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Because We Say So:
The Unfortunate Denial of Rights to Transgender Minors Regarding Transition

Amanda Kennedy*

I. INTRODUCTION

In the United States, we routinely endanger the health and well-being of transgender youth by denying them a voice in determining the paths their transitions take. This Note explores the barriers that transgender youth face when trying to take steps to transition. These barriers can take the form of statutes, case law, parental stonewalling, and financial concerns. Such barriers act to prohibit transgender youth from living in a way that conforms to their gender identity. Despite these obstacles, there are several legal tools that transgender youth may be able to use to influence their transitions. Transgender youth should be able to use state statutes and public policy to argue against having healthcare withheld from them. Finally, there is arguably a liberty in forming one’s concept of self. Used in conjunction, these tools may help youth overcome some of the social, legal, and financial barriers that they would otherwise face.

A. DEFINITIONS AND BACKGROUND

In this Note, I examine the rights of transgender youth. Youth will be defined as people under the age of 18. Although in other fields researchers may classify young people into their 20s as youth, I am concerned with the distinction of rights between legal adults (over age 18) and minors. However, most of the relevant research and case law is applicable to older minors. Pre-teens and teenagers are more likely to explore and verbalize gender identity than are younger children.

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3. Deana F. Morrow, Social Work Practice With Gay, Lesbian, Bisexual, and
Because people determine and define their identities individually, there are few universal definitions in the world of gender identity. Thus, it is necessary to establish a common vocabulary before examining the rights of transgender youth. In this Note, I will borrow definitions from psychologists. However, it is important to note that not all people use terms in precisely the same manner. Thus, attorneys, judges, legislators, and lay people may use them in differing ways.

Psychologists use an umbrella term of “gender identity disorder” in reference to “conflict between a person’s anatomical sex and his or her gender identity, or self-identification as male or female.” A person who experiences “strong and persistent cross-gender identification and persistent discomfort with his or her anatomical sex” may be referred to by psychologists as transsexual. However, I will use the term “transgender” to encompass the situations described above as well as individuals who do not feel comfortable with the societal norms imposed by their genders. These individuals may wish to take steps to physically change their bodies to conform to the sex with which they identify, or they may simply wish to express themselves socially in gender non-conforming manners.

B. TRANSITION

Transgender individuals often choose to transition in order to align their identity with how they are perceived physically, socially, and legally. A transition means different things for different people. For some people, simply questioning their identity and being honest with their friends and family is enough. Other people wish to change their names or undergo hormone treatments. For others, different types of surgery, such as chest reconstruction and genital surgery, are necessary for them to feel comfortable with who they are.

There are no laws that govern transition. However, there are international professional standards that are often used to guide transition. These standards are referred to as the Standards of Care for Gender Identity Disorders. They are published by the World Professional Association for Transgender Health, Inc. (WPATH). According to WPATH,

Transgender Adolescents, 85 FAMILIES IN SOC. 91, 92 (2004).
5. Id.
6. Gagne et al., supra note 1, at 483.
7. Id.
8. Id.
10. World Professional Association for Transgender Health, WPATH, http://www.wpath.org (last visited Sept. 14, 2007). WPATH was previously called the Harry Benjamin International Gender Dysphoria Association. Much of the literature regarding gender identity thus refers to the organization’s previous name. Also note that the
TRANSGENDER MINORS

professionals and lay people can use the Standards of Care (SOC) to guide transition in addition to clarifying expectations.11

While the method and extent of transition will differ for everyone, psychological well-being is the ultimate goal. The SOC state that "the general goal of psychotherapeutic, endocrine, or surgical therapy for persons with gender identity disorders is lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment."12 Youth are included in the SOC, with special guidelines that take into consideration their mental and psychological developmental differences from adults.13

II. ISSUES FACING THE TRANSGENDER COMMUNITY

A. COST

The transgender community has a multitude of non-legal issues with which to contend. Many of these issues are medical and psychological. Transgender people undergo psychological therapy to help them determine their transitional path. If they seek to physically transition, they then must make decisions regarding hormones and surgery. Thus, one concern for transgender individuals is the cost associated with physically transitioning.

Costs vary across the country, but the Transgender Law and Policy Institute, a non-profit organization connecting transgender persons with legal services, estimates the average cost of a therapy session is $100.14 Additionally, the Transgender Law Center estimates that the average cost-per-month for hormone treatment is $100.15 If one were to simply attend two therapy sessions per month alongside hormone therapy, the cost could reach $300 per month.

Three hundred dollars is a significant portion of many people's monthly income. What happens, then, if an individual also wishes to undergo surgery? Although not all transgender people wish to undergo surgery as part of their transitions, for a significant number of people it is an important aspect of feeling comfortable in their own bodies.16 Additionally, for those who wish to legally change their sex, surgery is required.17 There are many surgeries that can be part of an individual's

11. STANDARDS OF CARE, supra note 9, at 1.
12. Id.
13. Id. at 8, 9.
15. Id.
16. SUE ET AL., supra note 4, at 310.
17. For example, New Jersey statutes require "sexual reassignment surgery" to change one's sex on a birth certificate, although the state does not detail what kind of surgery is required. N.J. STAT. ANN. § 26:8-40.12 (West 2007). See also ALA. CODE § 22-9A-19 (LexisNexis 2005); IOWA CODE ANN. § 144.23 (West 2005).
transition, and many people have more than one. These surgeries include
reconstructive chest surgery, hysterectomy, and genital surgery.\textsuperscript{18}
According to the Transgender Law Center, these surgeries typically range
from $7000 to nearly $100,000.\textsuperscript{19}

On the one hand, medical insurance could alleviate the costs of surgery
associated with transitioning. However, considering that much of the
general population is uninsured, it is safe to assume that a significant
percentage of transgender people also lack health insurance.\textsuperscript{20} Even if a
transgender person is covered by insurance, policies are unlikely to cover
costs associated with the transition. Consequently, these individuals must
cover all of the costs themselves. This can make transitioning cost-
prohibitive even for people with well-paying jobs.

B. OTHER MEDICAL HURDLES

An additional medical hurdle can be the task of finding a
compassionate physician who is willing and able to provide medical
treatment to transgender people with the same level of courtesy and
expertise that would be granted to non-transgender patients. In some cities,
this is not an insurmountable challenge. For example, in San Francisco,
there are free clinics as well as private physicians who have staff that are
trained to be sensitive to transgender patients.\textsuperscript{21}

However, in other parts of the United States it can be very challenging
for transgender patients to find physicians with whom they feel safe being
honest when seeking medical treatment. For example, one transgender
man in his 20s reports traveling three hours from his home in Savannah,
Georgia to Atlanta to see an endocrinologist sympathetic to his needs.\textsuperscript{22}
This patient did not feel comfortable seeking prescriptions for testosterone
from any of the doctors in his insular Southern hometown.\textsuperscript{23} Some people
do not have the means to expend the time and money to travel to distant
doctors. For those who do, it is nevertheless an inconvenience.

C. PSYCHOLOGICAL AND SOCIAL FACTORS

There are also many psychological and social issues that accompany
gender identity. For example, many transgender people suffer from

\textsuperscript{18} SUE ET AL., supra note 4, at 310.
\textsuperscript{19} Transgenderlaw.org, supra note 14.
\textsuperscript{20} As of 2004, 45.8 million Americans were without health insurance. CARMEN
DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. CENSUS BUREAU,
INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, 16
\textsuperscript{21} San Francisco Department of Public Health, Community Health Network,
http://www.sfdph.org/dph/comupg/oservices/medSvs/hlthCtrs/TransgenderHlthCtr.asp (last
\textsuperscript{22} Interview with transgender male, age 25, confidentiality promised, in Savannah,
\textsuperscript{23} Id.
depression and/or anxiety associated with their gender identity. In addition to these challenges, the lives of transgender youth are complicated by factors unique to being young and transgender. For example, transgender youth struggling with their identities do not have the social network that other minority youth typically have. Deana Morrow, Associate Professor of Social Work at the University of North Carolina, explains that youth who are of ethnic or religious minorities have communities of faith, families, and neighborhoods to which to turn for support when faced with adversity. Youth who are gender nonconforming usually do not have analogous communities to provide support. As a result, they lack role models from whom they could seek answers to questions or concerns about their identities or the way that other people react to their identities.

Additionally, there are many social issues inherent in being transgender. As with people who are gay or lesbian, the decision to “come out” about their gender identity and transition remain with the individual. People who are transgender risk losing the acceptance of their family and friends when discussing their gender identity with people who previously had been part of their social network and support system. Transgender youth face these same issues.

Many youth feel that they must keep their identities a secret from their families for fear of disappointing them and may also fear being mistreated or disowned. These fears can lead to withdrawal from their families as well as other high-risk behaviors. These behaviors may include “substance abuse, risky sexual behaviors, running away, or attempting suicide.” One researcher also found that transgender youth are disproportionately represented among youth prostitutes. Particularly relevant is that “[o]ften, these kids are trying to earn enough money to pay for sex-reassignment surgery, and many are buying street-quality hormones.”

Additionally, social situations can pose safety threats. Questions arise such as: Which bathroom does it look like I belong in? Will I be safe in the one that I feel most comfortable in? How will the person I’m flirting with react if we get intimate? Will I be harassed by people in my community? According to Morrow, safety is of concern to transgender youth as well as

25. See Morrow, supra note 3, at 92.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
32. Id.
adults. Morrow advises social workers to be prepared to offer services to transgender youth because of the many risks discussed above.³³

III. LEGAL CONCERNS

Legal issues also present an obstacle for transgender individuals. Transgender people often wish to have their transitions recognized by the government. For example, they may wish to have the sex on their birth certificates altered. Different states have different requirements that a person must satisfy in order to obtain a new birth certificate. In some states, a new birth certificate may not be possible at all. For example, the Kansas Supreme Court has ruled that one’s sex at birth is inalterable.³⁴ The government’s recognition of one’s transition also impacts other aspects of life, including the ability to marry or adopt, placement in correctional facilities, and distribution of an intestate estate. Seemingly simple matters, such as getting a driver’s license, are also complicated when the government will not issue a license with one’s preferred gender listed.

Many other legal areas are also implicated in the lives of transgender individuals, including employment discrimination and family law.³⁵ An individual’s sex and gender identity influences many spheres of life that most people do not have to consider. People who are transgender have to address issues such as those discussed above every day.

However, within the parameters of existing law, adults are able to make decisions regarding the course of their transition. Adults can determine whether and when to consult a therapist or begin hormone therapy. Adults can petition a court for a name change or consent to surgery. They can purchase the clothing that they wish to wear and pursue job options that will allow them to save money for their transition.

Minors, on the other hand, are unable to make such decisions. Most minors must defer to their parents regarding decisions that affect their lives. For example, they may need parental consent to obtain employment. Unfortunately, laws are structured so as to create significant hurdles for transgender youth. On top of the issues that are faced by transgender adults, transgender youth face additional barriers due to their age.

One issue transgender youth face is safety and acceptance in schools. For at least a portion of their adolescence, minors cannot choose whether or not to attend school. School poses social challenges and safety threats.³⁶ Many youth are assaulted at schools because of their sexual or gender

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³³. Morrow, supra note 3, at 96.
³⁴. In re Estate of Gardiner, 42 P.3d 120, 137 (Kan. 2002).
³⁶. Morrow, supra note 3, at 93.
identity. Moreover, school faculty lack proper training to address anti-lesbian, gay, bisexual, and transgender (LGBT) sentiment in schools.

Some schools have also attempted to restrict the ability of transgender youth to wear clothing that conforms to their gender identity. Doe v. Yunits provides an example of a transgender youth challenging the application of school dress codes. There, the plaintiff was a 15-year-old student in the eighth grade. Previously diagnosed with gender identity disorder, she preferred to be acknowledged as female. The Court determined that if Doe could prove the allegations about the school’s rules, it could be ruled that she had been constructively expelled.

Yunits demonstrates that there are some protections for transgender youth. However, note that it is the first case of its kind and is only applicable in Massachusetts. In most states, youth would not have any recourse for rules applied to them in school. Additionally, youth who do not have the support of a parent are unlikely or lack the ability to pursue legal recourse.

Other challenges exist for transgender youth, particularly those in foster care. For example, in gender-segregated facilities, transgender youth are often placed in homes that do not conform to their gender identity because policy dictates that members of different biological sexes cannot dorm together. This can create safety issues stemming from a lack of social acceptance with the other youth. There is also the risk of psychological harm due to denial of the youth’s gender identity.

IV. DETERMINING WHETHER AND HOW A TRANSGENDER MINOR MAY TRANSITION

Of all of the challenges that transgender youth face, perhaps the most important is the ability of transgender youth to determine the path that their transitions will take. Youth do not have the ability to seek medical treatment with the same ease as adults. The ability of youth to determine their path of treatment varies depending on whether they have the support of one, both, or neither of their parents.

37. Morrow, supra note 3, at 93.
38. Id.
40. Id.
41. Id.
42. Id.
43. Id. at *20.
45. See Morrow, supra note 3, at 94 (illustrating a host of risk factors which, when they occur, have the potential to compromise the psycho-social well-being of individuals).
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A. WHEN PARENTS AGREE WITH THEIR CHILDREN

If parents are supportive of their transgender children, they can help them seek therapy and medical treatment. Parents can consent to hormone treatment or even surgery. Yet, despite the support of parents, there can still be opposition from others.

Hazel Beh, Assistant Professor of Law at the William S. Richardson School of Law, University of Hawaii, and Milton Diamond, Professor of Anatomy at the John A. Burns School of Medicine, University of Hawaii, explored the process of assisting an Australian 13-year-old beginning his hormone therapy.\(^{46}\) In *In re Alex*, 13-year-old Alex was a female-to-male transsexual who sought to begin hormone therapy in order to prevent female pubertal development.\(^{47}\) Due to his involvement with the dependency system, the Court was actively involved in making this medical decision. The judge in *In re Alex* ruled that Alex should be able to begin his hormone treatment. However, there was still resistance from community members in this well-publicized case.\(^{48}\) Some people opposed the treatment simply because of transphobia. The lack of understanding from the community resulted in the community’s inability to accept the decisions of transgender people regarding their transition. Thus, many people believed that Alex should not receive the hormone treatment that he was seeking:\(^{49}\)

Critics of Alex’s treatment were unlikely bedfellows. Some critics of treatment argued that such life-altering elective treatment on children should be avoided until the child has full decisional capacity. Still others questioned the moral and medical legitimacy of sex change treatment for gender dysphoria generally. And some in the lesbian and gay community argued that sex reassignment is necessary only because society is intolerant to gender-blending. Those in the feminist and other communities voiced one of the major arguments against the judgment. They argued that the decision was the result of patriarchal thinking.\(^{50}\)

Beh and Diamond explore one successful case for a transgender youth, but, “the hostility of schools, courts, social service agencies and even parents to sexual minority youth is well known.”\(^{51}\) Here, although the authors acknowledge that parents might not be supportive of their


\(^{47}\) Beh & Diamond, *supra* note 46, at 255.

\(^{48}\) Id. at 241.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id.
transgender children,\textsuperscript{52} they fail to explore what happens to youth when they do not have the support of their parents. Moreover, the authors fail to make suggestions as to what can be done about this lack of support.\textsuperscript{53}

B. WHEN PARENTS DISAGREE WITH EACH OTHER REGARDING THEIR CHILD’S TRANSITION

Sometimes parents disagree with each other regarding what should be done with their children. From name changes to medical treatment, parental disagreement must be addressed.

For a transgender person (minor or adult), legally changing one’s name enables one to choose an appropriate name that will be used in legal as well as social contexts. For example, a minor would be registered in school and obtain a driver’s license with a name that conforms to his or her gender identity. In general, minors may not change their names without parental consent. For example, in California, if parents do not both agree to the minor’s name change, they must appear before a judge, who then determines the best interests of the child.\textsuperscript{54} If the judge feels that the child is old enough to have meaningful input, the judge might consult the child.\textsuperscript{55} Whether the judge will do so is often influenced by the judge’s opinion on transgender issues. Due to the subjective nature of the “best interests” approach, the political climate of a state or area within a state may influence whether a minor is granted a name change. If a judge is ignorant about gender identity, he or she may simply not understand the importance of the name change. There may not be any animus toward the child or supportive parent, yet the judge may not feel that the name change is in the best interest of the child. Conversely, the judge may not be sympathetic to transgender issues and thus determine that changing a child’s name to a name that does not conform to his or her biological sex is not in the child’s best interest.

Disagreement among parents will also affect medical and psychological treatment. If parents are divorced or separated, “this disagreement can lead to a renewed custody challenge.”\textsuperscript{56} The Transgender Law Center recommends that parents seek legal advice if they wish to support their transgender children.\textsuperscript{57} Thus, transgender youth and supportive parents must assess risks when determining what course the child’s treatment will take. A supportive parent may risk losing custody to

\textsuperscript{52} Beh & Diamond, \textit{supra} note 46, at 279.
\textsuperscript{53} This is not to suggest that the authors have failed in any respect. Their article very successfully achieves the goals that the authors set forth.
\textsuperscript{54} \textit{CAL. CIV. PROC. CODE} § 1276 (Deering 2007).
\textsuperscript{55} \textit{Id.}
\textsuperscript{57} \textit{Id.}
the other parent, and the child will risk living with a parent who is not supportive of his or her gender identity. Additionally, parents must consider the costs associated with a renewed custody challenge. For parents who do not have the money to pay an attorney, it may be cost-prohibitive to even broach the subject of the child's treatment if the parent does not want to risk a custody challenge.

A custody challenge itself can also be detrimental to the child. If the challenging parent prevails, the child can wind up living with a parent who is unsupportive of his or her gender identity. The parent may believe that the child is mentally ill or that the supportive parent has "turned" the child. The parent may believe that the child should be punished for his or her identity. Or the parent may react in seemingly more innocuous ways such as deciding not to obtain psychological treatment for the minor despite providing an otherwise adequate home environment.

If minors were able to consent to their psychological and medical treatment, they may be able to avoid possible custody conflicts and therefore remain living with a supportive parent. It is contrary to logic that a supportive custodial parent who sincerely has his or her child's best interest at heart would not be able to consent to treatment for fear of losing custody.

V. WHAT ARE A MINOR'S OPTIONS WHEN PARENTS OPPOSE TRANSITION?

Even considering the problems that arise when only one parent is supportive, the most difficult situation for transgender youth is when they have no parental support at all. If a minor wants to pursue psychological and medical treatment, there are significant hurdles to overcome. In many states, youth are unable to consent to treatment without the support of their parents. Some states allow "mature minors" to consent to medical treatment. Even in these states, youth must often get a court to determine that they are "mature." Some states have instead placed the burden on the court to determine the need for treatment. The court does so by examining the clinician's documentation of medical need. This option provides some choices to transgender youth who seek treatment, but it also allows the court

60. Hartman, supra note 58, at 420. Connecticut, for example, omits the age limitation and instead requires the clinician to document that: (1) parental consent would cause the minor to reject treatment; (2) treatment is clinically indicated; (3) failure to provide treatment would be detrimental to the minor's well-being; (4) treatment has been knowingly and voluntarily sought by the minor; and (5) the clinician is of the professional opinion that the minor is mature enough to participate productively. *Id.*
discretion to reject the opinion of a clinician. However, it presumably is in the best interest of the minor to receive treatment that a clinician legitimately believes is necessary for the minor’s well-being and in which “the minor is mature enough to participate.” Thus, if the court defers to the opinion of the clinician, youth governed by this type of law will be able to receive treatment. Furthermore, by taking the clinician’s advice into account, the court satisfies a public policy goal of ensuring that the best interests of children are met.

A. “MATURE MINORS”

Minors are afforded the protections that the Constitution affords adults. Minors have been recognized as having a right, albeit limited, to privacy. However, this right has traditionally been applied only with regard to abortion and contraception. Even in these cases, many states still require parental consent for minors to receive the aforementioned medical “treatments.” Other forms of medical treatment have yet to receive protection under the umbrella term of the right to privacy. Thus, parents, not youth, have overriding control to make decisions regarding their children’s health care. Indeed, a plurality of the Supreme Court has indicated that “the tradition of parental authority is not inconsistent with our tradition of individual liberty.... Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.”

Ironically, these restrictions may fly in the face of the opportunity to fully “grow” if they restrict a minor’s ability to express his or her gender identity. The Supreme Court, however, implies that although we value personal growth for minors, we value it only so much as it conforms to the wishes of the minors’ parents. As discussed above, transgender minors often face adversity from their families. In these cases, the minor who wants to take steps to embody the gender with which they identify may be left with no options until he or she turns 18. In Justice Powell’s view, however, this outcome would be perfectly acceptable because the parents’ ability to exercise control over their children is considered more important than the minors’ ability to determine the manner in which they want to “grow” and “mature.”

61. Hartman, supra note 58, at 420.
62. In re Gault, 387 U.S. 1, 13 (1967). See also Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”).
64. Id.
65. Hanisco, supra note 59, at 909.
Some states have "mature minor" standards. Under these standards, if the minor is determined to be capable of making his or her own decisions, then he or she is able to consent to informed medical decisions. States are not required to enact mature minor legislation, so in many states, there are no such laws. The states that do enact mature minor legislation address minors' rights in different ways. For example, some states allow minors to make decisions without parental consent only if the decisions concern reproductive rights (contraception and abortion). Other states grant minors the ability to consent only if their parents are "unavailable." Very few states have a more comprehensive set of rights for minors to consent to medical treatment. California may be the most permissive state in terms of mature minor legislation. The California Family Code states that a minor of any age may acquire contraception or provide consent for abortion. Minors who may have been victims of sexual assault may consent to medical care that will assist in diagnosis or treatment of the harms resulting from the assault. For other medical services, the state employs a scheme in which children gain more ability to consent as they age. For example, minors 12 years of age or older may consent to outpatient mental health services if the treatment provider believes that the minor is mature enough to provide informed consent. Patients 12 years of age or over may also consent to treatment for sexually transmitted diseases as well as drug and alcohol treatment. At age 15, minors may consent to general medical treatment if they are not living with their parents and if they are managing their own finances.

States' various mature minor schemes affect transgender youth in different ways. Thus, transgender youth in different parts of the country have dramatically different rights. For example, the Idaho code only allows for decision making that relates to reproduction. As a result, a transgender youth would not have the ability to consent to any medical or psychological treatment that he or she wished to undergo as part of transition. In Kansas, transgender youth would not be able to consent to treatment addressing their transition either.

67. Hartman, supra note 58, at 410; Hanisco, supra note 59, at 930.
71. Id. § 6928.
72. Id. § 6924.
73. Id. § 6926.
74. Id. § 6929(b). Note that this provision does not include narcotic replacement treatment.
75. Id. § 6922(a).
77. This is presuming that there is no "emergency" treatment addressing gender identity.
On the other hand, in California, transgender youth may have a reasonable degree of autonomy in seeking medical and psychological care relating to their transitions. If they were able to find a sympathetic psychologist or psychiatrist, they could begin that type of treatment at age 12. It could also be argued that hormone therapy could then be prescribed if it were part of the outpatient’s mental health treatment. That is, if the therapist believed that it was in the best interest of the minor’s mental health to be prescribed hormones, the minor might be able to begin hormone therapy without the consent of his or her parents.

Additionally, it is at the discretion of the therapist whether or not to allow parental access to the minor patient’s records. If the therapist believes that it would be detrimental to the minor to share these records, he or she does not need to provide them to the parent or guardians. This degree of confidentiality may help alleviate a minor patient’s fears about his or her parents’ negative reactions. The breadth of options available to California minors affords a greater chance for transgender minors to seek counseling and have the opportunity to discuss their feelings and learn about options. As a result, minors might face a lower degree of high-risk behaviors associated with many transgender adolescents.

Additionally, youth age 15 and over who are no longer living with their parents can unilaterally consent to medical treatment. Thus, this law provides options to youth with families that are not only unsupportive, but with whom the youth may not feel safe or comfortable living in close quarters. The law specifically provides that the minor does not need permission from non-cohabiting parents to consent to medical treatment.

Am I advocating for all 12-year-olds who are questioning their identity to start hormone therapy behind their parents’ backs? Of course not. However, for some young people, simply knowing that they can honestly explore options with a therapist and physician will help alleviate their fears and feelings of confusion. Additionally, these laws do not allow minors to act with total autonomy. Since a minor must obtain a judgment from the court to determine his or her maturity and/or demonstrate to a doctor or therapist that he or she is capable of providing informed consent, there are checks placed upon complete autonomy. A therapist or doctor must also believe that the treatment is beneficial to the minor and that the minor is truly able to exercise informed consent. In the case of the minor in In re Alex, medical, psychological, and social work professionals all agreed that

78. CAL. FAM. CODE § 6924 (Deering 2007).
79. Note that while section 6924 of the California Family Code prohibits minors from consenting to convulsive therapy, psychosurgery, or administration of psychotropic medications, it does not speak to other types of prescriptive medication.
80. CAL. HEALTH & SAFETY CODE § 123115(a)(2) (Deering 2007).
81. For a discussion of high-risk behaviors, see Morrow, supra note 3, at 95-96.
82. CAL. FAM. CODE § 6922(a) (Deering 2007).
83. See supra notes 70-75 and accompanying text. See also Hanisco, supra note 59, at 930.
it was in Alex’s best interest to begin hormone treatment. The treatment that he was to begin was *reversible*. It would stop his menstruation and curtail feminine pubertal development. The Court determined that at a later date, Alex’s 16th birthday, further evaluation would be done to determine whether he should begin *irreversible* treatment.

The existence of reversible medical options cuts against the argument that some may have against allowing minors to make decisions about their transitions: That at a young age, minors do not have the capacity to consent to medical treatment that will affect their lives as a whole. For minors in California seeking mental health treatment without the consent of their parents, age 12 or over, there are plenty of treatment options — such as counseling, group therapy, exploration of social presentation of perceived gender (for example, wearing gender non-conforming clothing), or reversible prescribed medical treatment — that will not have a permanent negative effect if the minor should decide not to continue a transition as he or she ages.

Additionally, a transition can take a significant period of time. The SOC recognize the importance of “real-life experience” as part of a transition. That is, one of the preliminary steps before engaging in more invasive or irreversible options is to experience the social realities of transitioning. The SOC note that “[s]ince changing one’s gender presentation has immediate profound personal and social consequences, the decision to do so should be preceded by an awareness of what the familial, vocational, interpersonal, educational, economic, and legal consequences are likely to be.” The SOC suggest that clinicians assess their patient’s quality of life in his or her real-life experience before moving forward with additional treatment.

Taking steps to acquire experience in the areas that clinicians will assess takes time. Allowing youth to begin taking steps on their transitional path before they reach the age of majority will allow them to begin living more complete lives at an earlier age. If youth are unable to even begin mental health treatment or discussions with a professional until

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85. *Id.* at 255.
86. *Id.*
87. *STANDARDS OF CARE, supra* note 9, at 17.
88. *Id.*
89. *Id.* at 16-17. When clinicians assess the quality of a person’s real-life experience in the desired gender, the following abilities are reviewed:

1. To maintain full or part-time employment;
2. To function as a student;
3. To function in community-based volunteer activity;
4. To undertake some combination of items 1-3;
5. To acquire a (legal) gender-identity appropriate first name; and
6. To provide documentation that persons other than the therapist know that the patient functions in the desired gender role.

*Id.*
age 18, they may be well into adulthood before they are able to fully function in society in conformity with their gender identity. Considering the psychological effects of not addressing gender issues, transgender youth should not be required to prolong the process more than necessary.

B. EMANCIPATION

Legal emancipation enables minors to seek psychological and medical care for their transitions without parental consent. Emancipated minors are generally able to consent to medical treatment and procedures. The statutes that govern emancipation vary by state, but they generally stress independence from the parents as opposed to factors such as “capacity” or “maturity.” However, they also often require parental consent or acquiescence. Thus, although emancipation could theoretically allow minors to take control of their medical treatments, in fact, the parents must consent to the emancipation. It seems doubtful that parents who are unwilling to consent to treatment would allow their children to take steps to become legally independent in order to seek that very treatment.

C. COST OF TREATMENT

Allowing minors to make their own decisions regarding medical treatment does not alleviate the associated medical costs. Being able to consent to medical treatment is not synonymous with being able to pay for it. For example, even under the California Family Code, which grants adolescents greater access to medical and mental health treatment than other states, parents are not required to pay for counseling or residential treatment to which they do not consent.

Unless minors are able to find treatment options for which they can pay themselves or which are available free of charge, treatment may be cost-prohibitive regardless of whether the law grants transgender youth permission to make personal decisions. In some places, such as San Francisco, where there are free health department clinics that cater solely to people who identify as transgender, youth may have access to free or inexpensive care. However, in most places, such treatment is not an option.

Even so, being able to consent to treatment at least opens the door for youth to make plans regarding their transition. For example, older youth

90. Clements-Noelle et al., supra note 24, at 62.
91. Hartman, supra note 58, at 412.
92. Hanisco, supra note 59, at 907.
93. Id.
94. CAL. FAM. CODE § 6924(b)(2)(c) (Deering 2007).
95. One such example of free or inexpensive health care in San Francisco is the Larkin Street Youth Clinic, www.larkinstreet.org (last visited Mar. 2, 2008). For a complete listing of San Francisco free medical services, divided into age and needs (such as transgender services) categories, see SAN FRANCISCO FREE MEDICAL CHART, http://www.freeprintshop.org/download/medical_english.pdf (last visited Mar. 31, 2008).
who are able to work may be able to save money to pay the costs associated with transition. Additionally, youth who are covered by state medical insurance may be able to use this insurance to pay for treatment. In California, for example, Medi-Cal recipients may potentially be able to use Medi-Cal to achieve their transitional goals. The Transgender Law and Policy Institute reports that as of 2002, "Medi-Cal should cover hormone treatment, gender reassignment surgery, and other necessary procedures." 96

It is possible these youth may be able to get Medi-Cal to cover the cost of treatment associated with their transition, regardless of whether the parents consent. However, most states do not have state insurance programs that cover gender reassignment treatment and procedures for youth or adults. Additionally, children who are covered under their parents' private (not state-supported) insurance will most likely not have access to coverage without parental consent. Some insurance plans allow parents to expressly withdraw coverage authorization if the minor receives treatment to which the parent does not agree. 97

D. ACCESS TO INFORMAL PSYCHOLOGICAL CARE AS OPPOSED TO MEDICAL TREATMENT

As far as access and cost are concerned, youth may face fewer obstacles attaining psychological treatment and support services than they do in attaining medical treatment. In addition to the provisions discussed above for possible statutorily created rights to consent, there are many less formal, low- or no-cost options across the country. There are many programs that are created exclusively for youth and a wide range of available treatment for youth with alcohol and drug addictions. Oftentimes youth support groups exist in schools and communities. While these groups are rarely specifically geared towards gender identity issues, at least there are safe spaces for young people to foster their emotional and mental well-being. Many communities do also have support for LGBT youth 98 and some areas have support networks specifically for transgender and

96. Transgender Law Center, Medical and Gender Reassignment Procedures, http://www.transgenderlawcenter.org/pdf/MediCal%20Fact%20Sheet.pdf (last visited Sept. 13, 2007). This Transgender Law Center fact sheet continues, “Medi-Cal is required by law to evaluate requests on a case-by-case basis. They must approve those requests that they find to be medically necessary so long as the procedure is not considered to be “experimental.”” Id.


98. For example, Portland’s Sexual Minority Youth Recreation Center provides a safe recreational space for LGBT youth 23-years-old and younger. Youth can also visit QueerAmerica on the web and search for local resources by area code or zip code. See OutProud, Resources for Queer and Questioning Youth, http://www.queeramerica.org (last visited Mar. 30, 2007).
gender non-conforming young people. Additionally, the Internet provides resources for young people who want to connect with others regarding their gender identity or research transition options.

VI. FURTHER JUSTIFICATION FOR ALLOWING MINORS TO DETERMINE THE PATHS OF THEIR TRANSITIONS

Given the limited resources available to LGBT youth through less formal counseling or internet support, transgender youth need, and indeed are entitled to, broader decision-making capacity regarding their own medical and psychological treatment. Transgender youth who do not have supportive parents willing to consent to psychological and medical treatment pertaining to their child’s gender identity have extremely limited options. It would be in the best interest of these youth to expand their options to allow them to have more input into the paths that their treatments take. The previous sections have addressed psychological, medical, and social issues that transgender youth face as well as their limited ability to influence their own expression of their gender identity. This section addresses possible legal justifications for expanding youth rights in this context.

A. DEFINING ONE’S CONCEPT OF EXISTENCE

The options discussed in the previous sections are applicable when minors do not have the support of their parents. Many people would argue that if a parent does not wish to consent to psychological or medical treatment for his or her child, the discussion should immediately cease. In general, courts defer to parents’ wishes regarding treatment decisions that will not immediately threaten a child’s life. We as a society have determined that it is desirable for parents to be involved in their children’s medical treatment. However, in most cases, medical treatment does not speak to the child’s very identity. Because a person’s identity, which exceeds mere physical or mental health concerns, is of central importance in one’s transition, we must not apply traditional law.

Professor Chai Feldblum argues that as a result of the decision in Lawrence v. Texas, individuals have a right to define one’s own concept of

99. Such as the DeFrank Youth Group in San Jose, California. See http://www.defrank.org/services/groups/trans.html (last visited Sept. 11, 2007); see also Carla’s Salon and Boutique http://www.carlas.com/resources/youth.html (last visited Sept. 11, 2007) (providing several youth-centered transgender resources).

100. For example, Illinois Gender Advocates has youth-specific resources as well as links to sites that are specifically geared towards youth. See Illinois Gender Advocates, http://www.genderadvocates.org (last visited Sept. 11, 2007).

101. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”) (citing Pierce v. Soc’y of Sisters, 268 U.S. 510, 510 (1924)).

102. See Pierce, 268 U.S. at 510; Prince, 321 U.S. at 158.
existence.\textsuperscript{103} Feldblum argues that by extension, this right should apply to transgender individuals.\textsuperscript{104} Here, I argue that if this is indeed a right, it is one that should also apply equally to youth and adults.

Essentially, Feldblum argues that if we take the language of \textit{Lawrence} at face value, the Court is recognizing a liberty interest in determining one’s identity:

\begin{quote}
[The] liberty interest recognized by the court in \textit{Lawrence} — the right “to define one’s own concept of existence” is an interest that speaks directly . . . to the efforts of transgender people to define their gender identity and expression. Moreover, I argue that the state’s obligation — either under its guarantee to provide “equal protection” to its citizens or under its obligation to protect an individual’s fundamental rights as a matter of substantive due process — requires the state to provide intersex and transgender people with the affirmative protection and social structures necessary for them to realize their efforts towards self-definition.\textsuperscript{105}
\end{quote}

The affirmative protection and social structures argued here could be very valuable to youth. If laws and social programs were structured so as to allow youth to determine their identities, many hurdles, both legal and non-legal, could be removed from a minor’s path to transition. For example, part of instituting structures to assist transgender youth in realizing their efforts may involve establishing free or affordable clinics for minors or therapy programs.

\subsection*{B. Public Policy and Child Abuse Law}

If parents are financially able to provide medical treatment, they must do so.\textsuperscript{106} If parents do not provide medical treatment and thus put their children at risk of continued harm or permanent disability, they can be found guilty of child abuse.\textsuperscript{107} States vary as to their definitions of child abuse and medical neglect, but all states have laws that address neglect as a form of abuse.\textsuperscript{108} If parents refuse to provide their children with necessary

\begin{footnotesize}
\begin{enumerate}
\item[104.] Id.
\item[105.] Id. at 116.
\item[106.] There are some religious exceptions to this general rule. For example, parents may exercise discretion regarding medical treatment when treatment decisions are tied to a religious belief. However, they may not expose the child to communicable disease or risk of death. \textit{Prince}, 321 U.S. at 166-67.
\item[107.] The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106 (2000), grants funds to state programs designed to treat and prevent child abuse and neglect. Each state then creates its own laws regarding precise definitions of abuse and neglect. The language of the Act indicates that it should not be construed as establishing federal definitions of child abuse and neglect.
\item[108.] CHILD WELFARE INFORMATION GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2007), \textit{available at} http://www.childwelfare.gov/systemwide/lawspolicies/\end{enumerate}
\end{footnotesize}
psychological treatment, thereby damaging the child’s psychological health, they can be found guilty of emotional abuse.\textsuperscript{109} Because a necessary part of exploring one’s gender identity and determining future actions is to consult with a therapist, it can be argued that it is \textit{necessary} for the minor to have psychological treatment. Thus, parents who deny their transgender child the opportunity to explore their feelings through therapy could arguably be engaging in emotional abuse. Additionally, other psychological issues, such as depression, can accompany a struggle with gender identity.

\textit{In Re Alex} speaks to the mental health issues that accompany gender identity disorder.\textsuperscript{110} Alex “was actually threatening to kill himself and saying he would rather be dead and didn’t want to live this way, that he wasn’t a girl and didn’t want to be a girl.”\textsuperscript{111} Alex’s psychiatrist clearly linked Alex’s depression and suicidal ideation with his gender identity disorder. The psychiatrist wrote in one report that “the urgency of treatment is such that it should begin as soon as possible. Alex says that if treatment is delayed and she \textit{sic} has to go to high school with the presence of periods and increasingly feminized body, he will be extremely distressed and disadvantaged by that.”\textsuperscript{112}

Alex was lucky that he had a case manager and a supportive guardian concerned with his condition and who encouraged his mental health treatment. Many young people do not have parents or guardians willing to seek treatment for the child while respecting the views of the treating clinician. In this case, the Court was clearly concerned by Alex’s depression and took that into consideration when ruling that Alex should begin hormone therapy.

It is incongruous that states deny minors the right to treatment when treatment is sought and when a medical professional determines that it would be beneficial. Moreover, denying treatment simultaneously contravenes statutory law if enforcement mechanisms fail to hold parents liable for abuse for denying such treatment. States are clearly indicating that psychological welfare is an important state interest and that parents should not contribute to the decline of a child’s emotional well-being. As discussed above, there are many psychological issues that accompany psychological welfare is an important state interest and that parents should not contribute to the decline of a child’s emotional well-being. As discussed above, there are many psychological issues that accompany


\textsuperscript{110} Beh & Diamond, \textit{supra} note 46 at 250.

\textsuperscript{111} \textit{Id}. at 249.

\textsuperscript{112} \textit{Id}. at 250.
gender identity disorders, such as depression and suicidal ideation. These issues could and should be addressed by healthcare professionals. Additionally, if depression or other psychological impairments are tied to a patient’s gender identity, the gender identity issues should be addressed in the course of psychological treatment.

VII. CONCLUSION

Gender identity is an intensely personal exploration. No one can determine for any other person what their gender identity is or should be. Likewise, people should be able to freely and honestly determine what is best for them.

In restricting ability to express and conform to one’s gender identity, the government is infringing on one’s right to define one’s own concept of existence. According to the Lawrence Court, each person has this right, and there is no reason that it should not also extend to transgender youth.

Unfortunately, at this point, there are few decisions that transgender youth are able to make for themselves regarding the path that their transitions take. For the most part, youth cannot consent to medical treatment without parental consent. The ability of youth to obtain formal psychological treatment, as opposed to support groups or informal counseling, is also limited by parental consent. Youth also cannot change their names or legal gender without the consent of their parents.

Moreover, even if one parent does consent to medical treatment or a name change, the other parent can challenge the supportive parent’s action. Sometimes they also challenge custody, thereby resulting in a possible loss of contact between the child and supportive parent. Additionally, children benefit from the support of their parents, and parents should not be discouraged from helping their children seek treatment. Caring parents should not live in fear of having their children taken away by the state or non-custodial parent.

The inability to provide input into their treatment options has many effects on transgender youth. Many suffer from depression and contemplate suicide. Some run away. Others may turn to high-risk behaviors such as drug use or prostitution. Youth should have the ability to determine how they will express their gender and the means to define themselves. Because of the psychological and social effects of a struggle with gender identity, it is highly detrimental to youth to strip them of this right to self-determination. Thus, mature youth should be able to determine their treatment path if they are able to make informed decisions.

Does this mean that parents should take drastic transitional steps with children who are not mature enough to make medical decisions? Of course

113. Morrow, supra note 3; Clements-Noelle et al., supra note 24, at 62.
114. Feldblum, supra note 103, at 116.
not. Should parents rush into surgical options with their 5-year-olds? No, that is absurd. But consulting with psychologists and physicians and allowing minors to explore their identities and future options will lead to well-considered, legitimate transition decisions when the youth are ready to commit to more permanent transitional steps. Such steps will benefit minors whether those steps are taken before or after reaching the age of majority.