³ During Justice Ginsburg’s nomination to the U.S. Supreme Court, Arizona Senator Dennis

57. Rametti et al., *MtF Transsexuals*, *supra* note 55, at 953.

58. Rametti et al., *FtM Transsexuals*, *supra* note 55, at 203.

59. See Rametti et al., *MtF Transsexuals*, *supra* note 55, at 950; Rametti et al., *FtM Transsexuals*, *supra* note 55, at 200. The studies are underinclusive because they required the subjects to self-identify as transsexual. Rametti et al., *MtF Transsexuals*, *supra* note 55, at 950; Rametti et al., *FtM Transsexuals*, *supra* note 55, at 200; see *supra* note 47 and accompanying text (noting how the requirement of self-identification creates a very narrow definition of “transsexual”).

60. In fact, these studies are not the first to identify differences in the brains of transsexual people. See, e.g., Frank P. M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2036-37 (2000); Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 69-70 (1995).

61. See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 239 (2009) (“For a long time, courts were quite suspicious of discrimination claims brought by transgender employees. Historically, it was nearly impossible for these employees to bring actionable sex discrimination claims . . .” (footnote omitted)).

62. See *infra* Part II.B.

63. See *The Supreme Court: Excerpts From Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 22, 1993, at A20.

DeConcini asked Justice Ginsburg how she coined the legal term "gender discrimination":

JUDGE GINSBURG In the 70's, when I was at Columbia and writing briefs about distinctions based on sex, and writing articles and speeches, I had a secretary, and she said, "I've been typing this word sex, sex, sex, and let me tell you, the audience that you are addressing—the men that you are addressing"—and they were all men in the appellate courts in those days—"the first association of that word is not what you're talking about. So I suggest that you use a grammar book term; use the word 'gender.' It will ward off distracting associations."

SENATOR DeCONCINI That secretary obviously was a woman?

A. Yes, and Millicent, if you're somewhere watching this, I owe it all to you.⁶⁴

Justice Ginsburg is not alone in her use of "sex" and "gender." Although society has drawn a relatively clear distinction between the two terms, courts adjudicating sex discrimination claims have used "sex" and "gender" interchangeably.⁶⁵ Unfortunately, federal, state, and local laws provide no consistent definition of "sex" and "gender."⁶⁶ There are no statutes or regulations expressly defining when a transgender person becomes legally "male" or "female."⁶⁷ No court has ruled that a person is legally "male" or "female" for all purposes.⁶⁸ A transgender person's legal documentation, as a result, may inconsistently identify that person as both male and female.⁶⁹

64. *Id.*

65. See Weiss, *supra* note 30, at 597-610 (setting forth the history of the changing meaning of "sex"). But see, e.g., *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). Justice Antonin Scalia noted:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

J. E. B., *supra*, at 157 n.1.

66. See *infra* Part II.B.1-2.

67. See Weiss, *supra* note 30, at 590.

68. *Id.*

69. See *id.* at 590-91.

1. The Federal Perspective: Transgender Women or Just Men in Dresses?

Federal courts have not consistently defined transgender people.⁷⁰ In *Ulane v. Eastern Airlines, Co.*,⁷¹ the court held that Title VII of the Civil Rights Act of 1964⁷² (“Title VII”) did not reach discrimination on the basis of transsexuality.⁷³ *Ulane* involved a transsexual woman who filed suit after being fired from her job following sex-reassignment surgery.⁷⁴ The court narrowly defined “sex” under Title VII, denied her discrimination claim, and noted “Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.”⁷⁵ Numerous suits by transsexual plaintiffs have failed under similar reasoning.⁷⁶

The legal landscape for transgender plaintiffs changed when the Supreme Court decided *Price Waterhouse v. Hopkins*.⁷⁷ The Court in *Price Waterhouse* developed a new theory of sex discrimination based on gender-stereotyping.⁷⁸ The plaintiff, Ann Hopkins, filed suit under Title VII alleging sex discrimination after being denied partnership at her firm, in spite of her strong work record.⁷⁹ Partners had commented negatively on her “interpersonal skills,” as well as on the fact that she was a woman.⁸⁰ The Court stated that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”⁸¹ It determined that that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁸²

70. Glazer & Kramer, *supra* note 30, at 653.

71. 742 F.2d 1081 (7th Cir. 1984).

72. Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17) (providing in Section 2000e-2 that “[i]t shall be an unlawful practice for an employer . . . to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin”).

73. 742 F.2d at 1085-87.

74. *Id.* at 1082-83.

75. *See id.* at 1085-87.

76. *See, e.g.,* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047, 1050-51 (5th Cir. Unit B Feb. 1981); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977).

77. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

78. *See id.* at 250-52.

79. *See id.* at 231-36.

80. *See id.* at 234-36. Such comments included advice that Hopkins “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235 (internal quotation marks omitted).

81. *Id.* at 251.

82. *Id.* at 250.

Transgender plaintiffs have used *Price Waterhouse*'s sex-stereotyping theory to successfully file suit under Title VII as gender-nonconforming men. In *Barnes v. Cincinnati*⁸³ and *Smith v. City of Salem*,⁸⁴ the transsexual plaintiffs filed suits as gender-nonconforming men after experiencing adverse employment actions.⁸⁵ Philecia Barnes, a transsexual woman, was demoted as police sergeant because she did not act masculine enough.⁸⁶ Jimmie L. Smith was a lieutenant in the police department and had notified her supervisor about her intent to transition.⁸⁷ Smith's coworkers began commenting that Smith's "appearance and mannerisms were not 'masculine enough.'"⁸⁸ Smith was ultimately suspended.⁸⁹ Both plaintiffs prevailed on their claims of sex discrimination under the sex-stereotyping theory.⁹⁰

In 2008, the plaintiff in *Schroer v. Billington*⁹¹ prevailed not as a gender-nonconforming man, but as a transsexual woman.⁹² Rather than follow the reasoning in *Barnes* and *Smith*, the court based its holding on *Ulane*.⁹³ The *Ulane* and *Schroer* courts both saw transsexual people as an identity distinct from gender-nonconformity.⁹⁴ *Ulane* held that transsexual people did not fall within the reach of Title VII; *Schroer* held the opposite.⁹⁵ The court in *Schroer* made the analogy to an individual who is fired because she converts from Christianity to Judaism, stating, "No court would take seriously the notion that 'converts' are not covered by [Title VII]."⁹⁶ Title VII "easily encompasses discrimination because of a *change* of religion," and the firing, as a result, would be a "clear case" of religious discrimination.⁹⁷ In the same way, then, the refusal to hire the plaintiff "after being advised that she planned to change her

83. 401 F.3d 729 (6th Cir. 2005).

84. 378 F.3d 566 (6th Cir. 2004).

85. See *Barnes*, 401 F.3d at 733-35, 737; *Smith*, 378 F.3d at 568-70.

86. *Barnes*, 401 F.3d at 734-35.

87. *Smith*, 378 F.3d at 568.

88. *Id.*

89. See *id.* at 569. Prior to Smith's suspension, fire department officials agreed to require Smith to undergo three separate psychological evaluations with doctors chosen by the city. *Id.* Officials "hoped that Smith would resign or refuse to comply. If [Smith] refused to comply, . . . they could terminate Smith's employment on the ground of insubordination." *Id.*

90. See *Barnes*, 401 F.3d at 737-38; *Smith*, 378 F.3d at 571-75.

91. 577 F. Supp. 2d 293 (D.D.C. 2008).

92. See *id.* at 308.

93. See *id.* at 306-08; Glazer & Kramer, *supra* note 30, at 659-60.

94. See Glazer & Kramer, *supra* note 30, at 659-60.

95. Compare *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085-87 (7th Cir. 1984), with *Schroer*, 557 F. Supp. 2d at 306-08.

96. *Schroer*, 557 F. Supp. 2d at 306-07.

97. *Id.* at 306.

anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”⁹⁸

More recently in 2011, the Eleventh Circuit returned to the gender-stereotyping theory in *Glenn v. Brumby*.⁹⁹ Following the reasoning in *Barnes and Smith*, the court affirmed summary judgment for the plaintiff and held that terminating the plaintiff because of her gender-nonconformity constituted sex discrimination.¹⁰⁰ The court noted that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹⁰¹ It found, as a result, that, whether couched in terms of “sex” or “gender,” “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”¹⁰²

In 2012, the Equal Employment Opportunity Commission (the “EEOC”) held in *Macy v. Holder*¹⁰³ that “discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”¹⁰⁴ Citing to language in *Price Waterhouse*, the EEOC emphasized that an employer may not take gender into account *at all* when making employment decisions because to do so constitutes discrimination on the basis of sex.¹⁰⁵ *Macy* is a significant decision. Because the EEOC officially approved *Macy*, “it applies not only to complaints of discrimination that are filed against federal agencies, but also to charges of discrimination against transgender individuals that are filed against private sector employers with more than 15 employees or against state and local government employers.”¹⁰⁶

98. See *id.* at 306-08 (alteration in original).

99. 663 F.3d 1312 (11th Cir. 2011).

100. *Id.* at 1316-21. Even though Vandiver Elizabeth Glenn brought suit under the Equal Protection Clause, the Eleventh Circuit found that Glenn provided sufficient evidence to prove that her employer acted on the basis of her gender nonconformity under a Title VII analysis. See *id.* at 1320-21.

101. *Id.* at 1316.

102. *Id.* at 1317.

103. Appeal No. 0120120821, 2012 WL 1435995 (Equal Emp’t Opportunity Comm’n Apr. 20, 2012).

104. *Id.* at *11 (alteration in original).

105. See *id.* at *7. The EEOC explained:

This is true regardless of whether an employee discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.

Id.

106. CHAI R. FELDBLUM, EEOC, DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY UNDER TITLE VII (on file with *Hofstra Law Review*).

Even though the law is making progress, the long line of cases addressing discrimination against transgender employees does not provide "a stable basis" to protect against discrimination.¹⁰⁷ Some cases recognize the transgender identity as a distinct identity.¹⁰⁸ In other cases, like *Barnes* and *Smith*, there are no transgender people *per se*; "there just happen to be some men out there who want to wear dresses."¹⁰⁹ Unfortunately, state and local laws provide no better clarification on the meaning of "sex" and "gender."

2. The Local Perspective: Fifty States, Countless Interpretations

In an attempt to expressly protect transgender people from discrimination, some states and cities have included "gender identity" and "gender expression" in their nondiscrimination statutes.¹¹⁰ States and cities intended to use these statutes to more clearly define the types of identities protected under their nondiscrimination statutes.¹¹¹ As of 2012, sixteen states and the District of Columbia prohibit discrimination on the basis of sexual orientation, gender identity, and gender expression in employment, housing, and public accommodations.¹¹² Despite these nondiscrimination laws, where terms like "gender identity" have been defined by the legislatures, courts still have difficulty in understanding transgender people.¹¹³

107. Glazer & Kramer, *supra* note 30, at 653.

108. *See id.* at 659-60.

109. *Id.* at 665-67 (quoting ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 86 (2008)).

110. Weiss, *supra* note 30, at 595-96.

111. *See id.*

112. *See* CAL. CIV. CODE § 51 (West 2007 & Supp. 2013); CAL. GOV'T CODE §§ 12926(q)(2), 12940, 12955 (West 2011 & Supp. 2013); COLO. REV. STAT. ANN. §§ 24-34-401(7.5), -402, -501, -502, -601 (West 2008 & Supp. 2012); CONN. GEN. STAT. ANN. §§ 46a-51(21), -60 to -64c (West 2009 & Supp. 2012); HAW. REV. STAT. §§ 378-1, -2, 489-2, -3, (1993 & Supp. 2007); HAW. REV. STAT. §§ 515-2 to -3 (2006); IOWA CODE ANN. § 216.2(10), .6-.8A (West 2009); 775 ILL. COMP. STAT. ANN. 5 / 1-103(O-1), 2-102, 3-102, 5-102 (West 2011 & Supp. 2012); ME. REV. STAT. ANN. tit. 5, §§ 4552, 4553(9-C), 4572, 4581-A, 4592 (2002 & Supp. 2012); MASS. GEN. LAWS ANN. ch. 151B, §§ 1, 4 (West 2004 & Supp. 2012); MINN. STAT. ANN. § 363A.03(44), .08-.12 (West 2012); NEV. REV. STAT. §§ 118.075, .100, 613.310, .330, 651.050, .070 (West Supp. 2012); N.J. STAT. ANN. § 10:5-4, -5(rr) (West Supp. 2012); N.M. STAT. ANN. §§ 28-1-2(Q), -7 (West 2011); OR. REV. STAT. ANN. §§ 174.100(6), 659A.030, .403, .421 (West 2003 & Supp. 2012); R.I. GEN. LAWS §§ 11-24-1 to -24-2.3, 28-5-2 to -5-7, 34-37-1 to -37-4 (2002); VT. STAT. ANN. tit. 9, §§ 4501-4504, tit. 21 § 495 (2007 & Supp. 2012); WASH. REV. CODE ANN. §§ 49.60.030, .040(26), .180 to .2235 (West 2008 & Supp. 2012); D.C. CODE §§ 2-1401.02(12A), 2-1402.11, .21, .31 (2007 & Supp. 2012); *see also* NAT'L GAY & LESBIAN TASK FORCE, *STATE NONDISCRIMINATION LAWS IN THE U.S.* (2012), available at http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf (displaying the states with and without nondiscrimination statutes that include "gender identity and gender expression").

113. Weiss, *supra* note 30, at 596-97 (citing two failed attempts to protect transgender people under state nondiscrimination statutes: *Goins v. W. Group*, 635 N.W.2d 717, 721-25 (Minn. 2001)

The law's state of confusion about transgender people is most clearly demonstrated when they seek to change the sex markers from "M" to "F" or "F" to "M" on their state-issued identification to correctly reflect their brain sex.¹¹⁴ The administrative procedures vary between and within states, "contradict federal policies, and are often tied to factors that cannot be chosen or controlled, such as state of birth."¹¹⁵ States may require a court order to complete a name change.¹¹⁶ Courts may additionally require that "the supporting competent medical evidence needs to corroborate that the decision to live as a [transsexual person] is irreversible and completely permanent."¹¹⁷ Changing the sex on a birth certificate also varies by state.¹¹⁸ Every state that allows the change "requires evidence of surgery . . . though they vary in what proof is required and in the specificity of the evidentiary requirements."¹¹⁹ The procedure to change sex a marker on a driver's license differs between states, as well.¹²⁰ Because surgery is not an option for many transgender people, state-issued identification may inconsistently reflect both sexes, as a result.¹²¹

As a consequence of the lack of legal clarity, transgender individuals face many unique challenges in daily life.¹²² They encounter legal hurdles when addressing issues related to identification documents,

and Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 47 (App. Div. 2005)).

114. See Spade, *supra* note 44, at 760-75; Weiss, *supra* note 30, at 590-95.

115. Spade, *supra* note 44, at 761.

116. See, e.g., CAL. CIV. PROC. CODE §§ 1275-1279.6 (West 2007 & Supp. 2013) ("Applications for change of names must be determined by the Superior Courts."); 735 ILL. COMP. STAT. ANN. 5 / §§ 21-101 to 21-105 (West 2011); N.Y. CIV. RIGHTS LAW §§ 60-65 (McKinney 2009 & Supp. 2013); TEX. FAM. CODE ANN. §§ 45.101-45.106 (West 2008 & Supp. 2012).

117. See *In re Anonymous*, No. 2005/12940, at 1-2 (N.Y. Sup. Ct. Nov. 25, 2005), available at http://www.aclu.org/files/images/asset_upload_file286_27712.pdf. But see, e.g., *In re Winn-Ritzenberg*, 891 N.Y.S.2d 220, 220-21 (App. Term 2009) ("There is no sound basis in law or policy to engraft upon the statutory provisions an additional requirement that a transgendered-petitioner present medical substantiation for the desired name change."); William Glaberson, *For Transgender People, Name Is a Message*, N.Y. TIMES, Jan. 25, 2010, at A12. Even with help from the New York Civil Liberties Union, the same judge in *In re Anonymous* denied the petitioner's second request for a name change. See *In re Rockefeller (Supporting Transgender Man's Petition for Name Change)*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/case/re-rockefeller-supporting-transgender-mans-petition-name-change> (last visited Mar. 29, 2013).

118. See Spade, *supra* note 44, at 764-770, 832 app. 3 (compiling state requirements for gender reclassification on birth certificates).

119. *Id.* at 768.

120. See *id.* at 770-74, 822 app. 1, 830 app. 2 (compiling state requirements for gender reclassification on drivers' licenses).

121. See Weiss, *supra* note 30, at 590-95; *supra* text accompanying notes 44-45 (discussing the barriers to accessing surgery, as well as to even basic preventive and routine healthcare).

122. See Caryn B. Keppler, *Planning Considerations for the Transsexual Client*, N.Y. ST. B.A. J., Oct. 2011, at 20, 21-22, 24-25.

inheritance rights, burial instructions, guardianship, and child custody.¹²³ It should come as no surprise, then, that transgender people also experience complications when seeking membership in a fraternity.

III. FRATERNAL VALUES: A PART OF AMERICAN HISTORY

Let it be said that fraternities are about what matters most: enduring friendships founded on shared principles and personal affinities; living out good lives, not just having good times; cordial laughter, delightful gaiety, robust merriment; the lively pleasures of good companions; the sustaining loyalty of old comrades through whatever fortune or adversity may appear; the settled conviction that lives are lived to the best effect when firmly secured by mutual bonds of deep affection, administration, and respect. In freedom, if wisely chosen, there is fraternity, and in fraternity, if rightly used, there is joy.¹²⁴

Fraternities are engrained in the fabric of our nation, dating back to before its founding. On December 5, 1776, students formed the first Greek-letter society in the United States: Phi Beta Kappa at the College of William and Mary.¹²⁵ Phi Beta Kappa served social and literary purposes and held regular meetings.¹²⁶ In 1825, students formed Kappa Alpha Society at Union College in Schenectady, New York.¹²⁷ Soon after, two more organizations formed at Union College: Sigma Phi on March 4, 1827, and Delta Phi on November 17, 1827.¹²⁸ These three, sometimes called the "Union Triad," became the pattern for future fraternities.¹²⁹ In 1851, Alpha Delta Pi—the first sisterhood—began under the name of the Adelphean Society.¹³⁰ In 1867, students founded Pi Beta Phi as the first national collegiate women's fraternity.¹³¹ In January 1870, Kappa Alpha Theta formed as the first women's Greek-letter society.¹³²

123. See *id.* The legal challenges of transgender people are vast and are beyond the scope of this Note. For a thorough introduction to some of these issues, see *id.*

124. BAIRD'S MANUAL, *supra* note 22, at I-7.

125. *Id.* at I-10 (describing Phi Beta Kappa's characteristics of modern fraternities, including "secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, an urge for sharing its values through nationwide expansion").

126. *Id.*

127. See *id.*

128. *Id.* at I-10 to -11.

129. *Id.* at I-11.

130. *Id.* at I-12.

131. *Id.*

132. *Id.*

Fraternities began as secret societies.¹³³ During the early and mid-nineteenth century, colleges believed that, because of a “finite set of learning” in Greek, Latin, history, philosophy, and science, they had a monopoly over the thinking and conduct of their students.¹³⁴ In response to courses involving rote learning and recitation that ignored current events and issues, students formed their own societies where they could engage in literary discussions on current topics and the enduring questions from their courses—filling the void in the classroom.¹³⁵ Many of these fraternities also derived their philosophies and literature from Jewish and Christian Scriptures.¹³⁶ These themes carried over through the twentieth century, as historically Jewish, Catholic, non-sectarian, and African-American fraternities, for example, formed to fill voids on college campuses.¹³⁷

At the heart of the fraternity is the ritual, which is exclusive to each organization.¹³⁸ The ritual is a serious ceremony where new members learn about the underlying meaning and the historic rationale for their fraternity’s existence.¹³⁹ Ritual ceremonies focus on morals, ethical teachings, and the “lofty ideals,” for which fraternities have stood for hundreds of years.¹⁴⁰ Many rituals also charge or challenge new members “to be of good character and to be loyal to the other members.”¹⁴¹

Today, there are three prevalent types of fraternities: social, professional, and honorary.¹⁴² This Note focuses solely on social fraternities, which are legally protected as single-sex organizations and offer membership to students from all academic backgrounds.¹⁴³ The

133. See *id.* at I-1.

134. See *id.*; Ron Binder, *Historically White Men’s Fraternal Organizations*, in *THE ADMINISTRATION OF FRATERNAL ORGANIZATIONS ON NORTH AMERICAN CAMPUSES: A PATTERN FOR THE NEW MILLENNIUM* 29, 33 (Donald D. Gehring & D. Parker Young eds., 2003) [hereinafter *THE ADMINISTRATION OF FRATERNAL ORGANIZATIONS*].

135. BAIRD’S MANUAL, *supra* note 22, at I-1 to -2; Binder, *supra* note 134, at 33.

136. See BAIRD’S MANUAL, *supra* note 22, at I-3.

137. See Binder, *supra* note 134, at 35; *After 100 Years, Why Black Frats Still Matter*, NPR (July 7, 2011, 12:00 PM), <http://www.npr.org/2011/07/07/137672103/after-100-years-why-black-frats-still-matter> (“Elder Diggs, the principle [sic] founder of Kappa Alpha Psi, oftentimes could not take certain classes, couldn’t participate in contact sports, didn’t have the true social environment that his peers enjoyed on the college campus.”).

138. See BAIRD’S MANUAL, *supra* note 22, at ix.

139. *Id.*

140. See *id.* at ix, I-13.

141. *Id.* at I-13.

142. See *id.* at I-9 to -10. Professional fraternities select their members—both men and women—from similar courses of studies and organize activities focused on those studies. See *id.* at I-9. Honorary fraternities recognize and encourage scholarship and leadership achievements. See *id.* at I-9 to -10.

143. See 20 U.S.C. § 1681(a)(6) (2006); BAIRD’S MANUAL, *supra* note 22, at I-9. Professional

term "social" refers to the socialization required of members to their future responsibilities in society.¹⁴⁴ Social fraternities create a family structure and support members in today's overwhelmingly large college campuses.¹⁴⁵ They also provide nearly unmatched opportunities for personal development as organizational leaders, public speakers, and good citizens.¹⁴⁶

A. *Why Fraternities Matter: Evidence of the Fraternal Experience*

The enduring success of fraternities in American society can be attributed to the well-documented, lifelong benefits of membership. One reason transgender advocates have celebrated the recent NCAA policy change¹⁴⁷ is because it has opened doors for transgender students to the role models and lifelong benefits of sports.¹⁴⁸ Fraternities offer similar role models and benefits.¹⁴⁹ One study, the *University Learning Outcomes Assessment* (the "UniLOA"),¹⁵⁰ measured student behaviors along seven "domains" that employers, academicians, managers, researchers, accredited agencies, and others regard as crucial: critical thinking, self-awareness, communication, diversity, citizenship, membership and leadership, and relationships.¹⁵¹

The *UniLOA* concluded that engaging in highly organized activities during college impacts growth, learning, and development of students "in profound ways" not experienced by students who do not

and honorary fraternities do not receive the same protections under federal law as social fraternities. See § 1681(a)(6).

144. BAIRD'S MANUAL, *supra* note 22, at I-9.

145. See *id.* at ix.

146. *Id.*

147. See *supra* text accompanying notes 15-21 (introducing the NCAA policy).

148. See, e.g., Press Release, Nat'l Ctr. for Lesbian Rights, NCLR Applauds New NCAA Inclusion Policy Benefitting Transgender Student Athletes (Sept. 12, 2011), http://www.ncrlrights.org/site/PageServer?pagename=press_2011_NCAA_Trans_Policy_091211 ("Thanks to this policy, more transgender students will enjoy the lifelong benefits of participating in sports, and transgender children will have more positive role models for leading healthy and active lives." (internal quotation marks omitted)).

149. See *Press Room*, N.-AM. INTERFRATERNITY CONF., <http://www.nicindy.org/press/> (last visited Mar. 29, 2013) (collecting statistics on fraternity leaders in the United States).

150. CTR. FOR MEASURING COLL. BEHAVIORS & ACADEMICS, UNIVERSITY LEARNING OUTCOMES ASSESSMENT (UNILOA): NATIONAL REPORT OF MEANS, 2011-2012 (2011) [hereinafter *UNILOA*], available at http://www.measuringbehaviors.com/UniLOANationalReport11_12.pdf.

151. See *UNILOA*, *supra* note 150, at 2, 6; see also Mark Frederick & Will Barratt, *University Learning Outcomes (UniLOA) Explained*, ESSENTIALS (Ass'n of Fraternity/Sorority Advisors, Fort Collin, Colo.), Aug. 2012, at 1, 1, available at <http://www.afa1976.org/Portals/0/documents/Essentials/August%202012%20UniLOA%20Explained%20multiple%20authors.pdf> (explaining the development of the *UniLOA*).

participate.¹⁵² The study expressly identified two highly organized activities: fraternities and intercollegiate athletics.¹⁵³ In fact, students in organized activities consistently scored higher across all of the study's seven domains.¹⁵⁴ These findings "remain remarkably stable" and patterns and trends remain consistent, even as the study spans nearly seven years of data collection from 120,000 students across the nation.¹⁵⁵

The *UniLOA* reveals that, compared to nonmembers, fraternity members gain meaningful development during their fraternity experience.¹⁵⁶ Members of fraternities scored significantly higher than nonmembers in the domains of citizenship and membership and leadership.¹⁵⁷ Moreover, members of fraternities tend to have higher grade point averages, stay in school, and are more likely to donate as alumni.¹⁵⁸ Further, a look at today's leaders supports the *UniLOA*'s findings.¹⁵⁹ In the 113th Congress, 37% of the Senate and 23% of the House have ties to a fraternity.¹⁶⁰ Fraternity alumni comprise 50% of chief executive officers of the top ten companies of the Fortune 500, 15% of Fortune 100 chief executive officers, 44% of U.S. Presidents, and 31% of Supreme Court Justices.¹⁶¹ Despite these statistics, fraternities have struggled to provide transgender members with the lifelong benefits and fraternity role models that other members enjoy.¹⁶² An examination of fraternities' legal foundations demonstrates that they are empowered and able to provide these opportunities to transgender students.

152. *UNILOA*, *supra* note 150, at 4.

153. *See id.*

154. *See id.* at 22.

155. *See id.* at 3, 6.

156. *See id.* at 22; Frederick & Barratt, *supra* note 151, at 3-4. They are also more likely to "show[] higher levels of academic challenge, active and collaborative learning, and student-faculty interaction, and experience[] a more supportive campus environment." NAT'L SURVEY OF STUDENT ENGAGEMENT, PROMOTING STUDENT LEARNING AND INSTITUTIONAL IMPROVEMENT: LESSONS FROM NSSE AT 13, at 11 (2012), available at http://nsse.iub.edu/NSSE_2012_Results/pdf/NSSE_2012_Annual_Results.pdf.

157. *See UNILOA*, *supra* note 150, at 22.

158. *See* Robert DeBard & Casey Sacks, *Fraternity/Sorority Membership: Good News About First-Year Impact*, ORACLE, June 2010, at 12, 16-18, 20, available at http://member.afa1976.org/resources/PublicDocuments/Oracle_vol5_iss1_Debard.pdf; Albert A. Okunade & Phanindra V. Wunnava, *Alumni Giving of Business Executives to the Alma Mater: Panel Data Evidence at a Large Metropolitan Research University* 10 (Inst. for the Study of Labor, Working Paper No. 5428, 2011), available at <http://ftp.iza.org/dp5428.pdf>; *Press Room*, *supra* note 149.

159. *See, e.g., Press Room*, *supra* note 149.

160. *Id.*

161. *Id.*

162. *See supra* text accompanying notes 27-28.

*B. Foundations in the Law:
Title IX of the Education Amendments of 1972*

The legal foundation on which fraternities exist today includes the constitutional rights to intimate association and expressive association and the statutory exemption from Title IX of the Education Amendments of 1972 ("Title IX").¹⁶³ Congress enacted Title IX to achieve sex equality in educational institutions that receive federal financial assistance.¹⁶⁴ Title IX requires federally funded institutions to provide equal opportunities to both male and female students.¹⁶⁵ However, Title IX specifically exempts fraternities from its reach.¹⁶⁶

In 1971, Indiana Senator Birch Bayh proposed an amendment to a bill that sought to prohibit discrimination on the basis of sex in educational institutions.¹⁶⁷ The amendment did not pass.¹⁶⁸ In 1972, Senator Bayh again proposed an education bill addressing sex discrimination.¹⁶⁹ The purpose of the bill was to combat "the continuation of corrosive and unjustified discrimination against women" that reached all facets of education.¹⁷⁰ On June 23, 1972, President Richard Nixon signed the bill into law.¹⁷¹

163. 20 U.S.C. §§ 1681–1688 (2006); see Horton, *supra* note 22, at 426–28, 432; see *infra* Part IV.D (discussing the two distinct constitutional rights: the right to intimate association and the right to expressive association). The right to intimate association stems from the concept of personal liberty, and the right to expressive association is based on the First Amendment. See *infra* Part IV.D. Indeed, Congress has given fraternities a unique place in federal law. See also 42 U.S.C. § 1975a(b) (2006) (prohibiting the Civil Rights Commission from "inquir[ing] into or investigat[ing] any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club, or any religious organization").

164. Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can be Equal*, 49 B.C. L. REV. 217, 221–25 (2008) (providing a historical review of Title IX).

165. See 20 U.S.C. §§ 1681–1688.

166. *Id.* § 1681(a)(6). The exemption states:

[T]his section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists of primarily students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Girl Scouts, Boys Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

Id.

167. 117 CONG. REC. 30,155–58 (1971).

168. See *id.* at 30,399–400, 30,414–15.

169. See 118 CONG. REC. 5802–03 (1972).

170. *Id.* at 5803 (statement of Sen. Birch Bayh).

171. See *id.* at 22,702.

Title IX applies to “any education program or activity” that receives federal financial assistance and prohibits sex discrimination in three contexts.¹⁷² No one shall: (1) be excluded from participation in an education program or activity; (2) be denied the benefits of an education program or activity; and (3) be subjected to discrimination under an education program or activity.¹⁷³ Further, Title IX provides for various forms of recovery, including the discontinuation of federal funding to a program or activity that violates the statute.¹⁷⁴ Private plaintiffs may also sue a school by alleging that the school’s programs or activities violate Title IX.¹⁷⁵ Title IX also provides for monetary damages.¹⁷⁶ Plaintiffs have brought suit under Title IX in the context of athletics, employment discrimination, and sexual harassment, and the focus of Title IX has mainly been in these three contexts—not fraternities.¹⁷⁷ For decades, courts clarified Title IX’s application in these three areas, and Title IX has exempted fraternities from its reach.

The exemption for fraternities did not exist in the 1972 version of Title IX; Congress specifically added it in 1974.¹⁷⁸ That year, the Department of Health, Education, and Welfare sought to apply Title IX to fraternities.¹⁷⁹ Senator Bayh sponsored an amendment to Title IX to exempt fraternities from its requirements.¹⁸⁰ In a letter to the Department of Health, Education, and Welfare, he stated: “Fraternities and sororities have been a tradition in the country for over 200 years . . . [and] must not

172. See 20 U.S.C. § 1681(a) (2006).

173. *Id.*

174. See *id.* § 1682.

175. See *Cannon v. Univ. of Chi.*, 441 U.S. 667, 710-11, 717 (1979).

176. See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992).

177. See generally Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 187 (2012) (discussing the development and application of Title IX in the context of athletics, employment decisions, and sexual harassment); Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 22 J. LEGAL ASPECTS SPORT 127 (2008) (conducting a study of cases brought under Title IX between 1972 to 2007).

178. See 120 CONG. REC. 39,991-94 (1974).

179. See *id.* at 39,992. Senator Bayh stated:

I was distressed to see that under the proposed regulations, the Department [of Health, Education, and Welfare] was planning to apply title IX restrictions to a number of organizations which have no legitimate bearing on the original intent of title IX—that intent being the removal of sex discrimination in our Nation’s schools.

Id. (statement of Sen. Birch Bayh).

180. *Id.* at 39,991-92 (statement of Sen. Birch Bayh) (“As the author and prime Senate sponsor of title IX, I know that it was not my intent, and I do not believe it was the intent of the Congress that title IX be extended to organizations such as social fraternities and sororities.”). Senator Bayh noted that the exemption covered only social fraternities and “does not apply to professional fraternities or societies whose admissions practices might have a discriminatory effect upon the future career opportunities of a woman.” *Id.* at 39,992 (statement of Sen. Birch Bayh).

be destroyed in misdirected effort[s] to apply Title IX.”¹⁸¹ Congress subsequently passed the 1974 amendment.¹⁸²

Contrary to what fraternities may believe, Title IX does not govern the discussions and development of policies addressing transgender membership. Because of the 1974 amendment, fraternities enjoy extensive latitude under Title IX to determine whom they accept as members. The current legal foundation, therefore, should encourage fraternities to evaluate whether the inclusion of transgender members aligns with the purposes for which their organizations exist.¹⁸³

C. Title IX: Why Is Anyone Even Talking About It?

Fraternities most frequently argue: “If we allow a transgender person to remain a member we are compromising our single sex status.”¹⁸⁴ This is a “monster on the other side of the hill” concern.¹⁸⁵ Little things lead to big things, and by “compromising” on the issue of transgender membership, fraternities open the door to larger issues.¹⁸⁶ The monster theory also “assumes many facts not in evidence.”¹⁸⁷ It is so effective and plausible simply because no one has time to research the facts.¹⁸⁸ As a result, “[t]he monster is usually cast in vague terms.”¹⁸⁹ This perspective, however, misinterprets Title IX. A thorough examination of the statute reveals that Congress directed Title IX not at fraternities, but rather, solely at the university.

Title IX does not govern the membership practices of fraternities. The statutory text makes this explicitly clear.¹⁹⁰ Instead, Congress

181. *Id.* at 39,993.

182. See 20 U.S.C. § 1681(a)(6) (2006); 120 CONG. REC. at 39,994.

183. See Timothy M. Burke, *Publisher's Note on Associational Rights*, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Sept. 2011, at 2, 2 [hereinafter Burke, *Publisher's Note*], available at <http://fraternallaw.com/wp-content/uploads/2012/01/september-2011-issue-117.pdf>; Greg Lukianoff, *To Survive, Fraternities Need to Stand for Something*, Anything, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Sept. 2011, at 1, 1-2, available at <http://fraternallaw.com/wp-content/uploads/2012/01/september-2011-issue-117.pdf>.

184. E-mail from David L. Westol, J.D., Owner & CEO, Limberlost Consulting, Inc., to author (Nov. 5, 2011, 7:29 EST) (on file with *Hofstra Law Review*) [hereinafter Westol E-mail]. The real challenge to fraternities' rights to remain single-sex organizations lies in the constitutional rights of intimate and expressive association, not in Title IX. See *infra* Part IV.D (discussing the two constitutional rights and recent challenges to fraternities' right to remain single-sex).

185. Westol E-mail, *supra* note 184 (internal quotation marks omitted).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See 20 U.S.C. § 1681(a)(6) (2006) (“[T]his section shall not apply to *membership practices . . . of a social fraternity or social sorority . . .*” (emphasis added)).

specifically designed Title IX to bind *the university*, not the fraternity.¹⁹¹ Indeed, Title IX's statutory scheme focuses solely on the university. A university that receives federal funding must comply with Title IX throughout the institution and within its education programs and activities.¹⁹² The exemption under Title IX, however, permits a university to recognize social fraternities without losing its federal funding.¹⁹³ Without the exemption, a university could only recognize professional and honorary fraternities.¹⁹⁴

Title IX's language says nothing about fraternities and their single-sex status, and importantly, it does not impose any requirement on fraternities to remain single-sex to benefit under Title IX's exemption.¹⁹⁵ To retain federal funding, the university must recognize only social fraternities that have an "active membership of which consists primarily of students in attendance at an institution of higher education."¹⁹⁶ Title IX goes no further than that. Admittedly, then, by explicitly refusing to impose liability on universities that recognize such fraternities, Title IX indirectly "allows" fraternities to remain single-sex. However, Title IX's statutory language is not that narrow and "grants" fraternities significantly more than that. *All* aspects of membership decisions remain solely with the fraternity—including whether or not to admit transgender students.

Further, Title IX reaches only the programs and activities on college campuses.¹⁹⁷ In theory, the programs and activities in the context of social fraternities are those between the student-member and his chapter.¹⁹⁸ Therefore, Title IX does not contemplate reaching anything past graduation, including the relationships of alumni members with

191. E-mail from Erin Buzuvis, Professor, W. New England Univ. Sch. of Law, to author (Feb. 26, 2012, 5:18 EST) (on file with *Hofstra Law Review*) [hereinafter Buzuvis E-mail]; see 20 U.S.C. §§ 1681–1688. The available remedies under Title IX further demonstrate this statutory design. See *supra* text accompanying notes 174–77.

192. See 20 U.S.C. § 1687 (defining "program or activity" to include all the operations of a college or university).

193. See 20 U.S.C. § 1681(a)(6); Buzuvis E-mail, *supra* note 191.

194. Buzuvis E-mail, *supra* note 191.

195. See 20 U.S.C. § 1681(a)(6).

196. See *id.* Thus, under Title IX's language, a university has a greater risk of losing federal funding by recognizing a social fraternity with an active membership primarily of students who are *not* in attendance at an institution of higher education than one that admits transgender college students. See *id.*

197. See 20 U.S.C. § 1681(a).

198. See Telephone Interview with Gregory F. Hauser, Partner, Wuersch & Gering LLP (Oct. 4, 2011).

chapters and with national organizations.¹⁹⁹ A Title IX analysis, then, does not implicate alumni.²⁰⁰

As a result, concerns over the implications of Title IX and transgender membership should *not* motivate fraternities to exclude broad groups of people.²⁰¹ Over ten years ago, Timothy M. Burke noted:

The bottom line is that membership selection decisions should be made in a positive manner on the basis of the criteria contained in the organization's governing documents. Denying membership solely on the basis of some broad category into which an individual is pigeonholed . . . is an invitation to legal trouble.²⁰²

Fraternities should take the same approach when addressing transgender membership. The explicit exemption under Title IX—as well as the recent decision by the NCAA—demonstrates that fraternities have always had extensive latitude to define membership policies, especially in the context of transgender students.

IV. DEFINING MEMBERSHIP:

“ONE DAY YOU’RE IN; THE NEXT DAY YOU’RE OUT”

The experience of the NCAA in developing and enacting its current policy can serve as guidance to fraternities as they work through the issues related to transgender membership. The NCAA has already dispelled the common misconceptions and misinformation about transgender people. In addition, examples of fraternities that have already adopted transgender-inclusive policies demonstrate membership should be based on the criteria defined in fraternities' governing documents.²⁰³

As a matter of policy, transgender students should not have to guess and hope their way into fair consideration for membership. Fraternities should make clear, one way or another, what is required for transgender

199. *Id.*

200. *See id.*

201. *See* Timothy M. Burke, *Editor's Note*, FRATERNAL L. (Manley Burke, Cincinnati, Ohio), Sept. 2000, at 3, 3 [hereinafter Burke, *Editor's Note*], available at <http://www.manleyburke.com/wp-content/themes/manleyburke/inc/073---September-2000.pdf>.

202. *Id.* At the time, Burke was speaking about membership for gay people following the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *See id.* Burke cautioned fraternities, stating that *Dale* “should by no means be read as carte blanche approval of discriminatory membership policies or practices,” especially because federal, state, and local laws prohibit discriminatory practices in various situations. *Id.* The same caution translates over to transgender membership as nondiscrimination laws slowly begin to protect against transgender discrimination. *See supra* Part II.B (discussing recent court decisions protecting transgender people and listing sixteen states that protect against “gender identity and expression” discrimination).

203. *See* Burke, *Editor's Note*, *supra* note 201, at 3; Westol, *supra* note 26, at 4.

people to become members and to maintain membership as alumni. This Note does not propose that fraternities open their doors to all members.²⁰⁴ Rather, it sets forth a foundation for fraternities to understand that transgender-inclusive membership is possible and is happening in other single-sex contexts. Most importantly, this Note discusses how the law gives fraternities the freedom to begin these conversations and to make informed membership decisions that are consistent with their purposes, values, and creeds.

A. Fraternity Membership: It Is What a Fraternity Says It Is

For the majority of members, membership in a fraternity begins at initiation.²⁰⁵ A fraternity's national bylaws and governing documents set forth the requirements of initiation.²⁰⁶ These documents also control the single-sex status of a fraternity.²⁰⁷ The majority of fraternity bylaws and governing documents require members at initiation to be a "man"²⁰⁸ or "male."²⁰⁹ A few fraternities' documents express no sex or gender requirement for membership.²¹⁰

What does "man" or "male" mean to a potential new member who does not identify with his sex designated at birth? Fraternities should answer this question within their bylaws and governing documents. In the employment discrimination context, at least, federal courts are

204. See Pettitt, *supra* note 4, at 2.

205. See Westol, *supra* note 26, at 4; Telephone Interview with David L. Westol, J.D., Owner & CEO, Limberlost Consulting, Inc. (Sept. 24, 2011) [hereinafter Westol Telephone].

206. See Westol, *supra* note 26, at 4; Westol Telephone, *supra* note 205.

207. See Westol, *supra* note 26, at 4.

208. See, e.g., CHI PSI FRATERNITY, CONSTITUTION OF CHI PSI FRATERNITY 2 (2010), available at http://www.chipsi.org/resource/collection/2C613DFE-F5BE-4DBC-BF18-89EB6083E589/Constitution_-_as_of_7_August_2010.pdf ("Members of the Fraternity shall be *men* who have been duly initiated in accordance with this Constitution" (emphasis added)); DELTA SIGMA PHI FRATERNITY, CONSTITUTION AND BYLAWS 2 (2011), available at [http://www.deltasig.org/files/Constitution%20and%20By-Laws%20\(effective%208_1_2011\)%20copy.pdf](http://www.deltasig.org/files/Constitution%20and%20By-Laws%20(effective%208_1_2011)%20copy.pdf); THETA CHI FRATERNITY, THE CONSTITUTION AND BYLAWS OF THETA CHI FRATERNITY, INC. 21 (2012), available at <http://www.thetachi.org/clientuploads/Resources/Theta%20Chi%20Constitution%20Bylaws%20Oct%202012.pdf>.

209. See, e.g., DELTA UPSILON FRATERNITY, THE CONSTITUTION OF DELTA UPSILON FRATERNITY 2 (2011), available at http://www.deltatau.org/aspnet_client/FreeTextBox/upload/documents/Constitution_Bylaws.pdf ("Any *male* undergraduate enrolled in a college or university at which an Undergraduate Chapter of the Fraternity is chartered" (emphasis added)); SIGMA ALPHA EPSILON FRATERNITY, THE FRATERNITY LAWS 3 (2011), available at <http://www.saerecord.net/files/docs/FraternityLaws.pdf>.

210. See, e.g., KAPPA ALPHA ORDER, KAPPA ALPHA LAWS 6 (2012), available at <http://www.kappaalphaorder.org/wp-content/uploads/2011/04/2011-Kappa-Alpha-Laws-10-24-12-74th-Convention-8-3-12-Regulations-WEB1.pdf> ("Members of the Order shall be (a) those individuals who have been initiated into the Order, except those who have been expelled from membership, and (b) persons who have been elected to membership and are awaiting initiation.").

beginning to recognize transgender people as a distinct identity—transgender men are different than women, and transgender women are different than men.²¹¹ Following this reasoning, fraternities that admit transgender men would not necessarily contradict their desire to associate as single-sex organizations.²¹² Whether or not “sex” carries the same meaning under Title IX as Title VII, however, is unclear.²¹³ Admittedly, though, it does not matter. Title IX does not control fraternities, their membership practices, or their right to define what “man” or “male” means within their governing documents.²¹⁴

In addition, national bylaws and governing documents are generally silent as to whether or not a member who is already initiated must *maintain* his identity as “male” or “man” to remain a member.²¹⁵ Many documents, though, provide a basis for member removal “for cause” or for “conduct unbecoming a member.”²¹⁶ Fraternities may encounter problems, though, if they invoke these provisions against an initiated member who transitions.²¹⁷ If litigation resulted in such a situation, “it would be relatively easy to document a number of examples of alumni who had been convicted of felonies and yet remained members, ostensibly in good standing.”²¹⁸ Fraternities, then, should determine that an initiated member who transitions has *not* violated the governing documents that are silent on this issue.²¹⁹

211. See *supra* text accompanying notes 91-98 (noting two cases that determined transsexual people to be an identity distinct from gender-nonconformity).

212. See Buzuvis E-mail, *supra* note 191.

213. However, courts have already borrowed several Title VII analyses to interpret Title IX. See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999) (citing Title VII precedent to establish a Title IX sexual harassment claim); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000) (“[N]o logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’”). In *Montgomery*, the court applied *Price Waterhouse* and the sex-stereotyping theory under Title VII to find that the plaintiff has successfully pled a claim of sexual harassment under Title IX based on his perceived sexual orientation. See *Montgomery*, 109 F. Supp. 2d at 1090-93; see also *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 963-65 (D. Kan. 2005) (using *Price Waterhouse* to reach the same result as *Montgomery*).

214. See 20 U.S.C. § 1681(a)(6) (2006); *supra* text accompanying notes 190-200 (discussing how Title IX explicitly does not govern the membership practices of fraternities).

215. Westol, *supra* note 26, at 4.

216. *Id.* (internal quotation marks omitted); see, e.g., DELTA UPSILON FRATERNITY, *supra* note 209, at 3; KAPPA ALPHA ORDER, *supra* note 210, at 7 (“A member of the Order may be expelled for cause . . .”).

217. See Westol, *supra* note 26, at 4.

218. *Id.*

219. See *id.*; see also Westol Telephone, *supra* note 205 (“How does gender change affect ability to serve as a member?”).

Moreover, fraternities may not easily understand the unique reasons why transgender people will benefit most from membership in a fraternity.²²⁰ Like many on a large college campus, transgender students desire to belong by associating with a student organization.²²¹ Membership in a single-sex organization, in particular, often provides critical affirmation for transgender students because successful navigation of a gendered environment is a very empowering experience.²²² Fraternities provide crucial validation and support for transgender individuals who seek—often desperately—for that support.²²³ Most importantly, though, transgender individuals seek to be validated as members based on their character and values.²²⁴ Just like any potential new member, transgender students seek something “more than a loosely structured student organization, with an obscure identity and purpose”—the brotherhood, leadership skills, and bonds that can only be found in a fraternity.²²⁵

Nonetheless, fraternities’ reactions to transgender alumni have been inconsistent.²²⁶ Some fraternities, without exception, continue to recognize transgender alumni, correcting changes in name and title as requested.²²⁷ Despite that, alumni still fear revealing their transgender

220. See *infra* text accompanying notes 265-84 (discussing how the NCAA also acknowledged the challenges of a more complex understanding of gender).

221. E-mail from Jessica Pettitt, Soc. Justice & Diversity Consultant & Facilitator, to author (Jan. 16, 2013, 11:58 EST) (on file with *Hofstra Law Review*) [hereinafter Pettitt E-mail]; see BAIRD’S MANUAL, *supra* note 22, at ix; Carl Johnson & Heather Larabee, *Understanding Emerging Fraternal Organizations*, in THE ADMINISTRATION OF FRATERNAL ORGANIZATIONS, *supra* note 134, at 95, 96.

222. Pettitt E-mail, *supra* note 221 (“[I]t is in these [gendered] spaces that he feels a sense of belonging that allows him to be the man he is—without these spaces, he believes that his transition process might have taken longer. He finally sees himself and others see him as, just one of the guys.”); Pettitt Telephone, *supra* note 10.

223. See Pettitt Telephone, *supra* note 10; see also Angela Dallara, *College Fraternity Embraces Gay, Bisexual, and Transgender Membership*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION (Nov. 19, 2010, 2:11 PM), <http://www.glaad.org/2010/11/19/college-fraternity-embraces-gay-bisexual-and-transgender-membership> (quoting Jesse Weil, a transgender member of the Arizona State University chapter of Sigma Phi Beta Fraternity (“I really liked the idea of being in a male-gendered environment and it has helped me get comfortable with and explore and expand my identity and gender expression . . .” (internal quotation marks omitted))).

224. See Pettitt E-mail, *supra* note 221. Many transgender members disaffiliated because they “were disappointed that they weren’t validated as a member based on their character or values but [on] a physical status.” *Id.*

225. See BAIRD’S MANUAL, *supra* note 22, at ix; Johnson & Larabee, *supra* note 221, at 96-97; see also FIELDING & PETTITT, *supra* note 1, at 33 (“I share bonds and memories with these men that no one else will ever know. We have grown closer and stronger because of it. It’s the Brotherhood. The leadership. The service.”).

226. See Westol, *supra* note 26, at 4 (“Without exception, those fraternities continued to recognized the member . . .”). But see FIELDING & PETTITT, *supra* note 1, at 30.

227. See Westol, *supra* note 26, at 4.

identity to their fraternities.²²⁸ The response has also been especially disappointing for many transgender students seeking membership.²²⁹

Monica Bebie, Coordinator for Fraternity and Sorority Life at Carnegie Mellon University, sought guidance for two transgender students who identified as female and wanted to rush a women's fraternity.²³⁰ Her inbox filled with hate mail after posting a message to the Association for Fraternity/Sorority Advisors listserv.²³¹ The national organizations told Bebie that they would "forcibly and publicly kick [the transgender students] out" if they learned that either of the students had joined.²³² Bebie met with the two students, saying, "This isn't our brightest moment. If folks find out after the fact, all five organizations have said that they would remove you. They're single-sex organizations and said they don't accept you."²³³ These students' experiences are not unique.²³⁴ In addressing how to develop transgender-inclusive policies to better handle experiences like these, fraternities can learn from what has and has not worked, especially from the NCAA and its recent work in adopting its 2011 transgender-inclusive policy.

B. "Um, You're a What . . . ?": Surgery Makes No Difference

Fraternities' fears of violating Title IX may erroneously lead them to believe that, in order to admit transgender members, those members must have completely transitioned.²³⁵ However, fraternities should not

228. See, e.g., *supra* text accompanying notes 1-12 (discussing Eileen's experience).

229. See, e.g., E-mail from Gina Keucher, Wright State Univ. Assistant Dir. of Student Activities for Fraternity & Sorority Life & Leadership, to author (Jan. 4, 2012, 11:27 EST) (on file with *Hofstra Law Review*) [hereinafter Keucher E-mail] (describing the story of a fraternity that was ready to offer to a transgender man a bid for membership, that found out he was transgender, and that did not offer a bid to the transgender student after consulting with the national organization); Telephone Interview with Monica Bebie, Coordinator for Fraternity & Sorority Life, Carnegie Mellon Univ. (Nov. 16, 2011) [hereinafter Bebie Telephone].

230. FIELDING & PETTITT, *supra* note 1, at 28.

231. *Id.* Responses included: "This is embarrassing that you would be asking these questions," and "You should be embarrassed that you are talking about this on your campus." Bebie Telephone, *supra* note 229. Bebie noted that the some within the advisor community viewed her as the advisor with "that issue" on her campus. *Id.* Moreover, when the author of this Note reached out to Bebie for more information, Bebie had a moment where she thought the author was poking fun at her. *Id.*

232. FIELDING & PETTITT, *supra* note 1, at 28-29 ("Even though the individual chapters wanted these students as members, the national organizations refused to allow them into the chapters or even consider a revised definition of 'woman.'").

233. Bebie Telephone, *supra* note 229.

234. See Keucher E-mail, *supra* note 229 ("At this point none of the national organizations for the groups that are on my campus are willing to take a stand one way or the other to be trans-inclusive.").

235. The idea of a "complete" transition is misleading and incorrect because the process of transitioning involves numerous procedures, the necessity of which will vary on the specific individual. See *supra* text accompanying notes 40-43 (noting a non-exhaustive list of treatments a

require genital-reconstructive surgery as a prerequisite for membership, whether indirectly through state-issued documents or directly through institutional policies. Moreover, fraternities that base the determination of a potential new member's sex on state-issued identification will discover that the practice is completely impractical. Internal fraternity policies requiring surgery fare no better because they "lack[] a well-founded medical and policy basis."²³⁶

The NCAA once attempted to base transgender inclusion on state-issued documents.²³⁷ Prior to the 2011 policy, the NCAA made clear that it did not prohibit transgender students from participating in athletic competitions.²³⁸ Instead, the NCAA required transgender students to compete according to the sex as determined by driver's licenses, taxes, or voter registration.²³⁹ Because of the inconsistent requirements to change sex markers on state-issued documents, transgender people may never be able to correct all state-issued identification.²⁴⁰ For some purposes, a transgender person may be male, while for others, he or she may be female.²⁴¹ As a result, membership under such an "inclusive" policy will still exclude transgender people from competition depending on which document a university bases its determination.²⁴²

The inconsistency in legal documents would result, therefore, in competitive inequity.²⁴³ The most instructive example arises during competition between teams from different states.²⁴⁴ An Ohio university might base its team eligibility for transgender student-athletes on a different legal document than a university in New York.²⁴⁵ Coupled with different requirements to change sex on state documents, a transgender

transgender person *might* seek: legal name change, correction of sex designation on legal documents, development of a gender expression that aligns with his or her gender identity, hormone therapy, psychotherapy, or surgery). Further, surgery itself consists of numerous, separate procedures. *See* source cited *supra* note 43.

236. *See* PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 12 (2010) [hereinafter GRIFFIN & CARROLL, ON THE TEAM].

237. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, CURRENT NCAA POSITION AND RESOURCES REGARDING TRANSGENDER STUDENT-ATHLETE PARTICIPATION 1 (2010), available at http://fs.ncaa.org/Docs/Misc_Committees_DB/CWA10/May/Supplement%20No.%202023.pdf.

238. *Id.*

239. *Id.*

240. *See supra* Part II.B.2.

241. *See supra* text accompanying notes 114-21.

242. *See* Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 23-24 (2011).

243. *See* Telephone Interview with Karen Morrison, Director of Gender Inclusion, Nat'l Collegiate Athletic Ass'n (Feb. 22, 2012) [hereinafter Morrison Telephone].

244. *See id.*; *see also* Buzuvis, *supra* note 242, at 23-24 (noting another example).

245. Morrison Telephone, *supra* note 243.

student at the Ohio university may have been eligible for the New York team.²⁴⁶ However, because he or she attends the Ohio university, the transgender student is prohibited from competing.²⁴⁷ As a result, the inconsistency flowing from such a policy renders it an impractical and unpredictable solution to transgender inclusion.

Further, the NCAA has acknowledged that surgery, including genital reconstruction, has no bearing on a transgender person's athletic ability.²⁴⁸ One of the most often-cited reasons in opposition to transgender student-athletes is the concern of unfair competitive advantage on sex-segregated teams.²⁴⁹ The NCAA determined that these assumptions are not well founded.²⁵⁰ The NCAA dispelled assumptions that all men are taller, stronger, and more highly skilled at sports than women.²⁵¹ In fact, any competitive advantage that transgender women may have as a result of prior levels of testosterone "dissipate[s] after about one year of estrogen or testosterone-suppression therapy."²⁵² Further, concerns about male "imposters" in women's sports are unfounded.²⁵³ Rather than preventing men from fraudulently competing as women, "'sex verification' tests have been misused to humiliate and unfairly exclude women with intersex conditions."²⁵⁴ The NCAA has also criticized policies—including the International Olympic Committee's (the "IOC") 2004 policy—that require genital reconstruction surgery, stating that they "lack[] a well-founded medical or policy basis" because surgery has no bearing on a transgender

246. *See id.*

247. *See id.*

248. GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 12.

249. GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 13, at 7-8. The unfair competitive advantage is based on three assumptions: (1) transgender women do not deserve equal access to sports because they are not real women; (2) transgender women are born in male bodies and automatically have an unfair advantage over non-transgender women; and (3) men will pretend to be transgender to compete with women. *Id.* at 7.

250. *See id.* at 7-8.

251. *Id.* at 7 ("Transgender women display a great deal of physical variation, just as there is a great deal of variation in physical size and ability among non-transgender women and men.").

252. *Id.* at 8, 13 (quoting Eric Vilain, Director of the Center for Gender-Based Biology and Chief Medical Genetics Department of Pediatrics, University of California, Los Angeles) ("Research suggests that androgen deprivation and cross sex hormone treatment in [MtF] transsexuals reduces muscle mass; accordingly, one year of hormone therapy is an appropriate transitional time before a[n] [MtF] student-athlete competes on a women's team.").

253. *Id.* at 8 ("[I]n the entire 40 year history of 'sex verification' procedures in international sport competitions, no instances of such 'fraud' have been revealed.").

254. *Id.* (internal quotation marks omitted); *see supra* note 30 and accompanying text (discussing briefly the intersex identity).

person's athletic ability.²⁵⁵ Instead, policies like that of the IOC fail to protect the privacy and dignity of transgender people.²⁵⁶

Like the NCAA, fraternities should prevent inconsistent results and avoid membership policies based on state-issued documents. Fraternities also have no reason to worry about the physical, unfair competitive advantage of transgender people because such advantage is not a requirement of membership.²⁵⁷ Moreover, the genitalia of a potential new member are irrelevant because sex discrimination is often not based on biological sex.²⁵⁸ Rather, it is based on a presumption of a person's sex from his or her gendered appearance.²⁵⁹ Just like the employment discrimination context, fraternities generally do not know the anatomical sex of any of their members, whether or not they identify as transgender.²⁶⁰ Therefore, when they make membership determinations on the basis of sex, fraternities base their decisions on an assumption that is premised on gender stereotypes.²⁶¹ Surgery, therefore, has no bearing on a transgender person's abilities, character, or values.

C. Leading by Example: Fraternities Are Already Doing It

Fraternities set forth their own membership requirements within their constitutions, bylaws, and governing documents, not through national fraternal organizations like the North-American Interfraternity Conference and the National Panhellenic Conference.²⁶² This is unlike

255. GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 12.

256. *Id.*

257. See, e.g., SIGMA CHI FRATERNITY, STANDARD OPERATING PROCEDURES MANUAL 6-7 (2012), available at <http://www.sigmachi.org/sites/default/files/Documents/sop.pdf> ("[N]o man shall be admitted to membership who is not believed to be a man of good character, a student of fair ability, with ambitious purposes, a congenial disposition, possessed of good morals, and having a high sense of honor and a deep sense of personal responsibility . . ."); SIGMA PHI EPSILON FRATERNITY, BYLAWS 1-3 (31st ed. 2011), available at <http://www.sigep.org/resourcedocs/about-resources/2011GrandChapterBylawsandAdministrativePoliciesandProcedures.pdf> ("A brother in the Sigma Phi Epsilon Fraternity is a man of good moral character . . .").

258. See Weiss, *supra* note 30, at 589-90; see also Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 564-65 (2007) ("In essence, all 'sex' discrimination is really 'gender' discrimination.").

259. Weiss, *supra* note 30, at 589-90.

260. See Turner, *supra* note 258, at 564 ("Yet it is extremely implausible that most employers who discriminate against women do so because of a view that a Y chromosome, or a penis, is required to do a certain kind of work.").

261. See *id.*

262. Westol Telephone, *supra* note 205; see, e.g., BAIRD'S MANUAL, *supra* note 22, at I-37 ("[The NPC] is empowered to make recommendations to member fraternities, such recommendations becoming law only after ratification by the member groups."); *Constitution and Bylaws*, N.-AM. INTERFRATERNITY CONF., <http://www.nicindy.org/about/constitution-and-bylaws/> (last visited Mar. 29, 2013) ("All such activities [of the House of Delegates] shall preserve the autonomous right of each member fraternity over its own affairs.").

the NCAA, where national governing bodies regulate intercollegiate athletic programs.²⁶³ Implementing nationwide policies, as a result, may not be as feasible for fraternities as it has been for the NCAA. However, it is not impossible.²⁶⁴

Until the 2011 policy, the NCAA allowed colleges to decide "how to count transgender athletes when reporting participation rates" or whether to allow them to play on the team consistent with their gender identity.²⁶⁵ It adopted a nationwide policy "[b]ecause a more complex understanding of gender may be new and challenging for some people."²⁶⁶ The NCAA acknowledged the dangers of creating policies guided by misinformation and stereotypes, rather than accurate and up-to-date information.²⁶⁷ Therefore, it sought to give necessary guidance to campus and athletic administrators to avoid misconceptions and misinformation in policies that would create more problems than the policies would solve.²⁶⁸

The NCAA recognized that an explicit policy would protect organizations from litigation and other negative consequences.²⁶⁹ States are continuing to adopt specific legal protections for transgender students.²⁷⁰ Courts are also applying sex discrimination laws to prohibit discrimination against transgender people.²⁷¹ A failure to adopt a policy ensuring equal opportunities may result in costly and divisive litigation.²⁷² Importantly, in the case of the NCAA, campuses did not push back after the adoption of the policy.²⁷³ The response was "a lot quieter than we thought it would be."²⁷⁴ Karen Morrison, NCAA Director of Gender Inclusion, noted: "Maybe a lot more schools would be more engaged in it when they have a transgender person

263. GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 13.

264. See Grasgreen, *supra* note 16.

265. *Id.*

266. GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 13, at 5-6.

267. *Id.* at 6.

268. *Id.*

269. *Id.* at 16; see also *infra* text accompanying notes 307-314 (discussing how explicit statements and policies can strengthen the expressive associational purposes of fraternities).

270. See GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 19, 50 app. B; sources cited *supra* note 112 (compiling states with nondiscrimination statutes that prohibit discrimination against "gender identity and expression").

271. See GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 19; *supra* Part II.B.

272. See GRIFFIN & CARROLL, ON THE TEAM, *supra* note 236, at 19; Morrison Telephone, *supra* note 243 ("It won't rattle your world. It won't come. It's better to pitch it now before [transgender people] sue because you have not talked about [it and] because they want the benefit of athletics.").

273. See Morrison Telephone, *supra* note 243.

274. *Id.*

present themselves.”²⁷⁵ Schools, in fact, thanked the NCAA for their leadership.²⁷⁶

Most importantly, the NCAA policy relieved people’s worry about the concept of transgender people.²⁷⁷ It took “away the fear of the unknown” for the university, as well as for the students who were hesitant to come out or who wanted to compete as transgender athletes.²⁷⁸ Without an express statement from the NCAA, transgender students competed while hiding expression of their identities because they did not want to face potential backlash from the media or in the arena.²⁷⁹ Many more transgender students chose “not to participate because they were scared of outing themselves,” wondering, “What is going to happen to me?”²⁸⁰

The NCAA realized that “someone is going to have to make the decisions,” and “we’re going to make a decision [based] on medical principles.”²⁸¹ Even then, Morrison noted, “We know we haven’t got it all figured out.”²⁸² However, the policy ensures that transgender students know how they will be treated.²⁸³ The NCAA policy has made it safer for students and universities to address transgender inclusion on sports teams.²⁸⁴

In the same way, a clear policy will make it safer for students and chapters to address transgender inclusion within fraternities. It will reduce the fear of members and alumni like Eileen who do not want to face potential backlash. Most importantly, a fraternity may benefit most from an explicit policy because it will strengthen and protect against challenges to its claims to intimate and expressive associational rights under the U.S. Constitution.²⁸⁵ In fact, fraternities have begun to take explicit stances that reinforce their creeds and purposes.

On May 14, 2006, Sigma Phi Beta Fraternity (“SPB”) enacted a transgender-inclusive policy that went “above and beyond any other

275. *Id.*

276. *Id.*

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* Morrison noted a potential example of a transgender man who has not transitioned but wants to compete on the men’s swimming team. *Id.* With the high-tech swimsuits, NCAA regulations do not permit men’s suits to go above the waist. *Id.* “There are going to be things like that coming at us.” *Id.* However, the NCAA continues to hold educational sessions on this issue. *Id.*

283. *Id.*

284. *Id.*

285. *See* Buzuvis E-mail, *supra* note 191; *infra* Part IV.D (discussing the constitutional rights of intimate and expressive association and their application to fraternities).

known policy of a national social college fraternity.”²⁸⁶ SPB sought to make it known that it was committed to transgender inclusion while maintaining its identity as a fraternity of men.²⁸⁷ The policy defines “male” “as any individual who self-identifies as male, regardless of his assigned sex at birth or his expression o[r] the perceived expression of his gender.”²⁸⁸ Moreover, members will remain members, even if they decide to transition.²⁸⁹ SPB acknowledged that the policy addresses “the complex nature of gender identity by respecting students’ ability to self-identify.”²⁹⁰ Both Delta Xi Phi Multicultural Sorority, Inc. (“DXP”) and Gamma Alpha Omega Sorority, Inc. (“GAO”) have adopted a very similar policy.²⁹¹

286. See Press Release, Sigma Phi Beta Fraternity, Sigma Phi Beta Fraternity Adopts Groundbreaking Policy in Recognizing Students’ Self-Identified Gender (May 14, 2006) (on file with *Hofstra Law Review*) [hereinafter SPB Press Release]; see also SIGMA PHI BETA FRATERNITY, NATIONAL CONSTITUTION AND BYLAWS OF SIGMA PHI BETA FRATERNITY 42 (2012) (on file with *Hofstra Law Review*). SPB “is a social fraternity operating within the traditional Greek system” that formed at Arizona State University in 2003 for gay, straight, bisexual, and transgender students. *About Sigma Phi Beta Fraternity*, SIGMA PHI BETA, <http://www.sigmaphibeta.org/about-sigma-phi-beta.php> (last visited Mar. 29, 2013). In 2005, members formed the national organization. *Id.* SPB “create[s] positive role models, promote[s] leadership, and increase[s] the community involvement of queer and queer-allied male college students.” *Id.*

287. SPB Press Release, *supra* note 286.

288. SIGMA PHI BETA FRATERNITY, *supra* note 286, at 42. In light of the inconsistent and difficulties in correcting state-issued documents to reflect a person’s gender identity, SPB does not require potential new members to obtain legal recognition of their gender identity. See SPB Press Release, *supra* note 286; *supra* text accompanying notes 114-21 (discussing the confusing web of requirements within and among states to correct state-issued documents).

289. SIGMA PHI BETA FRATERNITY, *supra* note 286, at 42 (“Sigma Phi Beta Fraternity strives to uphold its gender identity, but first and foremost values brotherhood; therefore, no[] member can lose his membership rights due to a change in gender, gender identity or gender expression.”).

290. SPB Press Release, *supra* note 286 (“Sigma Phi Beta’s decision to welcome transgender fraternity members is in direct fulfillment of the Greek Life values of self-determination, self-actualization, and brotherhood. The inclusion of gay and transgender students in the fraternity system ensures the formative experience of true brotherhood . . .”).

291. See DELTA XI PHI MULTICULTURAL SORORITY, INC., POLICY AND PROCEDURE 25 (2011) (on file with *Hofstra Law Review*); *Non-Discrimination Statement*, GAMMA ALPHA OMEGA, http://www.gammaalphaomega.com/index.php?option=com_content&view=article&id=52&Itemid=76 (last visited Mar. 29, 2013). Both DXP and GAO define female as “any individual who self-identifies as female, regardless of her assigned sex at birth, her expression or the perceived expression of her gender.” See DELTA XI PHI MULTICULTURAL SORORITY, INC., *supra*, at 25; *Non-Discrimination Statement*, *supra*. Regarding active members and alumni, DXP “strives to uphold its gender identity, but first and foremost values sisterhood; therefore, no member of [DXP] can lose her membership rights due to a change in gender, gender expression or gender identity.” DELTA XI PHI MULTICULTURAL SORORITY, INC., *supra*, at 25. GAO’s policy for active members and alumni states the same. See *Non-Discrimination Statement*, *supra*. DXP formed in 1994 on the University of Illinois at Urbana-Champaign to promote multicultural awareness, the empowerment of women in higher education, community service, friendship, and sisterhood. *The Delta Xi Phi Story*, DELTA XI PHI MULTICULTURAL SORORITY, INC., http://deltaxiphi.com/our_story (last visited Mar. 29, 2013). GAO formed in 1993 at Arizona State University for “the advancement of Hispanics/Latinas while promoting a quest for higher learning and volunteerism.” *Herstory*, GAMMA ALPHA OMEGA,

Another example is Delta Lambda Phi National Social Fraternity (“DLP”), which devoted two years to reviewing its membership policies before setting forth a revised transgender-inclusive policy in November 2011.²⁹² DLP has always accepted transgender members, but it had addressed the situation “on an ad hoc, chapter-by-chapter basis.”²⁹³ Under its previous policy, DLP prohibited its members from questioning the sex or gender identity of members and prospective members.²⁹⁴ Anyone who identified as a man would be accepted as such.²⁹⁵ However, DLP had the option of requiring objective proof of sex if nonmembers challenged a member’s sex.²⁹⁶ In such a situation, DLP would not grant membership to any member who failed to provide the required objective proof.²⁹⁷ The policy did not outline how to handle members whom the fraternity initiated as men but who later transitioned.²⁹⁸ Unfortunately, the policy only created confusion in its application and left many questions unanswered.²⁹⁹

Under its 2011 policy, DLP acknowledged that, as a fraternity of men, many current and future members “may not necessarily be of the male sex.”³⁰⁰ Therefore, DLP redefined “man” within its bylaws to mean “any person who is male bodied or male identified at the time of induction.”³⁰¹ DLP clarified that it is a fraternity of men, regardless of whether it is a single-sex organization.³⁰² Any initiated member will remain a member for life, even if he expresses a gender other than

http://gammaalphaomega.com/index.php?option=com_content&view=article&id=3&Itemid=4 (last visited Mar. 29, 2013).

292. Memorandum from Joel Corcoran, Gen. Counsel & Vice President for Legal Affairs, Delta Lambda Phi Nat’l Soc. Fraternity, to Bd. of Dirs. & Senior Staff of the Fraternity Office, Delta Lambda Phi Nat’l Soc. Fraternity 1 (Nov. 4, 2011) (on file with *Hofstra Law Review*) [hereinafter Corcoran Memo]. DLP formed in 1987 and “is a traditional Greek social organization founded by and for a decidedly nontraditional group: gay, bisexual, and progressive men.” *About*, DELTA LAMBDA PHI SOCIAL FRATERNITY, <http://dlp.org/about/> (last visited Mar. 29, 2013); *History*, DELTA LAMBDA PHI SOCIAL FRATERNITY, <http://dlp.org/about/history/> (last visited Mar. 29, 2013).

293. Corcoran Memo, *supra* note 292, at 2.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 3.

298. *Id.*

299. *See id.* at 2-3. DLP noted that the confusion was “largely because our membership did not fully understand the distinctions among sex, gender identity, and gender expression.” *Id.* at 3. The NCAA acknowledged similar difficulties for organizations developing transgender-inclusive policies. *See supra* text accompanying notes 266-68.

300. Corcoran Memo, *supra* note 292, at 4.

301. *Id.* at 3, 5 (“The word ‘man’ (or plural ‘men’) as used in our bylaws is now clearly defined as a person who is male bodied (as a matter of sex) or male identified (as a matter of gender identity) at the time of induction.”).

302. *Id.* at 3.

male.³⁰³ Problematically, the policy still requires some showing of proof "if an outsider ever challenged the status of a member."³⁰⁴ The new policy "essentially cast[s] gender expression as a type of free speech along the same lines as religious or political expression."³⁰⁵ Members who express themselves as other than male are behaving no differently from members who engage in other forms of expression.³⁰⁶

In addition to developing inclusive policies, some organizations have taken stances to express that, by admitting transgender members, they are not waiving their First Amendment right to associate in a manner that excludes the other sex.³⁰⁷ SPB, for example, included a "Statement on Title IX."³⁰⁸ Because federal and state laws do not clearly

303. *Id.* at 4 ("As long as he was male bodied or male identified at the time of induction, he is a member of DLP for life . . .").

304. *Id.* at 4, 6-7 ("If the gender of an [sic] member of DLP is placed in doubt for any reason, that member must provide some objective proof of a 'man's' gender identity to the relevant Chapter, Colony, or Interest Group in order to remain a member of DLP . . ."). The author of this Note does not recommend that any fraternity use DLP's policy as a model. By requiring objective proof based on medical opinion, the policy will likely interfere with a member's right to self-identify, especially because access to adequate healthcare is not an option for many transgender people. *See id.* (listing what constitutes sufficient proof: "[a] signed affidavit by a licensed psychologist, psychiatrist, or endocrinologist attesting to the identity claimed by the individual in question," or other nationally approved "equivalent documentation"); *supra* text accompanying notes 44-45 (discussing the significant—and often extreme—financial and social barriers to accessing adequate preventive, routine, and transition-related healthcare). To be sure, although it defines the proof a member must show to retain his membership, DLP does not make clear how it will determine whether the challenge to a member's gender is legitimate or merely a bias-motivated prank. *See Corcoran Memo, supra* note 292, at 4, 6. In the athletic context, the NCAA has determined that concerns of "imposters" are unfounded and that, over the forty years of "sex verification" procedures in international athletics, no "fraud" has ever been revealed. *See supra* text accompanying notes 243-44. Such a policy raises justified criticism, then, because DLP places the heavy, extremely invasive burden on the member—who *must* produce medical proof under *any* challenge to his gender—and leaves no discretion to the fraternity. Corcoran Memo, *supra* note 292, at 4, 6 ("If the gender of an [sic] member of DLP is placed in doubt *for any reason*, that member *must* provide some objective proof of a 'man's' gender identity . . ." (emphasis added)). Fraternities, as a result, should not follow DLP's policy.

305. Corcoran Memo, *supra* note 292, at 4.

306. *Id.* (noting that such expression may take the form of drag performances, fashion, or group discussions). Members may also express themselves as, for example, Catholics, Jews, Democrats, Republicans, Libertarians, or Green Party members. *Id.*

307. *See* DELTA XI PHI MULTICULTURAL SORORITY, INC., *supra* note 291, at 25; SIGMA PHI BETA FRATERNITY, *supra* note 286, at 42; *Non-Discrimination Statement, supra* note 291; *see also infra* Part IV.D (discussing fraternities' claims to the constitutional rights of intimate and expressive association and two recent challenges to these rights in court).

308. SIGMA PHI BETA FRATERNITY, *supra* note 286, at 42. The statement provides:

Federal and state law provides no clear and consistent definition of gender. Therefore, the Fraternity adopts the most expansive policy under present law in order to prevent exclusion and/or discharge of transgender members regardless of legal gender designation. This policy is not intended to change the all-male character of the Fraternity nor to waive the Fraternity's rights under Title IX.

Id.

and consistently define “gender,” SPB adopted the “the most expansive policy under present law.”³⁰⁹ Importantly, SPB noted that its transgender-inclusive policy “is not intended to change the all-male character of the Fraternity nor to waive the Fraternity’s rights under Title IX.”³¹⁰ DXP and GAO’s statements mirror that of SPB’s.³¹¹

These explicit position statements have the potential to be a strong argument against constitutional challenge.³¹² The fraternity is still able to assert that it has an expressive purpose that is served by the exclusion of women.³¹³ Importantly, by admitting someone who was assigned female at birth but now—like the other members of the fraternity—identifies as a man, the organization is not undermining this purpose.³¹⁴

Unlike the NCAA, fraternities have little reason to worry about unfair competitive advantage within their memberships.³¹⁵ Rather, fraternities are committed to providing opportunities for members to develop their skills as leaders, public speakers, and good citizens.³¹⁶ The NCAA has done “the right thing” by taking steps to ensure equal access to sports for transgender students.³¹⁷ Fraternities, then, should do the same by basing determinations for all members—transgender or not—on the values, creeds, and purposes on which their organizations were founded.

D. Constitutional Foundation in the Law: Stand for Something

While fraternities may be reluctant to start the conversation about transgender membership, the time has come for a broader discussion about fraternal values. Title IX is only one pillar of the legal foundation

309. *Id.*

310. *Id.*

311. See DELTA XI PHI MULTICULTURAL SORORITY, INC., *supra* note 291, at 25; *Non-Discrimination Statement*, *supra* note 291. Both statements hold:

Federal and state law provides no clear or consistent definition of gender. Therefore, the sorority adopts the most expansive policy under present law in order to prevent exclusion and or [sic] discharge of transgender members regardless of legal gender designation. This policy is not intended to change the all-female character of the sorority nor to waive the sorority’s rights under Title IX.

DELTA XI PHI MULTICULTURAL SORORITY, INC., *supra* note 291, at 25; *Non-Discrimination Statement*, *supra* note 291.

312. Buzuvis E-mail, *supra* note 191.

313. *Id.*

314. *Id.*

315. See *supra* text accompanying notes 249-56.

316. See BAIRD’S MANUAL, *supra* note 22, at ix; Burke, *Editor’s Note*, *supra* note 201, at 3 (“The bottom line is that membership selection decisions should be made in a positive manner on the basis of the criteria contained in the organization’s governing documents.”); see, e.g., SIGMA CHI FRATERNITY, *supra* note 257, at 7.

317. See GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 13, at 5.

that supports today's fraternities. The rights to intimate association and expressive association under the First Amendment are two others.³¹⁸ The Supreme Court has held that such associations are "central to our constitutional scheme" and are "a fundamental element of liberty protected by the Bill of Rights."³¹⁹

Associations fall "on a spectrum from the most intimate to the most attenuated of personal attachments."³²⁰ In determining the extent of a state's ability to infringe on the freedom to intimately associate, a court evaluates the association by its size, purpose, policies, selectivity, congeniality, and other characteristics pertinent to the particular case.³²¹ The Supreme Court has held that the freedom of expressive association is implicit in the right to engage in activities protected by the First Amendment, finding that individuals have the right to associate to pursue "political, social, economic, educational, religious, and cultural ends."³²² Government action, such as intrusion into a group's internal structure or affairs, may unconstitutionally infringe upon expressive associational freedom.³²³ Intrusion is justified when a regulation serves compelling state interests that are unrelated to the suppression of ideas

318. Horton, *supra* note 22, at 432; see also Tim Burke, *The Right to Freedom of Association: Private Public Distinctions*, in THE ADMINISTRATION OF FRATERNAL ORGANIZATIONS, *supra* note 134, at 255, 260-67 (discussing in-depth the rights to intimate association and expressive association). Fraternities base their right to associate on the Constitution and the First Amendment, which guarantees the right to exclude members on the basis of sex. See, e.g., *NIC Resolutions*, N.-AM. INTERFRATERNITY CONF., <http://www.nicindy.org/about/resolutions/> (last visited Mar. 29, 2013) ("[T]he right to determine and offer membership is an essential component in the heritage and tradition of the fraternal movement, grounded in the history of American freedom of association and speech.").

319. See *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984).

320. *Rotary Club*, 481 U.S. at 545-46. The most intimate relationships involve the family, including: childbirth, child rearing, child education, and cohabiting with relatives. *Jaycees*, 468 U.S. at 619-20 ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life."). On the other end of the spectrum lies a business enterprise. *Id.* at 620. ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."). Between the two extremes exists a wide range of relationships with varying degrees from constitutional protection from state intrusion. *Id.*

321. See *Jaycees*, 468 U.S. at 620.

322. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). This freedom is crucial in preventing the injection of majority views into groups that express unpopular views. *Id.* at 647-48 (citing *Jaycees*, 468 U.S. at 622).

323. See *id.* at 648 (citing *Jaycees*, 468 U.S. at 623). In particular, forced inclusion of unwanted members infringes this freedom if the members' presence significantly affects a group's ability to advocate public or private viewpoints. *Id.* This freedom, however, is not absolute. *Id.*

and “that cannot be achieved through means significantly less restrictive of associational freedoms.”³²⁴

Two recent cases—*Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*³²⁵ and *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*³²⁶—demonstrate that fraternities’ claim to the right to associate under the Constitution may be in jeopardy. In each case, courts found that the fraternity at issue failed to warrant protection as intimate and expressive associations, suggesting that the current state of fraternities requires serious evaluation to survive future challenges to

324. *Id.* (citing *Jaycees*, 468 U.S. at 623).

325. 229 F.3d 435 (3d Cir. 2000). *Pi Lambda Phi Fraternity* involved the University of Pittsburgh chapter of Pi Lambda Phi Fraternity’s First Amendment challenge to the university’s withdrawal of and refusal to again recognize the fraternity. *Id.* at 439–40. The university had revoked the chapter’s recognition after police raided the fraternity’s house and discovered “various drugs and drug paraphernalia.” *Id.* at 439. After an unsuccessful appeal to the university to reinstate recognition, the fraternity filed suit. *See id.* at 439–40. The trial court held that the First Amendment did not protect the fraternity’s associational activities because it engaged in social activities, not expressive or intimate association. *Id.* at 441. On appeal, the Third Circuit affirmed, holding that the chapter did not qualify for constitutional protection as either an intimate or expressive association. *Id.* at 442, 444–45. In rejecting the fraternity’s intimate association argument, the court focused on the fraternity’s membership size, its recruiting practices, and its lack of seclusion, finding that the fraternity lacked the essential characteristics of intimate associations. *Id.* at 442. With regard to the fraternity’s expressive association claim, the court found that the chapter did not actively pursue the ideals of the national organization, that it did not take a public stance on political, social, or cultural issues, and that the chapter’s charitable acts were “minor,” “underwhelming,” and “merely incidental” to the group’s character. *Id.* at 444. The court concluded that the protections under the First Amendment required the fraternity to do more than simply claim to be an expressive association. *Id.* The court, however, did expressly note it was not holding that all fraternities are not expressive associations and that the case should be confined to its facts. *Id.* at 444–45. (“It is entirely possible that a fraternity (or sorority, or similar group) could make out a successful expressive association claim . . .”).

326. 502 F.3d 136 (2d Cir. 2007). *Alpha Epsilon Pi Fraternity* involved the Chi Iota Colony of Alpha Epsilon Pi Fraternity’s First Amendment challenge to the denial of university recognition because of a university nondiscrimination policy prohibiting discrimination on the basis of “gender.” *Id.* at 139–42. The fraternity filed suit against the university, alleging violations of their rights under both the freedoms of intimate association and of expressive association, among other claims. *See id.* at 142. The fraternity also sought a preliminary injunction to require the university to recognize it as an official student group. *Id.* at 142–43. The district court granted injunctive relief on the ground of intimate association but not on the ground of expressive association. *See id.* at 143, 149 n.2. On appeal from the university, the Second Circuit held that the fraternity was not constitutionally protected as an intimate association and vacated the preliminary injunction. *Id.* at 149. The court focused its analysis on four factors: size, selectivity, purpose, and exclusivity. *See id.* at 144–47. The court found that while the chapter only had nineteen members, the small size was “the product of circumstances, not a desire to maintain intimacy.” *Id.* at 145. The court also looked unfavorably upon the fraternity’s lack of selectivity, finding that a high percentage of students who expressed interest were invited to join. *See id.* at 145–46. The court further found that the fraternity lacked exclusivity, involving nonmembers in “crucial aspects of its existence.” *See id.* at 146. The court then found that the university did not substantially infringe on the fraternity’s associational freedom by choosing not to subsidize the activities of the fraternity and vacated the preliminary injunction. *Id.* at 148.

their associational rights.³²⁷ In light of these cases, particularly *Alpha Epsilon Pi Fraternity*, fraternities should understand that their modern-day message might be insufficient to survive constitutional challenges.³²⁸

Fraternities have clearly demonstrated the benefits of membership.³²⁹ Studies have confirmed what fraternities already know: that their members become leaders and more active citizens.³³⁰ The time has come for a broad conversation in the fraternal community about embracing core values and strengthening the integrity of all fraternities. While this conversation is far broader than can be adequately addressed in this Note, the conversation must begin now, and addressing transgender membership must be an important part of that conversation.

V. CONCLUSION

Title IX does not govern the membership practices of fraternities. Therefore, fraternities should determine what "man" or "male" means within their bylaws and governing documents. This Note demonstrates that the law empowers—indeed, even urges—fraternities to make the necessary decisions that are consistent with their purposes, creeds, and values.³³¹ Fraternities should make clear what is required for transgender people to become members and to maintain membership as active members and alumni. Only then will fraternities remain consistent with their values and purpose in creating irreplaceable familial bonds on college campuses. Brothers should remain brothers, even during and after transitioning—a decision consistent with the lifelong bonds of brotherhood that forms the foundation of fraternities' constitutional

327. See *id.* at 149 & n.2 (noting that Second Circuit addressed only the fraternity's interest in intimate association because the fraternity did not appeal the district court's denial of relief on the interest in expression association); *Pi Lambda Phi Fraternity*, 229 F.3d at 442, 444-45; Lukianoff, *supra* note 183, at 1-2 ("[I]f all you do is party and hang out on your campus, it's possible that even public universities bound by the First Amendment can kick you off campus.").

328. See Burke, *Publisher's Note*, *supra* note 183, at 2; Lukianoff, *supra* note 179, at 2.

329. See *supra* text accompanying notes 124-62.

330. See *supra* Part III.A.

331. See Burke, *Publisher's Note*, *supra* note 183, at 2 ("Fraternities and sororities strengthen their position in attempting to enforce their First Amendment Freedom of Association rights by rededicating themselves to the purposes for which their organizations exists."); Lukianoff, *supra* note 179, at 2 ("Standing up for a cause is not only a good way to show that fraternities can make a positive contribution to society, but it also helps to ensure the future survival of the fraternity.").

associational rights.³³² Fraternities must convey a consistent message stressing that the same values and purpose that dictate how to treat fraternity members should apply with equal force to transgender people.

*Stevie V. Tran**

332. See, e.g., DELTA SIGMA PHI FRATERNITY, *supra* note 208, at 3 (“Membership in this Fraternity shall be for life, and no member of this Fraternity can voluntarily sever his connection therewith.”); KAPPA ALPHA ORDER, *supra* note 210, at 6 (“Membership of those initiated into the Order is for life”); SIGMA ALPHA EPSILON FRATERNITY, *Principles to THE FRATERNITY LAWS*, *supra* note 209 (“To provide our members with life-long fraternal experiences that are productive, rewarding and enjoyable.”); SIGMA CHI FRATERNITY, *supra* note 257, at 25 (“Sigma Chi, both in stated goals and purposes and usually-achieved results, is a positive experience, designed to be contributory and beneficial throughout a man’s life.”); THETA CHI FRATERNITY, *supra* note 208, at 21 (“Any person joining Theta Chi Fraternity becomes a member for life”).

* J.D. candidate, 2013; Lesbian, Gay, Bisexual, and Transgender (LGBT) Rights Fellow; Hofstra University School of Law. Professor Elizabeth M. Glazer, you laid the foundation for this Note. I owe this to you—and that whiteboard in your office. Thank you to the countless individuals, especially Jessica Pettitt and Beth Stathos, who gave their time to have a conversation with me on this topic. You are, literally, what supports this Note (your names are in all the footnotes!), and I am grateful for the opportunity to have learned from every one of you. Thank you, also, to Dave Gerardi, Rebecca Sklar, and the editorial boards of Volumes 40 and 41, especially Katie Porter and Tiffani Figueroa. Stephen D. Piraino read countless versions of this Note, and I am appreciative of his feedback. Lastly, this Note would not have been possible without David Brown, Jonathan Gould, and Nathan Arrowsmith. Your friendship serves as a constant reminder of why I continue to believe in our Ritual and Values.

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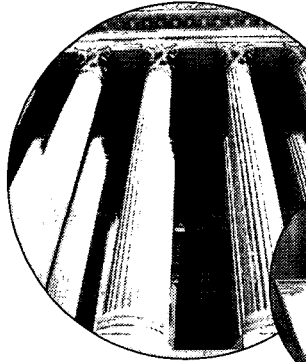
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