

**WINNING THE HOUSING LOTTERY: CHANGING UNIVERSITY
HOUSING POLICIES FOR TRANSGENDER STUDENTS**

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INTRODUCTION

At Southern Utah University, Kourt Osborn, a transgender¹ student, was denied a dorm room because of his gender identity.² Born as a female, Osborn, who identifies as a male, applied to live in the male dorms. The University determined that Osborn could live in the men's dormitory only with physician supervision of his hormone treatment, therapist acknowledgment of his Gender Identity Disorder, and official documentation of sexual reassignment surgery.³ Osborn was told that the failure to present these three items would result in a denial of male housing. Furthermore, Osborn was also denied the option of female housing.⁴ Osborn filed a formal grievance, to which Dean O'Driscoll, assistant to the University's President and the University's spokesman, responded that the school was not discriminating against transgender students, but following a policy that aims to ensure that all students feel safe and comfortable in on-campus housing.⁵ O'Driscoll admitted that proof of gender is not

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1 This Comment will use transgender as an "umbrella term" that includes "transsexuals, transvestites, cross-dressers, drag queens and drag kings, . . . intersexed people, bigendered people, and others who . . . 'challenge the boundaries of sex and gender.'" Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 589 n.4 (2000) (quoting LESLIE FEINBERG, *TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL*, at x (1996)).

2 Scott Jaschik, *Gender Status and Single-Sex Dorms*, INSIDE HIGHER ED, Dec. 20, 2007, <http://www.insidehighered.com/news/2007/12/20/transgender>.

3 Matt Comer, *Breaking: Transgender Student Denied Campus Housing at Public Utah College*, INTERSTATEQ, Dec. 14, 2007, <http://www.interstateq.com/archives/2473/>.

4 *Id.*

5 Jaschik, *supra* note 2.

required of all students; only transgender students must provide written medical proof.⁶ In response to the University's statement that they only offer male or female student housing, Osborn stated that it was "archaic to believe people of different genders can't live in an apartment together."⁷ Osborn felt "dehumanized, degraded, demoralized."⁸

What happens when transgender and non-transgender worlds collide? What happens when these worlds converge in the context of an individual's most intimate space, the home? Kourt Osborn's experience reveals the unfortunate story of a college student denied the opportunity to live in a college residence hall—an integral social part of the college experience. It appears that the University acted on the premise that other students would not feel comfortable living with a transgender individual.⁹

The fear and uncertainty surrounding the transgender experience result in part from limited public exposure to individuals in the transgender community. The current increase in transgender visibility and university housing requests from transgender students necessitate a reevaluation of campus housing policies to ensure that all students have safe and comfortable housing options.¹⁰ University-mandated, gender-based housing policies force transgender students into gendered rooming situations based on biological sex, instead of gender identification. Harassment of transgender individuals is not an isolated event at school, but an ongoing epidemic.¹¹ Recognition

6 Matt Comer, *Southern Utah Responds to Denial of Transgender Student Housing*, INTERSTATEQ, Dec. 18, 2007, <http://www.interstateq.com/archives/2479/> ("[A letter] has to state clearly, by a doctor, are we dealing with a male student or a female student" (alteration in original)).

7 *Id.*

8 *Id.*

9 While understandable that the University would be concerned with accommodating the needs of the majority of the student body, this traditional housing policy, grounded in institutionalized heterosexism, marginalizes and alienates many students, such as gender non-conforming students. This policy ignores those students who prefer living with someone of the opposite sex or gender, as well as those who are uncomfortable being housed according to biological sex. See Comer, *supra* note 3.

10 See generally Brett Beemyn, *Serving the Needs of Transgender College Students*, 1 J. GAY & LESBIAN ISSUES IN EDUC. 33 (2003) (explaining that although transgender youth are becoming increasingly visible on college campuses, they remain one of the most underserved populations).

11 See generally Harsh Realities *Finds Transgender Youth Face Extreme Harassment in School*, GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, Mar. 17, 2009, <http://www.glsen.org/cgi-bin/iowa/all/news/record/2388.html> (discussing the high levels of victimization that transgender youth face in school).

of this epidemic is a critical first step in achieving inclusive, non-discrimination policies and safer, inclusive campus communities.

The conflicting interests of transgender and non-transgender students present a quandary for university housing. College students have a legitimate and fundamental interest in their living arrangements on college campuses. Although in the minority, transgender students should also have the opportunity to live in a comfortable environment. Transgender students may assert their right to campus living arrangements according to their self-identified gender, rather than their birth sex. If universities honor these claims, they may face legitimate objections from non-transgender students on grounds of modesty, safety, and the right to privacy within the home. Failure to honor such claims may also be met by objections from transgender students. The potential constitutional claims that could result from accommodating the housing needs of transgender students are laden with conflict. These constitutional issues would arise in the public university context and suggest the need for public universities to implement housing policy changes. Private universities would also benefit from such policy recommendations. Universities should provide housing options that protect gender expression and identity of transgender students and take into account the interests of the rest of the student body.

University life for transgender students should not be marred by frustration and alienation within their living space and larger social college environment. This Comment recognizes the difficulties universities face in balancing the needs of transgender and non-transgender students and placing transgender students, particularly pre-operative students,¹² in housing according to self-defined gender identity. Sex segregated housing should remain an option, but not the only option. This Comment suggests that universities make assignments on the basis of students' self-defined gender identity. As

¹² “Pre-operative” refers to individuals who desire, but have not yet had, sexual reassignment surgery (SRS), while “post-operative” individuals have had SRS. “Non-operative” is a term describing individuals who do not want, or are unable to have, SRS. Such individuals may undergo hormonal and surgical treatments or instead “change their gender presentations without bodily alteration.” Patricia Gagne & Richard Tewksbury, *Conformity Pressures and Gender Resistance Among Transgendered Individuals*, 45 SOC. PROBS. 81, 83 (1998); see also NICOLETTE SIRAGUSA, GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, THE LANGUAGE OF GENDER: A DISCUSSION AND VOCABULARY LIST FOR EDUCATORS ON GENDER IDENTITY 5 (2001), http://glsen.org/binary-data/GLSEN_ATTACHMENTS/file/179-1.pdf. But see Telephone Interview with Kathryn L. Stewart, Youth Law Project Attorney, Equality Advocates Pennsylvania (Jan. 5, 2009) (explaining that the term post-operative is a “misnomer” given the debate within the transgender community as to what surgery is necessary to be made into what is classically described as a biologically male or female body).

an initial step, universities would change housing forms to include a non-binary gender question, which gives students the option to self-identify outside of the male and female categories. In addition, universities would not force transgender students to provide official documentation of sex reassignment surgery. This Comment will also explore the importance of gender-neutral housing as a means to ensure that transgender students benefit from academic and social life. In order to accommodate gender non-conforming individuals and recognize students' true gender identity, students who choose this option would be assigned housing regardless of gender.

Part I of the Comment provides an overview of university housing policies. Part II discusses gender theory, social construction of gender, and approaches to challenging the current discourse. Part III explores the right to gender self-determination and challenges the notion that the state can and should define your gender identity. Part IV examines constitutional claims that transgender and non-transgender students may assert within the context of university on-campus housing by exploring various facets of the right to privacy. Part V considers students' First Amendment freedom of association claims. Part VI evaluates current university housing policies and argues that universities have a legal duty to provide alternative housing options to meet the needs of transgender students.

I. OVERVIEW OF UNIVERSITY CAMPUS HOUSING ISSUES

University housing is replete with complications and difficult choices that impact a fundamental aspect of the college experience. Roommate and hallmate assignments, as well as bathroom access, are frequent sources of tension and raise contentious and complex issues for transgender students. Most university housing is designated as single sex by room, hall, or building and is based on traditional conceptions of sex and gender.¹³ The implications are significant for all,

¹³ The establishment of co-ed dorms in the 1960s and 1970s provides a historical backdrop for considering campus housing today. *See generally* ELANA LEVINE, *WALLOWING IN SEX: THE NEW SEXUAL CULTURE OF 1970S AMERICAN TELEVISION* 9 (2007) (explaining that the social movements and sexual revolution of the 1960s and 1970s led to the establishment of co-ed dorms); 2 *RELIGION AND AMERICAN CULTURES: AN ENCYCLOPEDIA OF TRADITIONS, DIVERSITY AND POPULAR EXPRESSIONS* 399 (2003) (noting that colleges established co-ed dorms in the 1960s and 1970s and stopped prohibiting men and women from entering each other's dormitories). The liberalization of campus housing suggests that the norm of single sex housing was destabilized, but the impact of experimentation has been limited because sex segregated housing persists and universities struggle with accommodating gender non-conforming individuals. It should be noted that a student might check off a box that indicates self-identified gender that is contrary to biological

but for transgender students, who represent a near-invisible presence on college campuses, the issues are more disturbing because they face a dearth of acceptable on-campus housing options.¹⁴ Public universities are in a difficult position. Most university housing policies dictate that room assignments must be based on biological sex and, therefore, housing administrators cannot knowingly place a “female” student with “male” students, or vice versa.¹⁵ While universities may want to accommodate transgender students’ requests to be placed in a campus housing arrangement according to their self-identified gender, universities must also take into account the rights, safety, and comfort of non-transgender students. As a result, universities are forced to play a balancing game in which housing administrators juggle the rights of transgender students with those of non-transgender students.¹⁶

To date, over 220 campuses have taken affirmative steps towards adopting policies that protect students from discrimination.¹⁷ Such non-discrimination policies, which include gender identity and ex-

sex, but this self-identification is likely to be red-flagged unless a student has changed his or her transcript and birth certificate. This is problematic because it conflates the terms “sex” and “gender.”

- 14 See BRETT-GENNY JANICZEK BEEMYN, TRANSGENDER LAW & POLICY INST., WAYS THAT U.S. COLLEGES AND UNIVERSITIES MEET THE DAY-TO-DAY NEEDS OF TRANSGENDER STUDENTS, <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Mar. 28, 2010) (explaining that the lack of safe and comfortable on-campus housing options is a significant problem for transgender students).
- 15 Implicit in this sentence is recognition of the fact that universities play a significant role in classifying individuals as male or female. This classification often comes down to how well an individual has transitioned, which is measured, in part, by the sex reassignment surgery. For example, in a study surveying twenty-five colleges, only six had a “process for students to change the ‘M/F’ box on their documents without having gender reassignment surgery.” Brett Genny Beemyn & Jessica Pettitt, *How Have Trans-Inclusive Non-Discrimination Policies Changed Institutions?*, GLBT CAMPUS MATTERS: GUIDANCE FOR HIGHER EDUCATION 4 (2006), available at <http://www.jessicapettitt.com/images/Non-discrimination.pdf>. However, Kathryn Stewart suggests that individuals transition socially and medically, and these two aspects of transition do not necessarily have to coincide. Often, social transition begins long before medical transition for various reasons, including safety and social well-being. Telephone Interview with Kathryn L. Stewart, *supra* note 12.
- 16 See Alex Dubilet, *Nondiscrimination Policy All Talk, No Action, Some Say*, THE DAILY PENNSYLVANIAN, July 15, 2004, available at <http://media.www.dailypennsylvanian.com/media/storage/paper882/news/2004/07/15/News/Nondiscrimination.Policy.All.Talk.No.Action.Some.Say-2151306.shtml> (describing the involvement of LGBT activists in amending nondiscrimination policies).
- 17 2008 GENIUS INDEX: GENDER EQUALITY NATIONAL INDEX FOR UNIVERSITIES AND SCHOOLS 2 (2008) (on file with author). The GENIUS Index is a tool designed to track academic institutions leading efforts to create “GenderSAFE” campuses that “create safe, supportive, and equitable environments where students can learn, grow, and succeed whether or not they fit the expectations or stereotypes for masculinity or femininity.” *Id.*

pression, are invaluable because their reach is not only limited to transgender individuals, but also extends to individuals who do not adhere to gender stereotypes.¹⁸ Nevertheless, in 2008, 45% of student respondents to the 2008 GENIUS Survey reported being harassed or witnessing harassment due to expectations of masculinity and femininity.¹⁹ The problem of harassment in residence halls due to gender is significant, with 25% of students reporting that they had been harassed or witnessed harassment in a residence hall due to gender.²⁰ Universities and colleges have faced minimal litigation with regard to transgender students and university housing, yet student transgender advocacy and social activist groups are rallying behind this cause by raising awareness about transgender issues on college campuses and creating a supportive community.²¹

II. GENDER THEORY

In order to examine the issues faced by the transgendered community in the university housing context, it is important to explore various concepts within gender theory to understand the complexity of gender identity and expression. The remainder of this Part demonstrates that sex and gender are socially constructed and develop through interaction with others.

A. *Denaturalizing Sex and Gender*

The following definitions provide a foundation to better understand essential terms in this arena. These definitions will be critiqued and challenged in the remainder of this section.

Gender: a “way of perceiving bodies, behavior, and dress as either masculine or feminine.”²²

Sex: “[a]ssigned biological sex, as evidenced by chromosomes or genitals.”²³

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* See generally Brett Genny Beemyn, *Trans on Campus: Measuring and Improving the Climate for Transgender Students*, ON CAMPUS WITH WOMEN, Spring 2005, http://www.aacu.org/ocww/volume34_3/feature.cfm?section=2 (providing statistics on the harassment of transgendered students and the effects on their attitudes and behaviors).

²¹ See generally *Groups Aid Transgender Student Who Was Denied Housing*, THE ADVOCATE, Dec. 19, 2007, http://www.advocate.com/news_detail_ektid51190.asp (describing the groups that came to Kourt Osborn’s aid at Southern Utah University).

²² GENIUS INDEX, *supra* note 17, at 3.

²³ *Id.*

Transgender: an umbrella term “used to describe people who do not identify with the gender roles assigned to them by society based on their biological sex.”²⁴

Gender Expression: “[m]anifesting feelings of masculinity or femininity through how one looks, acts, and dresses;”²⁵ distinguished from sexual orientation.

Gender Identity: an “individual’s innermost sense of self as ‘male/masculine,’ ‘female/feminine,’ somewhere in between, or somewhere outside of these gender boundaries. Sometimes this ‘innermost sense’ does not correspond with anatomy (e.g. a person born anatomically male, but who identifies as female).”²⁶

Gender Non-Conforming: describing “someone who displays non-traditional forms of gender expression.”²⁷

Gender Dysphoria: “[u]nhappiness or discomfort with the gender role assigned by family and society to one’s biological sex.”²⁸

Female to Male (FTM): a “person born biologically female, who identifies [as] or feels male, and who takes on the sex, gender, or both of a male through surgery, mannerisms, dress, behavior, etc.”²⁹

Male to Female (MTF): a “person born biologically male, who identifies as or feels female, and who takes on the sex, gender, or both of a female through surgery, mannerisms, dress, behavior, etc.”³⁰

Sexual Reassignment Surgery: a “surgical procedure that modifies one’s primary and/or secondary sex characteristics through surgery.”³¹

The terms “sex” and “gender” are laden with nuances and ambiguities that a one-sentence definition cannot adequately convey. The abundance of literature exposes the complexity of these concepts and questions the nature of sex as biological and determinative of gender.³² The assumption that sex is biologically determined through

24 *Id.*

25 *Id.*

26 Siragusa, *supra* note 12, at 1.

27 GENIUS INDEX, *supra* note 17, at 3.

28 Siragusa, *supra* note 12, at 3.

29 *Id.*

30 *Id.*

31 *Id.* at 4.

32 *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) (challenging sex as a natural biological fact as well as the gender identity given based on biological sex); Elaine Craig, *Trans-phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN’S L.J. 137 (2007) (depicting how and why transgender issues are often experienced as uncomfortable or disruptive); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83 (2008) (addressing the means by which rights-based approaches to transgender advocacy risk undermining its transformative possibilities); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 16–18 (2003) (showing the importance of relying on medical evidence with respect to transgender issues); Dylan Wade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 256–58

anatomy, hormones, and physiology, contributes to the premise that sex flows from nature. Although many individuals are not fully male or female,³³ society generally accepts a male-female binary.³⁴ Academics have challenged this concept of biological essentialism³⁵ because it defines sex identity through genitalia and takes “sex” outside of the “realm of social construction.”³⁶

Biological essentialism also impacts the way in which we understand gender.³⁷ Feminist and gender theory scholars question the conceptualization of gender as biologically determined by sex. Feminist scholar Judith Butler argues that both sex and gender are cultural constructions.³⁸ Dylan Vade offers a comprehensive definition of gender that asserts its dynamic nature:

Gender is one’s own specific way of interacting with and presenting oneself to the world. Gender is expression Gender is how we relate to each other and to the world. . . . Gender is a sense of self *and* a relationship to the world. One’s sense of self is organic and inter-relational. Gender is that expressive, relational, embodied self.³⁹

(2005) (describing how transgender people are discriminated against in many areas of life).

- 33 Intersexed persons, who are one out of every 2000 children, have both male and female characteristics at birth. Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, NAT’L CTR. FOR LESBIAN RIGHTS, *TRANSSEXUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1, 5 (2000), <http://thetaskforce.org/downloads/reports/reports/TranssexualEquality.pdf>; see also Jennifer Rellis, “Please Write ‘E’ in This Box” *Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 223–24 (2008) (describing the prevalence of “intersexed individuals”).
- 34 Rellis, *supra* note 33, at 224 (explaining the traditional premise that sex is “fixed at birth . . . [and] that everyone fits neatly into boxes labeled male and female”).
- 35 See, e.g., Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, at 20, 20–21 (exploring the need to expand the two accepted categories of male and female, for there are “many gradations running from female to male”).
- 36 Gilden, *supra* note 32, at 88–89 (explaining that individuals become “legible as male or female as a result of the cultural inscription of sex at birth,” resulting in the “illusion” that “sex is innate and not the product of interpellation”); see also JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 7–8 (1993) (describing the “medical interpellation which . . . shifts an infant from an ‘it’ to a ‘she’ or a ‘he’”).
- 37 See Gilden, *supra* note 32, at 89 (“If gender is understood as a social construction of sex, and is thus alterable only within the limits of one’s assigned sex, gender thus limits its own reconstruction so long as sex remains understood as an uncontested category.”); Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 719 (2005) (describing a model of gender under which the “social and cultural attributes associated with gender are the natural result of a person’s biological sex”).
- 38 BUTLER, *supra* note 32, at 11; see also Gilden, *supra* note 32, at 88 (gender is not simply a “cultural manifestation of one’s biological sex. Rather, it is a normative ideology that creates the appearance of a determinative biological self”).
- 39 Vade, *supra* note 32, at 276 (citation omitted).

Implicit in Vade's definition is a recognition that gender is "situational" and changes over the course of time.⁴⁰ This definition resists generalizing gender and instead acknowledges that gender must be personalized. This notion of "gender fluidity" rejects biological determinism.⁴¹ Scholars have noted that various societies embrace a dynamic gendered existence in which gender is not "indelibly determined by one's biological sex, but rather by other aesthetic, occupational, religious, or sexual factors that interweave with the human body."⁴²

Gender identity does not develop in a bubble, but is the product of interaction with others and is colored by societal reception of gender expression.⁴³ This relational aspect of gender identity and expression often results in the performance of gender. West and Zimmerman explain that "doing gender" involves individuals in "a complex of socially guided perceptual, interactional, and micropolitical activities" that are perceived to be reflections of masculine and feminine natures.⁴⁴ Managing gender seems to be individual, but, in reality, societal interaction and institutions are the guides of normative behavior and create a pressure to conform,⁴⁵ contributing to a culture of inequality and exclusivity.

B. Gender Theory and Transgender Individuals

In "doing" gender, individuals can refuse to live up to normative ideals of gendered behavior and "engage in behavior at the risk of gender assessment."⁴⁶ Individuals who reject normative gender categories rattle society's fundamental understanding of gender and chal-

40 *Id.* at 267 ("[R]ecognition of one's gender identity at one point in time does not negate a different identification at a different point in time.").

41 *See generally* Gilden, *supra* note 32, at 86 (arguing that gender fluidity "does not look to biology or anatomy as necessary determinants of gender roles . . . [and] provide[s] space for fluidity between and within gender roles").

42 *Id.* at 119 (citations omitted). *See generally* Rellis, *supra* note 33, at 224–27 (describing the prevalence of gender fluidity).

43 *See* Craig, *supra* note 32, at 141 (arguing that gender is created in a "relational, interpretive manner" and that gender identity is the result of biological and psychological processes as well as social and cultural interactions); *see also* Riki Wilchins, *A Continuous Non-verbal Communication*, in *GENDER QUEER: VOICES FROM BEYOND THE SEXUAL BINARY* 11, 12 (Joan Nestle et al. eds., 2002) (explaining that gender is created in a "continuous non-verbal dialogue with the world").

44 Candace West & Don H. Zimmerman, *Doing Gender*, in *DOING GENDER, DOING DIFFERENCE: INEQUALITY, POWER, AND INSTITUTIONAL CHANGE* 3, 4 (Sarah Fenstermaker & Candace West eds., 2002).

45 *Id.* at 13.

46 *Id.* (emphasis omitted).

lence the “binary biological truth about human experience.”⁴⁷ The difficulty in accepting gender identity as separate from biological sex is reflected in societal unfamiliarity and discomfort with transgender identity.

Accepting transgender identity often provokes anxiety because there is “no one way to be transgender. . . . *there is no prototypical transgender experience.*”⁴⁸ The term “transgender” is not monolithic, but instead must be read broadly in order to recognize the complexity of gender identity and the diversity of the transgender experience.⁴⁹ Vade suggests that transgender people “have all genders,” arguing there are “infinitely different women and infinitely different men.”⁵⁰ For example, individuals may identify as combinations of male and female, may not identify as either male or female, or may see themselves as falling between male and female.⁵¹ As a result, transgender individuals have “different identities, bodies, levels of fluidity, sexual orientations, and ways of mixing and matching all of the above.”⁵² This “mixing and matching” can be threatening to individuals who

47 Gilden, *supra* note 32, at 91 (explaining that “[b]y performing deeds that fail to conform to those activities that supposedly flow naturally from one’s birth-assigned sex, trans people reveal sex is the cultural inscription of meaning on human bodies”).

48 Vade, *supra* note 32, at 271.

49 *See id.* at 261 (proposing a non-linear conceptualization of gender, a “gender galaxy,” defined as “three-dimensional non-linear space in which every gender has a location that may or may not be fixed”).

50 *Id.* at 264–65.

51 *Id.* at 265; *see also* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 144–45 (1994) (self-describing as a “gender outlaw” who identifies as neither male nor female); LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 1 (1998) (describing personal narrative as an FTM who does not identify as either male or female and instead uses the gender-neutral pronoun “sie”).

52 Vade, *supra* note 32, at 271 (describing the concept of “body diversity,” under which trans individuals make a wide range of choices for their bodies with regards to hormone treatment and surgery). It is important to note that transgender individuals have different sexual orientations and may identify as straight, gay, lesbian, bisexual, or any other sexual orientation. Transgender causes are often distinct from LGB causes. “Gender identity and sexual orientation are not the same.” GLAAD, MEDIA REFERENCE GUIDE 8 (8th ed. 2010), available at <http://www.glaad.org/Document.Doc?id=99>. *See generally* BISEXUALITY AND TRANSGENDERISM: INTERSEXIONS OF THE OTHERS (Jonathan Alexander & Karen Yescavage eds., 2003) (providing an overview of literature arguing that transgender identity issues are distinct from sexual orientation issues); Raine Dozier, *Beards, Breasts, and Bodies: Doing Sex in a Gendered World*, 19 GENDER & SOC’Y 297 (2005) (exploring the distinction between gender identity and sexual orientation); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 25 (1995) (discussing the historical and contemporary confusion and distortion of sex, gender, and sexual orientation as social and legal constructs).

cling to gender identity—their own and others’—because gender is a critical component of “self-concept” and social identity.⁵³

Recognition of the complexity of transgender identity is impeded by the medicalization of gender identity, which reinforces the gender binary.⁵⁴ The reliance on medical evidence forces individuals who want to express an identity separate from their biologically designated sex to show their desire for gender normativity, convince doctors that they have Gender Identity Disorder,⁵⁵ and indicate that they want body alteration to match a narrow gender identity.⁵⁶ This has significant implications in the university housing context. In addition to relying on the identity indicated on the birth certificate, housing policies often require that physicians supervise hormone treatment, that therapists diagnose the student with gender dysphoria, and that the student undergo sexual reassignment surgery.

The medicalization of gender identity ignores the fact that transgender individuals make choices about their bodies for different personal and economic reasons.⁵⁷ This medicalization has permeated American jurisprudence, which reflects the tendency to pathologize transgenderism and ignore the complexities of transgender identity.⁵⁸

53 Carolyn Jackson & Jo Warin, *The Importance of Gender as an Aspect of Identity at Key Transition Points in Compulsory Education*, 26 BRIT. EDUC. RES. J. 375, 375–76 (2000). See Part IV.B for a more detailed discussion of prejudice against transgender individuals.

54 See generally JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* (2002) (providing a historical perspective on transsexuality and describing the shift in medical beliefs regarding sex); Dean Spade, *supra* note 32, at 18 (“[M]edical care associated with sex reassignment is still doled out through gender-regulating processes that reinforce oppressive and sexist gender binaries.”).

55 See Romeo, *supra* note 37, at 725 (describing the medical criteria for Gender Identity Disorder as an “on-going desire since early childhood to be the ‘opposite’ gender, a desire to physically modify one’s body, and heterosexual desire in the gender with which one identifies”); see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 532–37 (4th ed. 1994).

56 Spade, *supra* note 32, at 24 (“My quest for body alteration had to be legitimized by a medical reference to . . . a binary gender system . . .”); see also Romeo, *supra* note 37, at 724–27 (examining the “medical model” of gender under which gender nonconformity is a psychological condition and individuals must “meet certain norms of their lived gender”).

57 Romeo, *supra* note 37, at 730 (arguing that the “medical model of gender privileges those who have the ability to access health care and choose to undergo all available medical procedures to modify their bodies, while providing very limited protection, if any, to those who do not”).

58 See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (defining transgender as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change” (quoting AMERICAN MEDICAL ASSOCIATION, *ENCYCLOPEDIA OF MEDICINE* 1006 (1989))); *Maggert v. Hanks*, 131

Scholars criticize current legal strategies of protection for transgender people because they force transgender people into the binary and fail to challenge underlying norms.⁵⁹ Scholars suggest that individual victories obtained under current legal strategies may be counterproductive to long-term progress, and instead advocate new strategies to alter dominant discourse.⁶⁰ The different approaches to transgender advocacy provide an important framework for evaluating the realities transgender individuals face in dealing with university housing policies and suggest strategies for challenging mainstream gender norms.

III. GENDER SELF-DETERMINATION

The troubling nature of the state's authority to identify individuals as male or female presents rigid obstacles in creating a space for fluid gender identities. Feminist and gender theory literature suggest that individuals should have the right to self-identify outside of the gender binary.⁶¹ The *ability* to choose a gender identity may be distinguished from the *right* to define an identity. Do individuals have the constitutional right to identify gender for themselves as they choose?

F.3d 670, 671 (7th Cir. 1997) ("Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.").

59 See Gildea, *supra* note 32, at 104 ("To the extent that this border constitutes one between sanity and pathology, the distinction reaffirms the abjection of the transgendered status and normalizes mainstream understanding of maleness and femaleness."); see also Francine Tilewicz Bazluke & Jeffrey J. Nolan, "Because of Sex": *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 366 (2006) (explaining that the courts have overwhelmingly failed to recognize the distinction in meaning between sex and gender); Vade, *supra* note 32, at 255 (explaining that the system generally works against transgender people, who have historically been successful when they fit a narrow view of what it means to be transgender).

60 Transgender legal advocacy is plagued by the controversial challenge of balancing the value of disability-based arguments that reinforce the gender binary against the importance of securing legal recourse for transgender individuals. See Gildea, *supra* note 32, at 92 (criticizing sex-stereotyping theory because it does not challenge biological essentialism and instead advocating a rights-based approach under which transgender advocacy "must directly confront the underlying social meaning attached to such expression"); Spade, *supra* note 32, at 29 (arguing that the "goal for trans law and policy remains demedicalization and an end to practices that coerce people into expressing gender identity through a narrowly defined binary").

61 See generally Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101 (2006) (positing a "right to gender self-determination" under the Fourteenth Amendment Due Process Clause); Rellis, *supra* note 33, at 256–57 (arguing that advocates should "begin building a constitutional right to self-identify outside the gender binary" based on the Fourteenth Amendment).

If one accepts the premise that sex and gender are social constructs, individuals become victims of the label assigned to them at birth.⁶² Critical race theorists suggest that race is socially constructed and, therefore, is not indicated on birth certificates because it is central to an individual's self identity.⁶³ Following this logic, scholars argue that gender is a "healthy and legitimate expression of a person's identity, whether or not expression conforms with the expected norms of their birth gender . . ."⁶⁴ Consequently, the legal system should recognize resistance of normative manifestations of gender as an expression of an essential part of identity, not as an act of defiance.

Scholars have suggested that the right to gender self-determination has its roots in the Due Process Clause of the Fourteenth Amendment, which protects personal dignity and autonomy.⁶⁵ Gender self-determination stems from the right to privacy.⁶⁶ Although there is no explicit right to privacy in the Constitution, in *Griswold v. Connecticut*,⁶⁷ the Supreme Court recognized that the "penumbra of rights" provides a guarantee of zones of privacy. The fundamental rights that emanate from the penumbras of the Constitution have been expanded upon through the recognition of more extensive liberty rights under the Fourteenth Amendment.⁶⁸ In

62 Vade, *supra* note 32, at 285 (critiquing the sex-gender distinction because it gives doctors power to assign gender by using "doctor-assigned gender" to define "sex").

63 See Craig, *supra* note 32, at 168 ("[I]t is 'not ethical for anyone to exert power to define a feature of [another's] core identity.'" (quoting Elizabeth Reilly, *Radical Tweak—Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297, 324 (2005))). Interestingly, in 2000, the Census was amended to allow respondents to select one or more races for the first time. However, the Census allows respondents to check only one gender box. Racial and Ethnic Classifications Used in Census 2000 and Beyond, U.S. Census Bureau, <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last visited Mar. 28, 2010); see also Ramona E. Douglass, Dir. of Media & Public Relations, Ass'n of MultiEthnic Ams., Upgrading America's Conversations on Race: The Multi-Race Option for Census 2000 (June 2000), <http://www.ameasite.org/census/upgrade2k.asp> ("What has been dismantled . . . is the mythical notion that race is fixed rather than fluid, or that any governmental agency's perception of racial identity takes priority over an individual's right to self-identify.").

64 Romeo, *supra* note 37, at 739.

65 See Langley, *supra* note 61, at 101 ("To fully realize the Fourteenth Amendment's promise of liberty, people must be able to determine gender for themselves.").

66 See *id.* at 115–16.

67 381 U.S. 479, 484–86 (1965) (recognizing the marriage relationship as falling within the constitutionally protected "zone of privacy").

68 See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court stated that “[a]t the heart of liberty is the right to define one’s own concept of existence.”⁶⁹ The Court in *Lawrence v. Texas* emphasized the “substantive force of the liberty protected by the Due Process Clause” under *Casey*, which was based on “the respect the Constitution demands for the autonomy of the person” when making decisions in the realm of procreation and family relationships.⁷⁰ In extending the recognition of such autonomy to the realm of sexuality and sexual conduct,⁷¹ the Court relied on a robust reading of liberty rather than reaching to “specific tradition”⁷² or fundamental rights that are “deeply rooted in this Nation’s history and tradition.”⁷³

The Court’s recognition of the more encompassing and evolving liberty rights acknowledged in *Lawrence* could be extended to gender self-determination.⁷⁴ Decisions such as *Casey* and *Lawrence* criticize excessive state regulation in areas involving “choices central to personal dignity and autonomy.”⁷⁵ An individual’s chosen gender identity is at the core of such liberty and autonomy rights.⁷⁶ Gender identity is a fundamental aspect of one’s self-concept and, therefore, an integral part of existence. It should not be “formed under compulsion of the State.”⁷⁷

The law is not a reflection of gender realities for transgender individuals.⁷⁸ Allowing for the possibility of gender self-determination strikes at the foundation of the male-female binary and permits “the addition of infinite new classifications of individuals’ genders.”⁷⁹ This theoretical argument is a step in ensuring that individuals are not the victims of gender “labels” or the state’s “coercive power to create the gender-related legal categories.”⁸⁰ However appealing this concept of

69 *Id.* at 851.

70 539 U.S. 558, 573–74 (2003).

71 *See id.* at 574.

72 Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

73 *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

74 *See Langley*, *supra* note 61, at 117 (“Justice Kennedy’s reasoning in *Lawrence* may be imported to the gender self-determination context.”).

75 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

76 *See Rellis*, *supra* note 33, at 258 (“What is closer to the ‘heart of liberty’ and more ‘central to personal dignity and autonomy’ than an individual’s chosen gender identity—to be granted full legal rights and protection against discrimination even if one does not fall into one of two neat societal boxes labeled male or female.”) (internal citation omitted).

77 *Casey*, 505 U.S. at 851.

78 *See Wade*, *supra* note 32, at 255 (“The law paints a specific picture of transgender people . . . in which all transgender people look the same.”).

79 *Langley*, *supra* note 61, at 102.

80 *Id.* at 113.

gender self-identification may be, state compelling interests⁸¹ create substantial obstacles for translating theory into practice, especially in university housing.

If we can embrace a framework in which we reconceptualize gender as a social construct, the concept of self-identification becomes more plausible. However, when self-identification is considered in university housing, the individualized nature of self-identification claims becomes increasingly complicated because university housing is not a solitary experience. The practical considerations of roommates, hallmates, and privacy concerns in an area that already involves discretionary and subjective decisions create a housing quandary. The claims that transgender and non-transgender students may assert to contest their housing situation will be explored through different aspects of the right to privacy and the First Amendment freedom of association.

IV. THE RIGHT TO PRIVACY

Our jurisprudence has consistently affirmed the sanctity of the home. Significant concerns arise when students are not comfortable in their dorm rooms. Both transgender and non-transgender students may raise various claims founded in the right to privacy.

In identifying the right to privacy, future Justices Louis D. Brandeis and Samuel D. Warren emphasized the home as a safe place for expressing one's identity and "inviolate personality."⁸² The Supreme Court's recognition of the right to privacy in *Griswold v. Connecticut*⁸³ and subsequent cases have affirmed the "right to be let alone" in the home.⁸⁴ These cases suggest the importance of the right to engage in activities within the home that would be off limits elsewhere.

81 *See id.* at 128 (describing the state's interests in identifying individuals, maintaining records, and remedying discrimination claims).

82 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (presenting the intellectual beginnings of the American right to privacy and the "right to be let alone"); *see also* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (characterizing the "right to be let alone" as "the right most valued by civilized men").

83 381 U.S. 479 (1965).

84 *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (arguing that the individual has a reasonable expectation of privacy in the home and, therefore, the use of thermal imaging to search a home constitutes an unreasonable search); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (describing the importance of "[p]reserving the sanctity of the home, the one retreat to which men and women . . . escape from the tribulations of their daily pursuits"); *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (concluding that the possession of illegal obscene materials in the home was not punish-

The notion of privacy extends beyond personal space of the home to include the “concept of personal liberty.”⁸⁵ Privacy is widely recognized as an umbrella concept that encompasses physical, informational, decisional, proprietary, and associational privacy.⁸⁶ This Comment explores different aspects of the right to privacy regarding transgender students, with a particular focus on physical and informational privacy.

A. Modesty Concerns

Shared living arrangements, a form of intimate association, are protected by the right to privacy.⁸⁷ Intricately tied to the notion of physical privacy in one’s living arrangement is the physical privacy interest in one’s body.⁸⁸ In recognizing modesty claims, many courts have acknowledged the individual’s interest in keeping one’s body secluded from the opposite sex.⁸⁹ In *Johnson v. Phelan*,⁹⁰ Judge Posner, in his dissent, described the issue as whether the appellant prisoner has an “interest that the Constitution protects in hiding his naked body from guards of the opposite sex.”⁹¹ Posner emphasized the importance of “Christian modesty” and the strength of the American “nudity taboo,” especially when applied to strangers of the opposite

able based on the right to satisfy intellectual and emotional needs in the home); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (finding that searching the home is an invasion of privacy and in violation of the Fourth Amendment if found to be unreasonable).

85 *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (explaining that the “right of privacy” is founded in the Fourteenth Amendment’s “concept of personal liberty”); *see also* *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *5 (D. Ariz. June 3, 2004) (“The right to privacy is derivative of the Fourteenth Amendment’s guarantee of substantive due process, among other constitutional provisions, although it is not expressly guaranteed by the Constitution.” (citing *Whalen v. Roe*, 429 U.S. 589, 598–99 nn.23–25 (1977))).

86 *See* ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 1 (2007); *see also* *Whalen v. Roe*, 429 U.S. at 599–600 (recognizing informational and decisional privacy interests within the zone of privacy).

87 *See generally* John T. Messerly, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949 (2008) (describing the privacy interests present in shared living arrangements).

88 *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body.”).

89 *See generally* Anita Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 843–45 (2006) (describing modesty as a “moral or ethical virtue” and suggesting the gendered nature of sexual modesty requirements).

90 69 F.3d 144 (7th Cir. 1995) (holding that prison officials did not violate male prisoners’ rights by having female guards monitor them when naked).

91 *Id.* at 152 (Posner, J., dissenting in part).

sex.⁹² Various cases have similar language discussing the modesty and privacy interests against exposing one's body in the presence of the opposite sex.⁹³

Same "sexness" protects and bolsters the individual's privacy claims. By assigning both female non-transgender students to live with individuals who identify as females, but were classified as male by birth, and male non-transgender students to live with students who were female by birth, but self-identify as male, non-transgender students may argue that they are uncomfortable with a living arrangement that violates their privacy interest in keeping their bodies secluded from the opposite sex.⁹⁴ In considering privacy and modesty-related claims in university housing, there is no case law specifically on point,⁹⁵ and, therefore, cases involving transgender individuals in

⁹² *Id.* ("The nudity taboo retains great strength in the United States. . . . The taboo is particularly strong when the stranger belongs to the opposite sex.")

⁹³ See *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (joining courts in "recognizing a prisoner's constitutional right to bodily privacy because most people have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating") (internal citations omitted); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (explaining that the photographing of a female's nude body by a male officer and the distribution of the photographs were an invasion of privacy because "[t]he desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity"); *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984) (acknowledging the fundamental nature of concerns about exposing one's body in front of a member of the opposite sex); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982) (recognizing that a person's legitimate privacy rights in using a washroom would be violated if a cleaning attendant of the opposite sex were to enter).

⁹⁴ These claims, which rely on a biological essentialism, would most likely be asserted in cases of pre- and non-operative transgender individuals.

⁹⁵ In 1996, several Orthodox Jewish students sought to be exempted from Yale's on-campus housing requirement on the grounds that their "religious beliefs and obligations regarding sexual modesty forbid them to reside in the co-educational housing provided and mandated by Yale." *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp.2d 183, 186–87 (D. Conn. 1998), *aff'd*, 237 F.3d 81 (2d Cir. 2000). The District Court of Connecticut dismissed the students' claims that Yale's policies violated their constitutional rights to free exercise of religion, as well as federal housing and anti-trust statutes. *Id.* The modesty and privacy arguments by the "Yale Five" were not discussed in the District and Circuit court decisions. Yale administrators acknowledged grappling with the challenge of balancing the needs of minority groups with the general student body, but they ultimately took the position that they could not excuse the "Yale Five" from the housing policy, which is a "'defining requirement' of a Yale education." William Glaberson, *Five Orthodox Jews Spur Moral Debate Over Housing Rules at Yale*, N.Y. TIMES, Sept. 7, 1997, at 45, available at <http://www.nytimes.com/1997/09/07/nyregion/five-orthodox-jews-spur-moral-debate-over-housing-rules-at-yale.html?scp=1&sq=Five%20Orthodox%20Jews%20Spur%20Moral%20Debate%20Over%20Housing%20Rules%20at%20Yale&st=cse>. The Yale controversy is distinguishable from the university housing dilemma because transgender students are generally not asking to be exempted from housing requirements; in fact, they are asking

prison housing and bathroom access litigation provide an interesting point of comparison.

1. *Privacy in the Prison Context*

While the housing issues that transgender prisoners face are distinguishable from those of transgender university students,⁹⁶ both involve sex segregated housing and bathroom access which are based on biological sex.⁹⁷ At the outset, a university's placement of an individual in male or female housing requires prior classification. Before other college students are introduced into the mix, housing authorities must choose the "appropriate" housing pool based on the university's accepted definition of sex. In his analysis of the issues facing transgender prisoners, Darren Rosenblum noted that in pre-incarceration processing, authorities try to determine if a prisoner is a man or woman.⁹⁸ Observing that prisoners are placed on the basis of genitalia,⁹⁹ Rosenblum found only one case where a pre-operative

for housing options that do not ignore their gender identity. Furthermore, as discussed below, the physical privacy arguments would most likely be mounted by non-transgender students, the majority, as opposed to the religious minority group in the Yale situation.

⁹⁶ Some distinctions include the difference in the student body versus prison population, the heightened safety concerns in prison, and Eighth Amendment analysis. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 519–20 (2000). One important distinction is that students choose to attend university, whereas prisoners have no choice about their imprisonment. Furthermore, courts have generally recognized that prisoners have reduced privacy expectations. *See e.g.*, *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) ("Prison inmates do not shed all fundamental protections of the Constitution at the prison gates." (quoting *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994)); *Cornwell v. Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) ("[A] convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where those claims are related to forced exposure to strangers of the opposite sex, even though those privacy rights may be less than those enjoyed by non-prisoners."); *Meriwether v. Faulkner*, 821 F.2d 408, 418 (7th Cir. 1987) (recognizing that a transgender prisoner's expectation of privacy was significantly limited in light of the overriding need to maintain institutional order and security).

⁹⁷ *See* Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV 1211, 1212 (2004) (describing the "common practice of classifying transgender prisoners based on their genitalia alone"); Rosenblum, *supra* note 96, at 523 (noting that placement based on genitalia is a "crude simplification of [the trans] gender identity").

⁹⁸ *See* Rosenblum, *supra* note 96, at 520 (describing the intake process for new inmates).

⁹⁹ *Id.* at 522 ("The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex." (citing *Farmer v. Brennan*, 511 U.S. 825, 829 (1994)); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("The practice of the federal prison authorities . . . is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender.").

transgendered woman was placed in a women's facility. In *Crosby v. Reynolds*, a female prisoner brought an action against jail officials for violating her privacy rights when she was housed with Lamson, a pre-operative transgender prisoner, who was housed according to her self-defined gender identity.¹⁰⁰ The female prisoner felt uncomfortable sharing a cell with a pre-operative individual, especially when using the bathroom, showering, and other activities involving nudity.¹⁰¹ The situation presented an infrequent quandary to which there was no established procedure and "no perfect answer."¹⁰² Lamson did not want to be segregated, and her safety would have been compromised with male prisoners.¹⁰³

While the court recognized the objections of the female cellmate as legitimate, the court ultimately concluded that "reasonable officials . . . would not understand that what they were doing violated the constitutional rights of the plaintiff."¹⁰⁴ The court recognized a clear constitutional right to privacy, but stated that the "contours of that right are not clear when it comes to the determination of where to house transsexuals."¹⁰⁵ The court noted ambiguity in the resolution, as well as objections to housing transgendered inmates according to their self-defined gender identity, stemming from discomfort and safety concerns.¹⁰⁶

The historic "sex-dichotomized prison system" compounds the difficulty of addressing transgender prisoners' needs.¹⁰⁷ Rosenblum suggests that the ideal solution would be placement based on self-defined gender identity, but he notes that the "principal problem with this solution is the comfort and security of the traditionally-gendered prisoners."¹⁰⁸ He continues:

Potential intolerance toward a transgendered person, however, should not be the sole factor in determining the best placement However,

100 763 F. Supp. 666, 666–67 (D. Me. 1991). The jail's physician opined it was in Lamson's best psychological and physical interest to be placed in female housing. *Id.* at 667. The court emphasized that while Lamson's "male genitalia remain anatomically intact," Lamson had received hormone treatments, developed tissue resembling female breasts, was scheduled for a "sex change operation," and had virtually no male sexual capacity. *Id.* at 667, 669.

101 *Id.* at 667–68.

102 *Id.* at 669.

103 Of the transgendered prison population, it is principally transgendered women (MTF) placed in male prisons who face rape, abuse, severe violence, and ostracism. Rosenblum, *supra* note 96, at 517 n.84.

104 *Crosby*, 763 F. Supp. at 670.

105 *Id.*

106 *Id.* at 669–70.

107 Rosenblum, *supra* note 96, at 531.

108 *Id.*

even if objections to housing transgendered women in a women's prison stem from homophobia, such objections require consideration. Legitimate objections to housing transgendered inmates according to their self-defined gender identity do exist.¹⁰⁹

The suggestion that segregation on the basis of biological sex may be justified by "legitimate penological objectives"¹¹⁰ is likely to be recognized in the university housing context, even if motivated by transphobia. While safety concerns are presumably greater and privacy presents less of a hurdle in the prison context, universities may posit legitimate educational and safety objectives in support of maintaining the housing status quo. Sex segregated university housing policies are traditional practice and represent precautionary measures that are justified by the state's legitimate interest in the safety of the general student body.

2. *Privacy in Bathroom Access Cases*

Cases in which transgender individuals assert the right to use bathrooms¹¹¹ according to self-defined gender identity also stress the conflict between non-conforming gender identity and societal norms. Described as "one of the last sex segregated public spaces," the public restroom forces individuals to confront gender stereotypes in the decision of which bathroom to use and to "assess the potential risk of entering that space."¹¹²

Non-transgender individuals assert privacy interests in bathroom-access cases. While privacy may be a valid concern, such claims are often rooted in prejudice and disgust; the veil of privacy may provide a more palatable, less controversial means of challenging the sharing of bathrooms. Sharing a bathroom with a transgender individual does not invade the non-transgender individual's privacy any more than sharing a bathroom with a non-transgendered individual.

When an individual expresses gender identity in a non-conforming manner, courts balance the interests of transgendered individuals with those of non-transgendered individuals, which often results in a loss for transgender litigants. In *Goins v. West Group, Inc.*,

¹⁰⁹ *Id.*

¹¹⁰ *Turner v. Safley*, 482 U.S. 78, 95 (1987).

¹¹¹ A great deal of transgender litigation with regards to bathroom access involves equal protection claims, especially in the employment context. See generally Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 895–96, 905 n.52 (2007) (providing an overview of cases dealing with bathroom access for transgender individuals and the general denial of protection).

¹¹² GENIUS INDEX, *supra* note 17, at 6.

the Supreme Court of Minnesota held that denying Goins, a transgender employee, access to the women's restroom at work did not violate the Minnesota Human Rights Act.¹¹³ After female employees expressed uneasiness about sharing a restroom with a "male," the company decided to implement a restroom policy designated by biological gender.¹¹⁴ Although there was no dispute that Goins consistently presented herself as a woman, the company explained its decision to require Goins to use a single-occupancy restroom as an attempt to accommodate both Goins and the female employees.¹¹⁵ Goins's discrimination claim was "predicated on her self-image as a woman that is or is perceived to be inconsistent with her biological gender."¹¹⁶ The court determined that the employer's designation of bathroom use by biological gender did not constitute discrimination in violation of the Minnesota Human Rights Act.¹¹⁷ "[T]he traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the *cultural preference* for restroom designation based on biological gender."¹¹⁸ The court explained that while the Minnesota Human Rights Act "protect[s] her right to be provided an adequate and sanitary restroom," it "does not go so far as to protect Goins' choice of restroom use."¹¹⁹

In her analysis of *Goins*, Elaine Craig explained that the dispute was "over whose definition of gender should govern."¹²⁰ She elaborated that courts "tend towards a balancing of interests analysis—weighing the interests of female born women with those of transwomen—and unfortunately, under this analysis, the transsexual litigants tend to lose."¹²¹ In *Etsitty v. Utah Transit Authority*, Etsitty, a pre-operative transgender woman, was fired because the company was concerned about potential liability from co-workers, customers, and the general public that might have resulted from Etsitty's use of a fe-

113 635 N.W.2d 717 (Minn. 2001).

114 *See id.* at 721.

115 *See id.*

116 *Id.* at 722.

117 *Id.* at 725; *see also* Hispanic AIDS Forum v. Estate of Bruno, 839 N.Y.S.2d 691, 696–97 (2007) ("[B]arring transgender persons from using the public bathrooms that do not correspond to their biological sexual assignment does not constitute discrimination.").

118 *Goins*, 635 N.W.2d at 723 (emphasis added).

119 *Id.* at 723 n.2.

120 Craig, *supra* note 32, at 170 (explaining that the court was essentially asking whether Goins was "woman enough" to use the women's restroom).

121 *Id.* at 170–71. The argument that courts are balancing transgender and non-transgender interests will be further explored *infra* Part VI.C.

male restroom.¹²² In addition to determining that Etsitty could not claim Title VII protection based on her transsexuality,¹²³ the court emphasized that “[t]here is no evidence that the defendants required Plaintiff’s appearance to conform to a particular gender stereotype, only that they required her ‘to conform to the accepted principles established for gender-distinct public restrooms.’”¹²⁴ The court explained that this requirement provided a “legitimate non-discriminatory reason” for Etsitty’s dismissal, especially because “[c]oncerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society.”¹²⁵

The non-transgendered individual’s privacy claims are not always winning. In *Cruzan v. Special School District, # 1*, Cruzan, a teacher at a public high school, filed a discrimination claim against the school for allowing a transgendered employee to use the women’s restroom.¹²⁶ Cruzan expressed concerns about her personal privacy, but the court concluded that the school’s accommodation of the transgendered employee was not enough to establish an adverse employment claim.¹²⁷ The transgender employee’s use of the female staff restroom did not affect Cruzan’s title, salary, or benefits. The court reasoned that the school had alternative restroom options for Cruzan, including the female students’ restroom and single-stall unisex bathrooms.¹²⁸ The Eighth Circuit’s suggestion that the employer may offer the complaining employee an alternative accommodation is not as simple in the university housing context. The university’s answer may be to move the complaining non-transgendered individual to a different accommodation, such as a single room, similar to the single-occupancy bathroom in *Cruzan*.

Courts have justified sex segregated bathrooms on the basis of cultural practice and traditional interpretation of the term “sex.” Privacy concerns are also implicit in the analysis in the bathroom access cases, as noted in *Etsitty* and *Cruzan*. In *Sommers v. Budget Marketing*,

122 2005 WL 1505610, at *1–2 (D. Utah 2005), *aff’d*, 502 F.3d 1215 (10th Cir. 2007) (finding that the UTA’s reasons for discharging Etsitty were legitimate and nondiscriminatory).

123 *See id.* at *3; *see also* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–87 (7th Cir. 1984) (concluding that transsexuals were not protected under Title VII on the grounds that reasonable statutory interpretation indicates that the term “sex” should be interpreted according to its “ordinary, common meaning” and, therefore, means “biological male or biological female”).

124 *Etsitty*, 2005 WL 1505610, at *6 (quoting *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003)).

125 *Id.* at *7.

126 294 F.3d 981 (8th Cir. 2002).

127 *Id.* at 984.

128 *Id.*

Inc., the Eighth Circuit recognized the tension between accommodating a transgendered employee's needs and the employer's interest in "protecting the privacy interests of its female employees."¹²⁹ In balancing transgender and non-transgender individuals' rights and recognizing privacy interests, courts are engaging in an analysis that implicates a central question: What is one's reasonable expectation of privacy in a public bathroom? Diana Elkind suggests that "multi-user restrooms are not a place where individuals typically have a high expectation of privacy."¹³⁰ There is no option of not sharing such public spaces and, therefore, individuals have a limited expectation of privacy.¹³¹ While a non-transgender individual may fear a loss of privacy in the bathroom, a transgendered individual "does not seem to invade one's privacy any more than anyone else who shares the public restroom."¹³²

In evaluating privacy claims, courts must consider the context and the individual's reasonable expectation of privacy.¹³³ Such contextual analysis is complicated in public university housing in which bathroom access and living spaces are shared. What is one's reasonable expectation of privacy in a university residence hall and a university dorm room? It would seem that within one's dorm room, an individual would have a heightened expectation of privacy, for it is one's personal space. However, if a student chooses to live in a non-single option, has that student accepted a living situation in which he or she has a more limited expectation of privacy? Based on this rationale, a non-transgender student who chooses to live in non-single university

129 667 F.2d 748, 750 (8th Cir. 1982).

130 Elkind, *supra* note 111, at 925 (citing Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 370 (1999)).

131 *See* Keller, *supra* note 130, at 370.

132 *Id.*

133 The concept of a "reasonable expectation of privacy" is found in Fourth Amendment case law. In *Katz v. United States*, the Court held that an enclosed phone booth, like a home, is an area in which a person has a constitutionally protected "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Justice Harlan's concurrence set out a two-prong test for evaluating privacy claims: (1) actual subjective expectation of privacy; and (2) reasonable expectation of privacy. *Id.* at 361. The second prong entails a balancing test in which the court weighs the government's interest in invading the individual's privacy against the individual's privacy interest in non-invasion. While the privacy rights implicated under Fourth Amendment analysis are distinguishable, cases evaluating whether individuals have a reasonable expectation of privacy in different situations highlight the importance of looking at the specific circumstances at hand. *See, e.g., California v. Ciraolo*, 476 U.S. 207 (1986) (holding that the Fourth Amendment was not violated by a naked-eye aerial observation of defendant's backyard); *Sanders v. Am. Broad. Cos., Inc.*, 978 P.2d 67 (Cal. 1999) (finding that an employee who lacks a complete expectation of privacy in a workplace conversation may still recover under the tort of intrusion).

housing accepts the notion of shared privacy. Why does living with a transgender student invade his or her privacy any more than sharing a dorm room with a non-transgendered individual? Furthermore, one's expectation of privacy is greatly reduced in a dorm hall and a bathroom. Such claims appear to be grounded in prejudice against and unfamiliarity with individuals who express gender identity in a non-conforming manner. Privacy becomes a pretext for prejudice. Exposing this prejudice provides support for transgender individuals' claims to gain access to housing according to self-identified gender.

B. *Safety Concerns*

Privacy is not a winning argument for maintaining sex segregated housing. Instead, as discussed in the bathroom access cases, sex segregated public facilities are maintained on other rationales, including comfort, safety, and propriety. These justifications may be enough for universities to rationalize the status quo.

The importance of feeling comfortable in one's living space is tantamount for all college students. The negative backlash against transgendered people stems from the fact that transgender individuals disrupt normative understanding of gender identity. This is especially anxiety-provoking in the housing context because we understand our own gender through relational processes and social interaction.¹³⁴ A great deal of discomfort stems from the fact that some transgender students, those who are pre- or non-operative, have opposite genitalia, which raises modesty and safety concerns, as well as fear of violence and sexual predation. Transgender individuals are often perceived as "sexual predators."¹³⁵ This prejudice contributes to the hard-to-explain, yet underlying fear of living with transgendered individuals. However, the likelihood of committing sexually violent crimes or predatory acts is not increased because one's genitalia do not match one's biological sex.¹³⁶ The prejudice that transgender individuals are more likely to engage in sexually predatory acts is unfounded and to base university policy on such a sweeping generalization would give effect to private prejudice.

¹³⁴ See generally Craig, *supra* note 32, at 141 (arguing that gender is created in a "relational interpretive manner" and that gender identity is the result of biological and psychological processes as well as social and cultural interactions).

¹³⁵ Telephone Interview with Kathryn L. Stewart, *supra* note 12.

¹³⁶ Elkind, *supra* note 111, at 925 n.170 ("[F]ear of sexual predators is not a sufficient reason to prohibit bathroom access based on gender identity.").

Some individuals may assert that sex segregated housing would promote the safety of transgender students, especially those who are pre- or non-operative or do not “pass.”¹³⁷ The argument is that it would be more dangerous to place a transgender student who was born a “male,” and “looks” like a male but identifies as female, with a female. Sex segregated placement would dictate that the pre- or non-operative “male” student be placed with a male. Arguably, by not throwing the transgender student into the lion’s den, housing officials would avoid arrangements that create discomfort for many non-transgender students and potentially aggressive reactions against transgender students.

This claim is insensitive to the individual’s self-defined gender identity, the individualized nature of the transgender experience, and the economic realities of sex reassignment surgery.¹³⁸ It seems unfair to require the transgender student from the above scenario to live in a male hall if he intends to live his life as a female. This Comment suggests that such a transgender student might be at a higher risk in male housing because of the violent reactions to gender non-conforming identity and expression. It does not necessarily follow that the non-transgender student is likely to be a victim of a sexually predatory act because she is housed with a transgender individual of a different birth sex.

Nevertheless, the fear of liability may be enough for universities to justify the continuation of traditional sex segregated housing.¹³⁹ Universities defend sex segregated living based on the fact that it has worked, it is traditional practice, and, most importantly, it furthers the legitimate state interest of protecting the safety of the general student body.

This Section highlights the complexity of the issues confronting transgendered individuals in university housing, especially involving privacy concerns that encompass a plethora of questions, including

137 “Passing” refers to “[s]uccessfully assuming a gender role different than the one assigned to a person based on biological sex when interacting with society.” SIRAGUSA, *supra* note 12, at 4.

138 It is also important to note the psychological ramifications on transgender students. A qualitative study examining the perspectives of transgender college students demonstrated that study participants, who lived part time as their self-identified gender, felt that the reaction of others reinforced their feelings of not being normal, while students who lived full time as their self-identified gender had a greater feeling of normalcy. Rob S. Pusch, *Objects of Curiosity: Transgender College Students’ Perceptions of the Reactions of Others*, 3 J. GAY & LESBIAN ISSUES IN EDUC. 45 (2005).

139 See *Etsitty v. Utah Transit Auth.*, 2005 WL 1505610 (D. Utah 2005) (holding that UTA’s reasons for discharging Etsitty were legitimate and nondiscriminatory).

safety, modesty, and propriety. Transgender individuals often face a lack of awareness in the legal system, and judges are often unfamiliar with transgender issues.¹⁴⁰ While universities must act in the interests of the general student body, the rights of the majority, the non-transgender community, must not take precedence over the minority. Both the prison and bathroom access cases suggest the tendency to prioritize the comfort and security of traditionally gendered persons. Universities should seek housing policies that resist the reproduction of this tendency. This Comment contends that the lack of transgender friendly housing policies may be the result of prejudice and unfamiliarity and, therefore, public universities should not be exempt from creating alternative housing options. It is not only non-transgender students who may cite safety concerns—transgender individuals are also victims of violent acts. The notion that transgender individuals have deceived others about their “real” gender identity assigned at birth can be explosive.¹⁴¹

C. Privacy: Informational Interest

The informational right to privacy “protects an individual’s right to control the nature and extent of information released about that individual.”¹⁴² The informational zone of privacy protects information about “one’s medical conditions”¹⁴³ and “one’s body itself.”¹⁴⁴ “Information about one’s body and state of health is matter which the individual is ordinarily entitled to retain within the private enclave

140 See Telephone Interview with Kathryn L. Stewart, *supra* note 12 (stating that there are few proven, successful legal strategies for transgender litigants, but the likelihood of success takes a hit when strong privacy interests are at stake); see also Gilden, *supra* note 32, at 86 (describing legal discourse surrounding gender and transgender individuals as limiting); Romeo, *supra* note 37, 719–38 (examining the inadequacy of models of gender used by courts); Vade, *supra* note 32, at 260 (explaining that transgender individuals tend to win in the courts when they fit within narrower definitions of transgender).

141 See Vade, *supra* note 32, at 263 (explaining that physical danger often results because the “perpetrator feels that the transgender person has deceived them”).

142 Bloch v. Ribar, 156 F.3d 673, 683 (6th Cir. 1998) (citing Whalen v. Roe, 429 U.S. 589, 599–600 (1977)).

143 Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *5 (D. Ariz. June 3, 2004); see also Tucson Woman’s Clinic v. Eden, 379 F.3d 531, 551 (9th Cir. 2004) (“Individuals have a constitutionally protected interest in avoiding disclosure of personal matters, including medical information.”) (internal quotation marks omitted).

144 Kastl, 2004 WL 2008954, at *5.

where he may lead a private life.”¹⁴⁵ The right to privacy also encompasses information about one’s genitalia.¹⁴⁶

In evaluating transgendered individuals’ claims to the right of privacy pertaining to medical information, not only are the interests of transgender and non-transgender individuals often construed as competing, but the courts must also take the asserted state interests into account. Under the Due Process Clause of the Fourteenth Amendment, state action that infringes upon fundamental privacy rights may be upheld only when the government action furthers a compelling state interest.¹⁴⁷ In *Bloch v. Ribar*, the Sixth Circuit articulated a two-step process for analyzing informational right to privacy claims: (1) the interest at stake must implicate a fundamental personal right or a right that is implicit in the concept of ordered liberty; and (2) the court must balance the government’s interest in disseminating information against the individual’s interest in keeping the information private.¹⁴⁸

In *Kastl v. Maricopa Community College*, the court determined that the right to privacy in personal information was implicated when the defendant demanded that Kastl reveal information about her genitalia.¹⁴⁹ The plaintiff, a male to female transgender who described herself as a “biological female incorrectly assigned to the male sex at birth,” claimed that her employer violated Title VII by requiring her to use the men’s restroom until proof of completed sex reassignment surgery.¹⁵⁰ The court identified the issue as whether an employer is allowed to require a biologically female employee, who was believed to have “stereotypically male traits,” to provide proof that she did not have male genitalia.¹⁵¹

The state’s justification for sex segregated bathrooms was based on the safety and privacy of other women using the bathroom.¹⁵² Characterizing this rationale as baseless, the court determined that the demand for information regarding the plaintiff’s genitalia was

¹⁴⁵ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (internal quotation marks omitted); *see also Bloch*, 156 F.3d at 685 (“Our sexuality and choices about sex . . . are interests of an intimate nature which define significant portions of our personhood. Publically revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private.”); *Whalen*, 429 U.S. at 591–93 (concluding that patients possessed a right to privacy in medical records).

¹⁴⁶ *Kastl*, 2004 WL 2008954, at *5.

¹⁴⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 929 (1992).

¹⁴⁸ *Bloch*, 156 F.3d at 684 (citing *J.P. v. DeSanti*, 653 F.2d 1080, 1090–91 (6th Cir. 1981)).

¹⁴⁹ *Kastl*, 2004 WL 2008954, at *1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *2.

¹⁵² *Id.* at *6.

not necessary or narrowly tailored when her sex had been established.¹⁵³ The court reasoned that “genitalia is not the sole indicator of sex,” the plaintiff “lives and presents herself as a woman,” and it was unconstitutional to require the plaintiff to provide proof that she lacked male genitalia.¹⁵⁴ While acknowledging that information regarding genitalia may be helpful for sex specific restroom assignments, the court stated that “reliance on that information to the exclusion of other offers of proof might lead to inaccurate determinations of sex.”¹⁵⁵ The court concluded that the Plaintiff’s equal protection claim survived the defendant’s motion to dismiss because she “stated facts [that overcame] the presumption of rationality applied to government classifications.”¹⁵⁶ Nevertheless, this legal victory for transgendered individuals was significantly frustrated when the court granted the defendant’s motion for summary judgment.¹⁵⁷ The court recognized the right to informational privacy, but noted that the right is conditional and “may be infringed upon a showing of proper governmental interest.”¹⁵⁸ In response to the defendant’s argument that the policy of sex segregated bathrooms was justified by “a compelling interest in protecting the privacy rights of other individuals,” the Plaintiff asserted her significant interest in maintaining her privacy with regards to her genitals and general medical condition.¹⁵⁹ The court dismissed the action because she “presented no evidence creating an issue of fact related to her privacy rights.”¹⁶⁰

The court left open the question of whether protecting the privacy interests of the non-transgendered individuals justified the infringement on the Plaintiff’s privacy interest in medical information. The arguments pit the privacy claims of transgendered individuals against those of non-transgendered individuals. The state interests behind the sex segregated public facility are also thrown into the balancing analysis. However, the danger in the balancing analysis is that it empowers courts to say that the results are important enough to

153 *Id.* (“Were this information truly necessary to preserve the single-sex nature of Defendant’s restrooms and the safety and privacy of their users, surely it would be sought from each person prior to granting restroom access.”).

154 *Id.* The court explained that the plaintiff’s personal physician determined that she was biologically female, that the plaintiff had legally changed her name to a traditionally female name and had changed her sex designation on her license. *Id.* at *1.

155 *Id.* at *6.

156 *Id.* at *8.

157 *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *8 (D. Ariz. Aug. 22, 2006).

158 *Id.* at *7 (internal quotation marks omitted).

159 *Id.*

160 *Id.*

justify the intrusion on privacy rights. Balancing, therefore, becomes an evaluation of how passionate courts are about the stated results and a means to maintain the status quo.

This has interesting implications in the university housing context, for as discussed in Part B, public universities can legitimize sex segregated housing policy on claims of safety. On the other hand, an individual's interest in medical information is significant. Consider this scenario: A pre-operative transgender student who self-identifies as a woman and physically looks like a woman is assigned to live with a male roommate because of her genitalia. Isn't the transgender student being forced to divulge information as to what is underneath her clothing? If an individual claims a specific gender identity, is it fair that the university require proof of genitalia? Is the university entitled to medical information about where a transgendered individual is in the process of transitioning?

The university might claim a right to such private medical information for safety reasons. University housing authorities have limited information when they make housing assignments. The university might claim that it is eliminating one potentially dangerous variable. While this response serves to further stigmatize transgender individuals, the state interests behind sex segregated public housing facilities may outweigh the privacy interest in medical information and provide an argument for universities to justify the continuation of housing according to traditional gender definitions.

V. FREEDOM OF ASSOCIATION

Freedom of association raises interesting questions regarding the right to define one's identity and the right to not associate with transgender individuals. Similar to the privacy context, First Amendment jurisprudence often adopts a balancing analysis. Students' claims under the First Amendment's freedom of association, both intimate and expressive, should be recognized as legitimate, but will ultimately fail in the educational context because universities' authority to make housing assignments is justified by the state's compelling interests in ensuring administrative efficiency and supporting its educational philosophy.

In *Roberts v. United States Jaycees*, the Supreme Court stated that the Constitution protects the freedom of association in "two distinct senses": "freedom of intimate association" and "freedom of expres-

sive association.”¹⁶¹ In describing the freedom of intimate association as protecting a “fundamental element of personal liberty,” Justice Brennan said that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”¹⁶² The Court emphasized that close relationships deserve protection from state interference in order to “safeguard[] the ability independently to define one’s identity that is central to any concept of liberty.”¹⁶³ The Court noted that family relationships exemplify the intimate freedom of association,¹⁶⁴ but stated that outside of family relationships, there exists a “broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.”¹⁶⁵

The Jaycees, a national organization of young men, claimed that the freedom of association protected their right to exclude women and to be a group where men associated with one another.¹⁶⁶ The Jaycees’ claims did not prevail under the Court’s freedom of intimate association analysis. The Court concluded that the Jaycees were outside of the category of highly personal relationships that merit constitutional protection after considering various factors, including size, purpose, policies, selectivity, and congeniality.¹⁶⁷

Expressive association, the second category within the freedom of association analysis, focuses on the right to associate for the purpose of engaging in certain activities, including speech.¹⁶⁸ Justice Brennan’s reading of expressive association in *Jaycees* considered the association itself as an expression of one’s views. The Jaycees claimed that the Minnesota Human Rights Act violated its freedom of association by forcing it to accept members it did not want. While the Court stated that the freedom of association “presupposes a freedom not to associate,” the court emphasized that the freedom of expressive association is not absolute.¹⁶⁹ “Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through

¹⁶¹ 468 U.S. 609, 617–18 (1984).

¹⁶² *Id.*

¹⁶³ *Id.* at 619.

¹⁶⁴ *Id.* at 619–20.

¹⁶⁵ *Id.* at 620.

¹⁶⁶ *Id.* at 613–15.

¹⁶⁷ *Id.* at 620.

¹⁶⁸ *Id.* at 618.

¹⁶⁹ *Id.* at 623.

means significantly less restrictive of associational freedoms.”¹⁷⁰ The Court concluded that the State’s compelling interest in eradicating discrimination against women justified enforcement of Minnesota’s anti-discrimination law.¹⁷¹

While the majority in *Jaycees* recognized that the Minnesota Act interfered with the group’s expressive liberty to a degree, the Court engaged in a balancing analysis and determined that the regulation was justified by a compelling state interest which outweighed the First Amendment right of freedom of association.¹⁷² Justice Brennan’s analysis in *Jaycees* suggests a limited recognition of the intrinsic value of associations, which contrasts sharply with the Court’s decision in *Boy Scouts of America v. Dale*, in which freedom of association was held to protect the Boy Scouts’ right to exclude an openly gay scout leader.¹⁷³ The Court stated that a group must engage in some type of expression in order to merit protection under the First Amendment’s expressive associational right.¹⁷⁴ In giving deference to the Boy Scouts’ definition of their expressive message, the Court concluded that expressive associations should not be forced to accept members whose presence affects the “group’s ability to advocate public or private viewpoints.”¹⁷⁵ Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court recognized the parade organizers’ right to exclude the Irish-American Gay, Lesbian and Bisexual Group from the parade, an inherently expressive activity.¹⁷⁶ In recognizing that free speech includes the right to decide what not to say, the Court explained that the gay, lesbian and bisexual group could not force the parade organizers to carry the group’s message.¹⁷⁷

The more limited view of association in *Jaycees* contrasts sharply with the robust reading of association in *Dale*. The recognition of the liberty to define oneself in a particular way has different implications with respect to university housing under a freedom of association analysis. The claims would most likely be asserted by non-transgendered students who express an interest in not being forced to associate with transgendered students within the confines of a dorm room. How far does the right to exclude, as recognized in *Dale*, extend? Unless one thought one has a constitutional right to choose

170 *Id.*

171 *Id.* at 623–24.

172 *Id.* at 626–30.

173 530 U.S. 640 (2000).

174 *Id.* at 648.

175 *Id.*

176 515 U.S. 557, 568 (1995).

177 *Id.* at 574–75.

one's roommate, which would also implicate the capacity of a roommate not to choose you, the associational claim is likely to lose, even though the reason invoked for not wanting to associate with a roommate is based on sex. This raises the question of how universities deal with students who do not want to live with their assigned roommate because of race, religion, or sexuality. Can an individual opt out of a housing situation because he does not like living with a roommate of X race? Does the right of association presuppose the right not to associate with individuals of Y religion in university housing? A student would generally not be able to get out of an arrangement on these grounds and would have to make a request for a housing change. This would follow in the case of living with a transgendered individual.

An important question to consider is whether one expresses oneself through one's living arrangement. While some may claim choices about the people with whom one shares a living arrangement is expressive,¹⁷⁸ it should be noted that many students do not express themselves through their housing assignments. The associational claim involved would most likely be intimate rather than expressive. The Court's discussion of intimate association in *Jaycees* highlights the importance of defining one's identity through close relationships. Shared living arrangements are a form of intimate association, but the question is whether such arrangements are protected under the First Amendment. While there is an associational claim here that is relevant, association would not give rise to a claim in a situation where a university has the authority to make housing assignments. In first year student housing, for example, students do not make choices about their particular roommate, hall, or dorm. If association concerns who one wants to eat lunch with or go on a march with, as in *Hurley*, a choice is involved. Such a choice is not implicated in this context. Associational claims do not go to the issue of how universities make assignments.

Any challenge to university housing on associational grounds would most likely be squelched after considering the state's compelling interests in administrative efficiency and supporting the university's educational philosophy. Similar to the Court's analysis in *Jaycees*, these interests would most likely outweigh First Amendment rights. Furthermore, unlike the cases explored in this Section, non-transgendered students do not constitute a group, nor do they ex-

178 See generally Messerly, *supra* note 87 (advocating against government interference with individuals' choices in living arrangements).

press a particular message in the housing context to warrant protection under the First Amendment, as noted in *Dale*.

The argument that an individual has a right to not associate would be defeated in the context of the educational environment. While a university may justify its policies, and students can get out of uncomfortable housing situations, this does not negate the need for universities to adopt alternative policies.

VI. ACCOMMODATING TRANSGENDER STUDENT NEEDS

Universities are given tremendous sway to make decisions in the best interest of students' education. Universities voice concern about protecting the welfare of the general student body, but the diverse approaches to the question of transgender students and housing suggest the difficulty of determining the appropriate baseline. An overview of specific university housing policies that attempt to accommodate the transgender student population indicates different strategies and recent trends.¹⁷⁹

A. Universities' Approaches: Policies and Trends

Some universities have adopted policies that support transgender students' quest for safe housing that is true to their gender identity.¹⁸⁰ At the University of California, Riverside, for example, the housing policy provides special accommodations for students in keeping with their gender identity/expression.¹⁸¹ The student must inform the University's Housing Department of the need for special accommodations and then provide information, which will remain confidential, so that University Housing staff is able to meet the student's housing needs.¹⁸² The University of Minnesota takes a case-by-case approach when transgender students want to live in housing with a

179 See generally TRANSGENDER LAW & POLICY INST., COLLEGES/UNIVERSITIES AND K-12 SCHOOLS, <http://www.transgenderlaw.org/college/index.htm> (last visited Mar. 28, 2010) [hereinafter TRANSGENDER LAW & POLICY].

180 Brett-Genny Janiczek Beemyn, *Ways that U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, TRANSGENDER LAW & POLICY INST., <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Mar. 28, 2010).

181 University of California, Riverside: LGBT Resource Center, Housing Policies Related to Gender Identity/Expression, <http://out.ucr.edu/campus/transpolicy.htm> (last visited Mar. 28, 2010) [hereinafter Housing Policies] (noting that "Housing consistently recognizes and respects the gender identity that the student has established with University Housing").

182 *Id.* (explaining the process by which students with concerns related to their gender identity/expression may seek special housing accommodations).

roommate of the gender with which they identify.¹⁸³ Students are interviewed by housing authorities, and then the administration determines the reasons students want to live together and decides whether to honor the request. Nevertheless, the University of Minnesota generally places transgender students in “apartment style” housing, in which they have a private bedroom and bathroom, but share the living space with students of their self-identified gender.¹⁸⁴ The University of Illinois at Chicago has taken a more liberal approach, making room assignments on the basis of a student’s current self-defined gender identity.¹⁸⁵

One of the most notable trends at the university level has been the creation of gender-neutral housing, defined as “[p]roviding the option for students to room together without restriction based on sex or gender.”¹⁸⁶ Under this approach, housing authorities assign roommates regardless of gender. The benefits are significant: Students are not required to identify their gender for housing purposes and can choose their roommates or have their roommates assigned to them without consideration of gender or sex. Universities have taken different approaches to gender-neutral housing, designating individual suites, halls, floors, buildings, areas of buildings, or most of the residence hall as gender-neutral.¹⁸⁷ In 2008, thirty-six colleges and universities offered gender-neutral housing.¹⁸⁸ Oberlin College, for example, has created ‘all gender’ floors. Wesleyan University established a hallway for students who chose not to designate their gender. Out of concerns of segregation of transgendered students, Wesleyan replaced this gender-neutral hallway policy with the current policy of matching returning students who choose the gender-neutral housing option.¹⁸⁹

Some universities allow students to apply for gender-neutral housing individually. The University of California, Riverside, for example, asks a student to check if both roommates *request* or are *open* to a

183 Nat’l Consortium of Directors of LGBT Res. in Higher Educ., FAQs: What Policies Can Be Put into Place to Accommodate Transgendered Students in Campus Housing, http://www.lgbtcampus.org/old_faq/trans_campus_housing.html (last visited Mar. 28, 2010) (describing the manner in which the University of Minnesota addresses transgender housing).

184 *Id.*

185 *Id.*

186 GENIUS INDEX, *supra* note 17, at 3.

187 *See* TRANSGENDER LAW & POLICY, *supra* note 179.

188 NATIONAL STUDENT GENDERBLIND CAMPAIGN, RESEARCH UPDATE—SUMMER 2008, <http://www.genderblind.org/research.pdf> (listing colleges and universities that offer gender-neutral rooming) [hereinafter RESEARCH UPDATE].

189 *Id.* at 8.

gender-neutral housing placement.¹⁹⁰ If a student alone is open to gender-neutral housing, but does not have a roommate, the University may contact the individual and make roommate assignments based on compatibility evaluations and follow-up interviews.¹⁹¹ Other universities require individuals who want to live in gender-neutral housing to apply with a specific roommate. At the University of Pennsylvania [hereinafter Penn], upper class students (sophomores, juniors, and seniors), who are over the age of eighteen, may apply to live in gender-neutral housing with a roommate, who can be of any gender.¹⁹²

Another transgender-friendly housing option is lesbian, gay, bisexual, transgender, and ally living-learning programs or theme floors or houses, which have been established in over twelve colleges and universities.¹⁹³ For example, the University of Minnesota established Lavender House for students interested in gender-related issues, providing students with the option of choosing their housing and programming around gender identity and sexual orientation themes.¹⁹⁴ At the University of California, Berkeley, the Unity Theme House provides a “mixed gender roommate” option open to all students, who can identify with any gender and need not provide official documentation.¹⁹⁵

The housing policies of two universities in Pennsylvania demonstrate the breadth of approaches. Erin Cross, Associate Director of the Lesbian Gay Bisexual Transgender Center at Penn, explained the steps of Penn’s housing process.¹⁹⁶ Penn makes a series of accommodations for sophomores through seniors. Upperclassmen can choose to live in gender-neutral housing. If students do not make this choice, the default is to place a student with someone of the same “gender.” Students who are eighteen or older can self-identify as gender-variant and must contact College Houses and Academic Ser-

190 GENDER NEUTRAL HOUSING: A PROPOSAL FOR OCCIDENTAL COLLEGE, slide 27, available at <http://clubs.oxy.edu/asoc/files/GA%20files/GenderNeutralHousing.ppt>.

191 See University of California, Riverside, LGBT Resource Center, Gender Neutral Housing Option, <http://out.ucr.edu/campus/gnhousing.htm> (last visited Mar. 28, 2010).

192 RESEARCH UPDATE, *supra* note 188, at 6.

193 TRANSGENDER LAW & POLICY, *supra* note 179 (including the University of California at Berkeley, Davis, Irvine, Riverside, Santa Barbara; the University of Colorado, Boulder; the University of Iowa; the University of Massachusetts; the University of Minnesota; and the University of Vermont).

194 University of Minnesota, Living Learning Communities, <http://www.housing.umn.edu/student/lc/index.html> (last visited Mar. 28, 2010).

195 RESEARCH UPDATE, *supra* note 188, at 6.

196 Interview with Erin Cross, Assoc. Dir., Univ. of Pa. Lesbian Gay Bisexual Transgender Ctr., in Phila., Pa. (Dec. 18, 2008).

vices (CHAS) when choosing their housing. This will lead to a series of conference calls to determine the best fit. If the individual has taken hormones or has had sexual reassignment surgery, Penn Housing tends to be more favorable to the gender towards which the individual is moving. Ms. Cross explained that this process is a “mess” for first year students, especially for those under eighteen, unless the parent gives the student permission to go through the same process with CHAS. She described the process as discretionary and stated that it is not usual for a pre-operative transgender to live with someone of the opposite sex.

In contrast to Penn, Arcadia University in suburban Philadelphia, Pennsylvania, has not adopted gender-neutral housing. Joshua Stern, Dean of Students and former Director of Residence Life, explained that while Arcadia has formed a working group to look at how the University responds to transgendered students, Arcadia is committed to housing students of the same sex together during freshman year.¹⁹⁷ Upper class students have coed housing options available in the form of coed suites or apartments, which he suggested provides some flexibility for transgender students. Students indicate their sex on their housing preference forms. Stern explained that if a self-defined female student who is biologically male is placed with a female, the University would most likely reassign the student and house the student with a male. If the student was not comfortable, he suggested that the University would do its best to accommodate the student, perhaps through the use of a single. Whether the student would be placed in a single on the male or female wing remained a complicated, unanswered question.

B. The Future of University Housing Policies

Although more universities are taking measures to ameliorate the housing situation for transgender students, the housing policies are replete with complexities and complications. Many universities deal with housing issues on a case-by-case approach, leaving universities without a settled, standard campus-wide policy. Crafting an individualized solution is difficult when residence halls are segregated by traditional sex identity.

Placing transgendered students in singles is often offered as the default solution. The single room as the only remedy is problematic because transgendered students may feel isolated. Singles are also

¹⁹⁷ Telephone Interview with Joshua L. Stern, Dean of Students and former Dir. of Residence Life, Arcadia Univ. (Jan. 8, 2009).

more expensive. According to Erin Cross, a single room at Penn costs more because the student has to pay a “single supplement.”¹⁹⁸ The single supplement is waived for medical necessities, but Gender Identity Disorder does not qualify an individual for a medical single.¹⁹⁹ The converse solution—transgendered buildings or areas of buildings—is also problematic because it assumes that transgender students want to live with other transgender students; thus, this solution may have a “ghettoization” effect.

Universities have various justifications for maintaining the status quo, especially because students can request to get out of a living situation in which they are uncomfortable.²⁰⁰ While sex segregated housing should remain an option, various alternatives are advisable, and, in fact, should be constitutionally required for public universities. This Comment examines claims that transgender and non-transgender students may raise in traditional sex segregated housing and ultimately finds that safety and educational concerns may allow universities to continue traditional policies. Nevertheless, public universities have a legal duty to provide non-traditional, non-sex segregated housing so that transgender and other gender non-conforming students have comfortable and safe options. The provision of only sex segregated housing neglects modern realities and changing conceptions of gender identity and requires heightened scrutiny. There is a strong argument that transgender individuals represent a protected class and, as a result, universities must provide alternative housing options on equal protection grounds.²⁰¹

Options that would grant transgender students access to housing according to self-defined gender identity, such as gender-neutral housing, would not disrupt traditional sex-segregated housing, but would be in addition to existing policies. The constitutional right to self-define gender should be considered a fundamental liberty right and should be extended to students in university housing under the Due Process Clause of the Fourteenth Amendment.²⁰² Although the right to gender self-determination is complicated in the university

198 Interview with Erin Cross, *supra* note 196.

199 *Id.*

200 *See, e.g.*, Housing Policies, *supra* note 181 (providing that if a student has a conflict with a roommate because of gender identity/expression, Housing recommends that the student speak with the Resident Director, who is trained on gender identity/expression issues, and if the issue remains unresolved, the next step is to speak with senior Residence Life staff and/or the Director of the LGBT Resource Center).

201 This argument is beyond the scope of this comment. *See, e.g.*, Elkind, *supra* note 111, at 902 (arguing that the transgender community should be treated as a suspect class).

202 *See supra* Part III.

housing context, it is possible for universities to achieve housing policies that recognize and address this right. Since the “right to define one’s own concept of existence”²⁰³ has been extended to procreation decisions and family relationships, as well as private sexual choices,²⁰⁴ why should this right not be extended to transgender individuals in the university housing forum? In this context, regulation is needed to ensure that transgender individuals can make “choices central to personal dignity and autonomy.”²⁰⁵

The remainder of this Section presents housing alternatives and solutions. The specific strategy adopted by a university cannot be mandated, but the university must provide an appropriate accommodation.²⁰⁶

Gender-neutral housing is an important development because it enables students to live with a roommate of any gender, but generally is an option limited to upperclassmen.²⁰⁷ Universities should extend this option to all students, an approach that has been adopted at the University of California, Riverside; California Institute of Technology; and Skidmore College.²⁰⁸ This option should be clearly indicated on housing forms for students of all years. If roommate assignments are based on factors other than perceived gender, transgender students will feel less stigmatized with regards to university housing.

Gender-neutral housing should be available to students who apply for this option with a specific roommate, as well as to students who have not yet identified a roommate. To facilitate this option, universities would follow-up with students to help find compatible roommates and create a database of students who consent to living with transgender students. At Michigan State University, the LGBT Resource Center has a list of “LGBT-friendly” students to assist Housing

203 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

204 *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

205 *Casey*, 505 U.S. at 851.

206 The argument that universities have a duty to provide such alternatives is supported by the case of the “Yale Five,” in which the district and circuit courts upheld Yale’s on-campus housing requirement. *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183 (D. Conn. 1998), *aff’d*, 237 F.3d 81 (2d Cir. 2000). It should be emphasized that Orthodox students have the option of single sex floors in specified Yale residences, an alternative that seems to accommodate religious needs. *See Glaberson, supra* note 95 (explaining the problems Orthodox students have with the University’s different housing options). In the same vein, non-sex segregated housing options provide an alternative that accommodates transgender students’ needs.

207 RESEARCH UPDATE, *supra* note 188 (citing Brandeis University, Brown University, Dartmouth College, Guilford College, Oregon State University, University of Pennsylvania, Stanford University, Swarthmore College, Washington University, and Wesleyan University).

208 *Id.*

authorities in making roommate and suitemate assignments.²⁰⁹ Surveying students to determine more tolerant placements may be administratively challenging, but the benefits would be far-reaching. To get at the root of the problem, universities should include a “non-binary gender question”²¹⁰ on housing forms and should not require proof of surgery or official documentation. Other appealing solutions include eliminating the requirement of filling out gender on housing forms and giving students the option of not indicating a gender preference when making roommate requests.²¹¹

Another option may be the negotiation of formal roommate agreements. At the University of Minnesota, roommates sit down with their Community Advisor, an upper class student who is trained to work with students living in university housing, and make a formal roommate agreement looking at issues such as study and sleeping habits, communication, and cleaning duties.²¹² Students resolve conflicts through the Community Advisor and then turn to the Residence Director and the Assistant Director of Residential Life to discuss the possibility of moving.²¹³ Just as all roommates make agreements for day-to-day living, non-transgender and transgender individuals living as roommates can negotiate interactions for optimal living arrangements.

The role of the Community Advisor at the University of Minnesota suggests the importance of education to help ensure that change begins with university officials.²¹⁴ It is critical that universities adopt policies that are sensitive to the needs of transgendered students, but

209 Michigan State University, Transgender Student Housing at Michigan State University, <http://transgenderhousing.msu.edu/FAQ.html> (last visited Mar. 28, 2010).

210 Beemyn & Pettitt, *supra* note 15 (indicating that seven of the twenty-five surveyed college campuses used a “non-binary gender question” on housing, admissions, or health care forms, giving students the option to self-identify outside of the gender binary by leaving a blank space after the term “gender” rather than using a check box).

211 *See generally* RESEARCH UPDATE, *supra* note 188. At Pitzer College, filling out gender is not required on housing forms, and all students, including first-years, have the option to specify their roommate’s gender. *Id.* at 5. Starting in the Spring of 2008, housing forms at Harvard University included a transgender checkbox. *Id.* at 4. At Carnegie Mellon University, students either select male, female, or no preference when *making* roommate requests in the housing lottery. *Id.* at 2.

212 *Getting Along with Your Roommate*, THE UNIVERSITY OF MINNESOTA, HOUSING AND RESIDENTIAL LIFE 2009–2010 GUIDEBOOK, <http://www.housing.umn.edu/guidebook/5/index.html>.

213 *Id.*

214 *See generally* Jeffrey S. McKinney, *On the Margins: A Study of the Experiences of Transgender College Students*, 3 J. GAY & LESBIAN ISSUES IN EDUC. 63 (2005) (explaining that self-identified transgender college students reported a hostile environment for transgender students and a lack of resources and education on transgender issues).

this represents an initial step that may be limited in effect if education and training do not reinforce policy. In fact, such education may be necessary to spur change at universities that have ineffective policies, as well as at universities that have not considered or have dismissed the need for changing housing plans. Training university and housing department administrators to make individualized judgments that determine the best placement for transgender students is critical. Exposing faculty and students to the issues affecting transgendered students is an integral part of campus-wide educational efforts. For example, universities could tie in gender-related topics in programming and housing.

The solutions to such housing predicaments are not easy. Universities need to shift the burden from the individual student to make the housing process as smooth as possible and to provide more explicit guidelines. Housing forms should have better choices in terms of sex and gender. Students should have the option to live with whom they want, regardless of gender, and should not find that the only policy attempting to accommodate the needs of transgender students is putting them all together. Universities have a duty to take preemptive measures to protect transgender individuals who feel that single-sex housing policies leave them without safe, comfortable, and autonomous living options.

CONCLUSION

College students are likely to complain about their roommate and other aspects of their living arrangements at some point during their cohabitation. When transgender students are thrown into the mix, a layer of complexity is added, given the unfamiliarity and discomfort with gender non-conforming behavior.

Students might take issue with being forced to live in a dorm room with a transgender individual. This objection raises larger questions: What if some students don't want to live with an individual because of his or her race, religion, or sexuality? What prejudices should universities accommodate? Part of the college experience is living with all kinds of people. Just as universities now have housing arrangements with interracial roommates, universities need to resist the tendency to segregate transgender individuals into transgendered dorms or living spaces. Universities need to take steps to educate students who do not want to share a room with a transgender person because of discomfort. Through more education and exposure, universities can help fight ignorance and unfamiliarity with issues affecting transgender individuals.

Kourt Osborn was denied access to both female and male housing. Universities must adopt policies to ensure that students have access to housing that enables them to express their gender identity. This Comment does not suggest that the remedy is to prohibit sex segregated housing, but instead to ensure that all public universities have non-sex segregated options. Public universities must implement policies that are sensitive to transgender individuals and provide them with acceptable housing options.