NOTES

COUNTERING A PHOBIC FRAME: UNDERSTANDING AND ADDRESSING GENDER-AFFIRMING CARE BANS

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Legislatures, courts, and media outlets have manufactured legal and scientific uncertainty around gender-affirming care. This is the result of a phobic frame that vanishes the perspectives of minors and reduces decisionmakers' confidence. This Note identifies that gender-affirming care bans should not be understood primarily as forms of sex discrimination, but instead as a form of unjustified impairment of minors' self-determination. The solution, necessarily, must question and overturn assumptions about decisionmaking competency for minors, rather than relying on equal protection or a sex discrimination analysis like Bostock v. Clayton County. *This Note argues that courts need only inquire into whether a minor is competent to decide about gender-affirming medical intervention because restrictions on minors' bodily autonomy must be justified rather than accepted at face value.*

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INTRODUCTION

In a speech at the Conservative Political Action Conference in 2023, commentator Michael Knowles claimed that "[f]or the good of society, transgenderism must be eradicated from public life entirely," though he later claimed he had not been calling for a genocide.[1] Reviewing a preliminary injunction from the Middle District of Alabama in August 2023, the Eleventh Circuit found that bans on gender-affirming care for trans youth did not violate the Equal Protection Clause.[2] On March 2, 2023, the Tennessee legislature passed Senate Bill 0001, prohibiting healthcare providers from providing gender-affirming care (including puberty blockers and hormone replacement therapy) to minors.[3] An analysis by NPR found state legislators had collectively introduced 306 bills targeting trans people, the vast majority focused on transgender youth.[4]

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1. Kelly McClure, CPAC Speaker Says, "Transgenderism Must Be Eradicated," While Claiming It Doesn't Exist, Salon (Mar. 4, 2023), https://www.salon.com/2023/03/04/cpac-speaker-says-transgenderism-must-be-eradicated-while-claiming-it-doesnt-exist/ [https://perma.cc/F7RK-62L5] (internal quotation marks omitted) (quoting Michael J. Knowles). Knowles had also denied his language amounted to a call for genocide during his show, claiming "[T]ransgender people is not a real ontological category. It's not a legitimate category of being . . . . They are laboring under a delusion and so we need to correct that delusion." Michael Knowles Show, 'The Trans Card' Is a Weapon for Libs and Criminals, SoundCloud, at 06:28–06:45 (Feb. 28, 2023), https://soundcloud.com/michaelknowlesshow/ep1192 (on file with the *Columbia Law Review*).

2. See Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1227 (11th Cir. 2023).

3. See Adam Polaski, Tennessee Governor Signs Bill Banning Access to Lifesaving Medical Care for Transgender Youth, Campaign for S. Equal. (Mar. 3, 2023), https://southernequality.org/tennessee-governor-signs-bill-banning-access-to-lifesaving-medical-care-for-transgender-youth/ [https://perma.cc/U76P-B7GQ].

4. Koko Nakajima & Connie Hanzhang Jin, Bills Targeting Trans Youth Are Growing More Common—And Radically Reshaping Lives, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports [https://perma.cc/NW23-GHM9] ("[O]ver the past two years, state lawmakers introduced at least 306 bills targeting trans people, more than in any previous period. A majority of this legislation, 86%, focuses on trans youth.").

An observer might conclude that skepticism and hostility toward trans youth is the spirit of the times.

Such intense focus on youth should prompt pause: More general laws targeting the provision of gender-affirming care would include minors as well, but general laws targeting all trans people are a small portion of the laws being passed.[5] Instead, legislators focus on youth because minors' autonomy is limited, subject to the wills of parents and guardians as well as the wills of institutional actors (such as school officials, social workers, and so on).[6] One rationale for that may be that "children's ongoing development is understood to compromise their ability to make good judgments on their own behalves."[7] The result, then, is a law governing children that affords children nearly no authority over themselves. This materializes more precisely in the legal challenges surrounding trans youth, a space wherein legislators can ignore the voices of the most-affected population—trans minors with virtually no access to democratic processes except as mediated through their caretakers or other adults who are willing to listen.

This Note addresses this silencing by offering a paradigm for considering the rights and competencies of minors in decisions around gender-affirming care. This Note also seeks to address and unify two regulatory domains: the domain of state action, in which states are legislating against gender-affirming care, and the domain of parental rights, in which parents' wishes trump their children's. Part I provides historical and doctrinal context on the rights and duties of minors and parents, drawing on *Bellotti v. Baird*[8] and *Planned Parenthood v. Danforth*.[9]

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5. Id.

6. See Laura A. Rosenbury, Between Home and School, 155 U. Pa. L. Rev. 833, 833 (2007) (noting that authority over the lives of children is distributed across parents, the state, and children themselves).

7. Emily Buss, Allocating Developmental Control Among Parent, Child and the State, 2004 U. Chi. Legal F. 27, 35.

8. 443 U.S. 622 (1979) (plurality opinion).

9. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976). Some definitions are in order: Transphobia can provisionally be described as "negative attitudes (hate, contempt, disapproval) directed toward trans people because of their being trans. . . . Transphobia occurs in a broader social context that systematically disadvantages trans people and promotes and rewards antitrans sentiment. It therefore has a kind of rationality to it, grounded in a larger cisgenderist social context." Talia Mae Bettcher, Transphobia, 1 Transgender Stud. Q. 249, 249 (2014) (citation omitted) (citing Patrick Hopkins, Gender Treachery: Homophobia, Masculinity, and Threatened Identities, *in* Rethinking Masculinity: Philosophical Explorations in Light of Feminism 95 (Larry May & Robert A. Strikwerda eds., 1996)).

Gender-affirming care "affirms diversity in gender identity and assists individuals in defining, exploring, and actualizing their gender identity, allowing for exploration without judgments or assumptions. . . . Gender-affirming care . . . [can include] psychoeducation about gender and sexuality (appropriate to age and developmental level), parental and family support, social interventions, and gender-affirming medical interventions." Kareen M. Matouk & Melina Wald, Gender-Affirming Care Saves Lives, Colum. Univ. Dep't

Part II offers "the phobic frame" as a framework for analyzing the public discourse over minors seeking gender-affirming care. Part III argues that minors' rights to gender-affirming care should be expansive and offers a test for courts to employ in deciding whether to judicially bypass a parent's veto.

I. CONTESTED PARENTS' AND MINORS' RIGHTS IN A PHOBIC FRAME

This Part offers a brief overview of the legal and normative background on parental rights. Section I.A describes the dissolution of what family law scholars Anne C. Dailey and Laura A. Rosenbury call "child coverture," that system by which fathers (and later, parents) could historically stand in for the legal personalities of their children.[10] Section I.B considers the normative values that might weigh in favor of or against strong parental rights. Section I.C then describes what this Note calls the "phobic frame," how the timbre of the present discourses around parents' rights in relation to children's gender identities both obfuscates the settled science behind gender-affirming care and continually shores up a view of parental rights as under attack from without, rather than being internally contradictory.

A. *Parents' Rights, Minors' Needs*

Most of United States history has seen parents exercise nearly unlimited control over their children (legally speaking, even infanticide did not necessarily constitute a limit).[11] This was borne of a proprietarian view of children as the assets of their fathers and of the persistent collapsing of children's personalities into those of fathers dating from mid-seventeenth century English law.[12] But by the eighteenth century, as William Blackstone was writing, the law had come to recognize fathers' authority as following from duties owed to their natural children (including illegitimate children), namely duties of maintenance,

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Psychiatry, (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/9BUU-FQ3T]. This Note, unless otherwise qualified, uses children and minors interchangeably because the questions here regarding transition and rights specifically refer to the transition and rights of minors. Moreover, the age of pubertal onset may lead minors to make choices at an age when they may be considered a "child," "teen," or "young adult," while there is no clear standard by which to make the distinction.

10. Anne C. Dailey & Laura A. Rosenbury, The New Parental Rights, 71 Duke L.J. 75, 90 (2021).

11. See Barbara Bennett Woodhouse, From Property to Personhood: A Child-Centered Perspective on Parents' Rights, 5 Geo. J. on Fighting Poverty 313, 314 (1998) ("As recently as in 1920 a parent who killed a child in the course of punishment could claim a legal excuse for homicide in no fewer than nine states.").

12. See Dailey & Rosenbury, supra note 10, at 88–90; see also 1 William Blackstone, Commentaries on the Laws of England *440–441; Woodhouse, supra note 11, at 314.

protection, and education.[13] If parents abandoned their children or failed to provide for their children's maintenance, Blackstone writes, a church could confiscate a parent's estate and dispose of it in support of the child; in the particular case that a Catholic parent sought to compel a Protestant child to convert through withholding maintenance, a (presumably older) child could go to court to compel a father to satisfy his duty of maintenance.[14] As a correlative, children owed parents "subjection and obedience during [their] minority, and honour and reverence ever after," and both protection and maintenance to their parents "in the infirmity of their age."[15] By statute, even a "wicked and unnatural progenitor" could haul a child to court to vindicate these obligations.[16]

The American system has been less inclined to see parents and children as mutually bound by duties.[17] For example, the twentieth-century American cases *Yoder* and *Pierce* recognize a nearly unlimited right for parents to direct their children's educations, which states have scrupulously recognized by unqualifiedly protecting homeschooling and passing laws that allow parents line-item vetoes of school curricula, with limited attention paid to the adequacy of the education.[18] Some states have even civilly immunized parents in the name of protecting parental prerogative, developing doctrines of parental tort immunity to prevent children's private recovery when injured by their parents.[19]

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13. 1 Blackstone, supra note 12, at *436–441.

14. Id. at *436–437. This remark clarifies that parental rights were bound up in and partly constrained by government policies, such as the nineteenth-century British bias against Catholics.

15. Id. at *441.

16. Id. at *442.

17. There is, however, some sense of reciprocity in *rights* between parents and children. See, e.g., Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976) ("The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent."). In a Hohfeldian conception, it would appear that those rights imply correlative duties, see Wesley Newcomb Hohfeld, Fundamental Legal Conceptions: As Applied in Judicial Reasoning 36 (Walter Wheeler Cook ed., 1978) (arguing that rights are correlative with duties), but as David Lyons has recognized, any correlation between rights and duties may not be general, for "the implications between them vary substantially with the kind of right in question; it is not clear that all rights imply duties; and even if they do, to emphasize the common elements is to obscure important differences among the 'correlations.'" David Lyons, The Correlativity of Rights and Duties, 4 Noûs 45, 45–46 (1970).

18. Jill Elaine Hasday, Family Law Reimagined 152–53 (2014) (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972), and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

19. Id. at 154. Of course, parents may still be criminally liable for abuse or related crimes. Id. at 155. Courts have also recognized basic requirements for parents to be able to assert their rights and have often used the power to terminate parental rights to violent effect. See Jennifer Wriggins, Parental Rights Termination Jurisprudence: Questioning the Framework, 52 S.C. L. Rev. 241, 241–43 (2000) (describing Supreme Court decisions that narrowed parental rights); see also Anne C. Dailey, In Loco Reipublicae, Yale L.J. 419, 451 (2023) ("[T]he definition and scope of parental rights turns on underlying assumptions about the parental role. Increasingly, those who fulfill the role—in other words, those who assume (or intend to assume) parental duties—enjoy parental rights.").

The language of parental rights, however, signifies two separate relationships. First, parental rights may refer to parents' rights to make individual decisions for their children, rather than allowing the state to decide. Second, however, parental rights may refer to parents' ability to make individual decisions for their children *instead of allowing their children to make those decisions*. Scholars, particularly those critical of the child welfare/family policing system, have noted that parental rights are racialized, that white parents are afforded the right to make choices for their children, but the decisions of Black and other nonwhite parents are heavily scrutinized and sometimes overridden by state actors.[20] Scholars critical of children's rights have noted that the rhetoric of children's rights can serve as a smokescreen for the motives of adults.[21] This Note focuses on the relationship between parents and children and the rights negotiated between them, in part because parental rights against states are more often implicated in questions around the state's educational capacities interfacing with parents' roles as educators of their own children,[22] whereas this Note is more concerned with the private life of a child, their parents, and how gender develops in that interface, which the twentieth-century pediatric psychoanalyst D.W. Winnicott might have called the cultural space.[23]

B. *Normative Foundations for Parental Rights*

The earliest cases have tended to frame the developments of parental rights as promoting the freedom of families by reducing the role of the state in the parent–child relationship and in family life more generally.[24]

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20. See, e.g., Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 59 (2002) [hereinafter Roberts, Shattered Bonds] ("From the outset, most Black families diverge from the [white heteropatriarchal] ideal because they are headed by unmarried mothers. . . . The Black community's cultural traditions of sharing parenting responsibilities among kin have been mistaken as parental neglect.").

21. See Martin Guggenheim, What's Wrong With Children's Rights, at xii–xiii (2005). This approach creates a strawman wherein Guggenheim and others need not actually address the substance of what it would mean to empower children to make decisions for themselves and instead need only focus on children's rights as a smokescreen.

22. Latoya Baldwin Clark, The Critical Racialization of Parents' Rights, 132 Yale L.J. 2139, 2200 (2023) (describing how parents' rights rhetoric has been used to narrow school curricula in the name of excluding "critical race theory"); Mary Ziegler, Maxine Eichner & Naomi Cahn, The New Law and Politics of Parental Rights, 123 Mich. L. Rev. (forthcoming 2024) (manuscript at 21–22), https://ssrn.com/abstract=4552363 [https://perma.cc/H35C-NL84] (noting that the parental-rights movement has "mobilized parental-rights rhetoric to restrict what schools can cover relating to gender identity").

23. See D. W. Winnicott, Playing and Reality 135 (Routledge 2010) (1971) ("The place where cultural experience is located is in the *potential space* between the individual and the environment (originally the object). The same can be said of playing. Cultural experience begins with creative living first manifested in play.").

24. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that the Due Process Clause protects "the right of the individual to . . . establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to

This may be normatively preferable: State intervention often harms families in poverty, families of color, and families that do not adhere to white, middle-class heteropatriarchal norms.[25] Moreover, scholars argue, parents' more specific knowledge of their children and their needs give parents a natural advantage in providing for their children's development.[26] Finally, limited state involvement can promote the development of families with diverse values and traditions, serving and preserving normative preferences for social pluralism.[27]

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enjoy those privileges . . . essential to the orderly pursuit of happiness by free men"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

25. See Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 617 (1989) ("[S]ome state courts deny custody to parents who are labeled, by themselves or by their ex-spouses, 'homosexual.' These courts reason that custody with such parents might result in stigmatization or harassment, harm the children's moral well-being, or adversely affect their sexual orientation." (footnote omitted)); see also Roberts, Shattered Bonds, supra note 20, at 59–60 ("Caseworkers often misinterpret Black parents' cultural traditions, demeanor, and . . . means of handling family distress as neglect. . . . Because these mothers do not fit the middle-class norm of a primary caregiver supported by her husband and paid child care, they are perceived as having abrogated their duty toward their children.").

26. See, e.g., Buss, supra note 7, at 27 ("If we knew absolutely nothing about the pathways of developmental influence, or had no reason to prefer some developmental outcomes over others, we would be wise to leave the upbringing of children entirely to private actors . . . with the greatest direct stake and investment in a child . . . ."); Clare Huntington & Elizabeth Scott, The Enduring Importance of Parental Rights, 90 Fordham L. Rev. 2529, 2529 (2022) ("[P]arental rights ensure that parents, rather than a . . . state actor . . . make decisions about what advances a child's interests. The legal system defers to parents' decisions . . . because parents are well positioned to know what an individual child needs . . . .").

27. See Buss, supra note 7, at 27 (noting that expansive parental rights "would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation"); Dorothy E. Roberts, Child Welfare and Civil Rights, 2003 U. Ill. L. Rev. 171, 178 ("Parents' freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups."). This Note operates under the position that pluralism is a worthwhile goal for American society. One persuasive reason is offered by the political theorist Carla Yumatle:

> [Pluralist commitment] puts a specific form of normative deliberation at the core of human experience. Insofar as ethical evaluation cannot be reduced to one single goal set for us beforehand, or to any calculation of the most efficient means to achieve one overarching value, pluralism is an antidote to instrumental rationality, a reminder that value decisions will never escape us and that we are bound to normatively orient ourselves unceasingly.

Carla Yumatle, Pluralism, *in* The Encyclopedia of Political Thought 2724, 2740 (Michael T. Gibbons ed., 2015). In this sense, pluralism keeps us on our toes and forces us to remain open and responsive to the difference as it presents itself in the world. For a historically situated discussion of an American normative preference for pluralism, see generally John G. Gunnell, The Genealogy of American Pluralism: From Madison to Behavioralism, 17 Int'l Pol. Sci. Rev. 253 (1996) ("Pluralism has been the dominant ideology of democracy in

But the structure of developmental control, as Emily Buss has argued, is not bipolar, but is instead triangular, control of children's development being allocated among parents, the state, and children themselves.[28] Both institutional actors and scholars often assume that parents' preferences and children's preferences coincide;[29] in this view, children presumptively lack the developmental capacity to identify and satisfy their own needs, whereas parents have better capacities for both relative to their children.[30] Consequently, the law normatively produces parents with supreme authority who may flagrantly disregard children's objections, limited only by parents' own sense of compunction and projected fears about how such disregard may sour a future parent–child relationship.

But this abstract legal view flattens the obvious reality that parents and children disagree constantly, demonstrating divergence between parents' perspectives and children's views on children's needs and how best to satisfy them. The frequency of this disagreement might encourage pause or even suspension of the belief that parents' knowledge is superior in every context. In infancy, children will refuse to eat, retain bowel movements, and cry for reasons that evade even attentive caretakers.[31] As children get older, they begin to contest parental control in more ideological ways, seeking knowledge that parents and teachers may deem inappropriate, seeking the company of friends their parents disapprove of (and perhaps *because* those friends draw parental opprobrium), and developing political views parents find illogical and even unthinkable. By the end, a child has sloughed off most (but, a parent may hope, not all!) dependencies; parents "los[e] [their children] to the world. Which is the point of your children growing up. If you do a good job, they go out into that world and make a life."[32] That is, one view of parenting's end goal might be to encourage children's differentiation from their parents—this,

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twentieth-century American political science as well as one of the discipline's central research programs.").

28. See Buss, supra note 7, at 30 ("There is another, often overlooked, private competitor for developmental control whose claims have not always been subrogated to those of parent and state: the child, in asserting the right to make choices for herself, asserts a claim for developmental control.").

29. See, e.g., discussion of Wisconsin v. Yoder, 406 U.S. 205 (1972) in Hasday, supra note 18, at 153 ("Only one of the Amish children at issue, Frieda Yoder, even testified during the course of the lawsuit . . . . Both sides in the litigation ignored the other Amish children, who were never asked whether and why they wanted to leave school after eighth grade.").

30. See Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487, 492 (1973) ("Even when a child cannot or will not recognize the identity of his interests with his parents', the law ordinarily does so, confident that children usually do not know what is best for themselves.").

31. See, e.g., Sigmund Freud, Three Essays on the Theory of Sexuality, *in* 7 The Standard Edition of the Complete Psychological Works of Sigmund Freud 125, 186 (James Strachey, Anna Freud, Alix Strachey & Alan Tyson eds. and trans., 1959) (describing anal retention).

32. Helene Stapinski, Opinion, Rediscovering My Daughter Through Instagram, N.Y. Times (Dec. 8, 2018), https://www.nytimes.com/2018/12/08/opinion/sunday/parenting-instagram-adolescence.html (on file with the *Columbia Law Review*).

too, might accord with any normative commitments to pluralism. The state typically privileges parents in these disagreements; the key exceptions, discussed in section II.C, are (reproductive) healthcare decisions, cases in which the law allows that healthcare is so closely tied up with a minor's individual body that parents may not have rights to override minors' decisions.

C. *Conforming Factors, Counterconforming Factors, and Phobic Frames*

While tolerance in the abstract sounds like a hallmark of social and political liberalism,[33] abstract commitments to tolerance may encounter a roadblock in apparently radical otherness. For some cisgender parents, this radical otherness appears in their transgender children.[34] In pointing out how gender can be a site of contestation between parents and children, the purpose is not to delegitimize children's genuine experiences of gender dysphoria, but instead to recognize that gender is always contested, that it is a domain of symbols and meanings in which parents, children, and others (such as the state[35] or healthcare workers[36]) make claims, encouraging the performance of binary gender roles and creating gendered expectations.[37]

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33. See, e.g., Kok-Chor Tan, Liberal Toleration in Rawls's *Law of Peoples*, 108 Ethics 276, 289 (1998) ("The idea of toleration is, of course, shared by all liberals. It is a central liberal belief that the state ought not to discriminate between individuals' genuinely private conceptions of the good life.").

34. This sense of radical otherness could be linked to the destabilizing of contained gender and sexual binaries, concordances that dictate what genitals dictate what sex, which dictates what gender. A more capacious sense of gender, "of large numbers of possible combinations of bodies, gender expressions and sexual orientations borders on the sublime—it confronts us all with a vision of potentially infinite specific possibilities for being human," and produces a kind of overwhelm, the "sensory dimension of the experience of the sublime— . . . shutting down is a form of psychical protection against the terror of boundary collapse at the edge of limitlessness." T. Benjamin Singer, From the Medical Gaze to Sublime Mutations: The Ethics of (Re)Viewing Non-Normative Body Images, *in* The Transgender Studies Reader 601, 616 (Susan Stryker & Stephen Whittle eds., 2006). Singer's explanation is useful too, as a necessary complement to "the phobic frame" described infra notes 51–52 and accompanying text. In Singer's view, "[t]he sublime effect of exceeding the cognitive limit is produced, to a significant degree, by the collapse of the medical gaze's epistemological frame. In that sublime moment of rupture, bodies that literally and metaphorically exceed two-dimensional medical images step into a new social context, and make new ethical claims." Id.

35. See Buss, supra note 7, at 30 ("[T]he legal challenges regarding parental identity focus on the allocation of authority between genetic parents and the state in assigning that identity.").

36. See Saru Matambanadzo, Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law, 12 Cardozo J.L. & Gender 213, 213 (2005) ("Immediately after birth the sexing begins as Josephine is wrapped in a pink blanket and Joseph is wrapped in a blue one, as a doctor or midwife declares the child's sex to its parents.").

37. While it is tempting to some to locate this insight in the work of radical Western feminists such as Judith Butler (Bodies that Matter: On the Discursive Limits of Sex xii (2d ed. 2011) ("'Sex' is, thus, not simply what one has, or a static description of what one is: it will be one of the norms . . . that . . . qualifies a body for life within the domain of cultural

This contest is negotiated amidst a field of conforming factors, those factors that urge children to adopt certain understandings of gender conformity. For example, laws granting parents all-but-absolute authority over their children enable parents' claims about their children's genders to have more weight. Practices by which medical professionals announce infants' sex with the language of gender ("It's a boy!" or "You have a baby girl!"), or perform procedures on the genitalia of intersex infants to produce conformity with a binary sex and corresponding gender identity make children into boys or girls, decisions that parents often direct or collude in.[38] Parents go on to dress, speak to, and construct projections of

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intelligibility.")) and Simone de Beauvoir (The Second Sex 273 (H.M. Parshley ed. and trans., Jonathan Cape 1956) (1949) ("One is not born, but rather becomes, a woman.")), the reality is that the hegemony of the gender–sex equation has seen challenges in cross-dressing, nonbinary genders ranging from the *hijras* of South Asia (see Jessica Hinchy, Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900, at 1 (2019) (introducing the persecution and characteristics of the Hijra)) to the Fa'Afafines of Samoa (see Johanna Schmidt, Redefining Fa'afafine: Western Discourses and the Construction of Transgenderism in Samoa, Intersections: Gender, Hist. & Culture Asian Context, Aug. 2001), to intersex lives (see Nico Mara-McKay, Becoming Gendered: Two Medieval Approaches to Intersex Gender Assignment, 7 Prandium: J. Hist. Stud., no. 1, 2018, at 1, 1 ("The methods for determining gender differ between Christian and Muslim contexts, and a comparison between their approaches to sex designation reveals the varied ways that gender was constructed and the social functions it served.")), and in eunuchry (see Shadab Bano, Eunuchs in Mughal Household and Court, 69 Proc. Indian Hist. Cong. 417, 422 (2008) ("Often the resentment against any eunuch-officers harped upon his physical deformity, his effeminate characterstics [sic], his closeness to womanly nature and association with women etc.")) globally throughout recorded history. Yet:

> [I]f what we call gender identity turns out to have a material foundation in the body for some but not for others—would that somehow invalidate the existence of people whose self-avowed gender identity or gender expression has no bearing on the biological circumstances of their birth? Instead of establishing an ontological foundation for sex reclassification—as if the presence of gender non-normative people requires a justification or even an explanation[,]

we may be better served by interrogating the very need for sex and gender classifications, what need the insistence on reifying the con- and discordances of so-called "sex" and so-called "gender" serves. See Paisley Currah, Sex Is as Sex Does: Governing Transgender Identity, at xvii (2022).

38. See Kevin G. Behrens, A Principled Ethical Approach to Intersex Paediatric Surgeries, 21 BMC Med. Ethics, no. 108, 2020, at 1, 2–3 (concluding that physicians' views are often dispositive in surgical decisions for intersex infants); Alyssa Connell Lareau, Note, Who Decides? Genital-Normalizing Surgery on Intersexed Infants, 92 Geo. L.J. 129, 130–31 (2003) ("Once physicians obtain parental consent . . . physicians shift responsibility for making the decision . . . to the parents. This shift in focus leaves unanswered the antecedent question . . . Whether parents have the legal right to consent to surgery on their infants that is irreversible, essentially cosmetic, and most often medically unnecessary."). Professor Frances E. Olsen offers a less objectionable account of gender differentiation than most:

> Gender differentiation serves a useful human purpose analogous to that served by religion. The gradual shifts that have taken place in our understanding of maleness and femaleness can be seen as reflections of an historical process resulting in deeper self-knowledge. The historical progress of gender differentiation consists in recognizing that what was

their children as cisgender and heterosexual and then act in accordance with those projections.[39] Teachers and peers do the same, further developing children's understanding of gender both personally and conceptually.[40] Later in life, parents, friends, and others may express disapproval about trans people and may directly insist to youth that they are not transgender, because they are too young to know, or because parents conflate other mental illnesses with gender dysphoria.[41] Medical professionals may refuse to provide patients with gender-affirming medical care, either on their own volition or because of laws penalizing medical professionals for doing so.[42]

But there are also counterconforming factors: those factors that, rather than urge conformity, create space for alternatives to that cisgenderist concordance. Perhaps most self-evident is the fact that greater visibility for trans people has meant that today's Americans are more likely to report knowing a trans person (and consequently, to be trans themselves).[43] Why might this be? While far-right opponents of trans rights have suggested that youth are vulnerable to a kind of "social contagion" termed "rapid-onset gender dysphoria," that view has been debunked.[44]

> previously considered immutable is contingent and subject to human control. The division of human beings into male and female could be judged to have been a useful device for enabling us to become conscious of the wide range of human possibilities.

Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1571 (1983). This parallels the defense of pluralism offered by Carla Yumatle, supra note 27.

39. See Heidi M. Gansen & Karin A. Martin, Becoming Gendered, *in* Handbook of the Sociology of Gender 83, 84–85 (Barbara J. Risman, Carissa M. Froyum & William J. Scarborough eds., 2d ed. 2018) ("Parents gender their children as they choose toys, activities, décor, and clothing, and in their expectations for behaviors . . . .").

40. See id. at 85–89 ("Teachers affect the construction of gender in preschool through implementing hidden curricula, which construct and reconstruct gendered bodies." (citation omitted)).

41. See, e.g., Katie J.M. Baker, When Students Change Gender Identity, and Parents Don't Know, N.Y. Times (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html (on file with the *Columbia Law Review*) (reporting a parent's response that "I'm afraid of medicalization. I'm afraid of long term health. I'm afraid of the fact that my child might change their mind." (internal quotation marks omitted)).

42. See Polaski, supra note 3 (reporting on state laws in Tennessee, Utah, Mississippi, and South Dakota that limit youth access to gender-affirming health care).

43. Robert P. Jones, Natalie Jackson, Maxine Najle, Oyindamola Bola & Daniel Greenberg, Pub. Religion Rsch. Inst., America's Growing Support for Transgender Rights 1, 16 (2019), https://www.prri.org/wp-content/uploads/2019/06/PRRI_Jun_2019_LGBT-Survey-1.pdf [https://perma.cc/L56N-BNDA] ("Less than one-quarter (24%) of Americans report having a close friend or family member who is transgender . . . . Notably, the proportion of Americans who say they have a close friend or family member who is transgender has more than doubled since 2011 (11%).").

44. See Greta R. Bauer, Margaret L. Lawson & Daniel L. Metzger, Do Clinical Data from Transgender Adolescents Support the Phenomenon of "Rapid Onset Gender Dysphoria"?, 243 J. Pediatrics 224, 225 (2022) ("We did not find support within a clinical population for a new etiologic phenomenon of rapid onset gender dysphoria during

Rather, as clinical psychologist Diane Ehrensaft suggests, "[i]t is not rapid-onset gender dysphoria, . . . [i]t's rapid-onset parental discovery" when parents learn of their children's gender identity after children have already grappled with it for months or even years.[45]

Trans visibility produces a meaningful benefit: Seeing trans lives in media and in real life "acts as a staging ground for the types of life that are permitted to become real and to shape reality in turn."[46] In other words, trans visibility can also make trans life viable, in part because it produces space for youth to interrogate their own gender identities, "to imagine other ways of being gendered in their everyday lives," and to lay their own claims to the contested fields of their genders.[47] Similarly, trans visibility makes it possible for minors to seek community with other minors who are interrogating their own gender identities or have already developed a sense of themselves as trans.[48] Supportive environments in schools, homes,

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adolescence."); see also Arjee Javellana Restar, Methodological Critique of Littman's (2018) Parental-Respondents Accounts of "Rapid-Onset Gender Dysphoria," 49 Archives Sexual Behav. 61, 65 (2020) (rejecting Littman's theory of "rapid-onset gender dysphoria"); Timmy Broderick, Evidence Undermines 'Rapid Onset Gender Dysphoria' Claims, Sci. Am. (Aug. 24, 2023), https://www.scientificamerican.com/article/evidence-undermines-rapid-onset-gender-dysphoria-claims/ [https://perma.cc/BPK3-9PN8] (explaining that a recent study claiming to describe more many "rapid-onset gender dysphoria" cases was retracted for failing to obtain ethics approval).

45. Broderick, supra note 44 (internal quotation marks omitted) (quoting Diane Ehrensaft).

46. Cáel M. Keegan, Laura Horak & Eliza Steinbock, Cinematic/Trans*/Bodies Now (and Then, and to Come), 8 Somatechnics 1, 7 (2018). Despite how trans visibility can make trans life viable, it can also make trans life unviable because (visible) transness exposes one to danger. See, e.g., Harmony Rodriguez, We Can't Let Increased Transgender Visibility Lead to More Vulnerability, The Guardian (Aug. 21, 2015), https://www.theguardian.com/commentisfree/2015/aug/21/transgender-visibility-vulnerability [https://perma.cc/Y3QT-FW8W] ("Paradoxically, when a person or group is hypervisible they may also be invisible, in the sense that they are treated as irrelevant by society. This hypervisibility puts marginalized groups at risk. . . . Hypervisibility is what turns trans women's lives into spectacle.").

47. Eve Shapiro, Drag Kinging and the Transformation of Gender Identities, 21 Gender & Soc'y 250, 260 (2007). This process of imagining other lives is most common in children, of course; it is, at least in one view, constitutive of childhood. See Sigmund Freud, Creative Writers and Day-Dreaming, *in* 9 The Standard Edition of the Complete Psychological Works of Sigmund Freud 141, 143–44 (James Strachey, Anna Freud, Alix Strachey & Alan Tyson eds., and trans., 1959). Adulthood may be marked by "ceas[ing] to play, and . . . seem[ing to] give up the yield of pleasure which they gained from playing. . . . [But] we can never give anything up; we only exchange one thing for another." Id. at 145.

48. See, e.g., Yolanda N. Evans, Samantha J. Gridley, Julia Crouch, Alicia Wang, Megan A. Moreno, Kym Ahrens & David J. Breland, Understanding Online Resource Use by Transgender Youth and Caregivers: A Qualitative Study, 2 Transgender Health 129, 134 (2017) (noting that trans youth sought out first-person autobiographical narratives of gender questioning and transition to fill knowledge gaps and sought out friends online in different stages of gender interrogation "to contextualize or normalize their own" experiences); see also Ben Kesslen, How the Idea of a "Transgender Contagion" Went Viral—and Caused Untold Harm, MIT Tech. Rev. (Aug. 18, 2022), https://www.technologyreview.com/2022/08/18/1057135/transgender-contagion-gender-dysphoria/ [https://perma.cc/NP6C-NVLF] ("Growing up, Jay—like a lot of queer and

and social organizations can make trans youth more resilient to broader social currents of transphobia and produce space to interrogate gender identity with some sense of stability and safety.[49] It is vital to note that these factors do not *urge* gender nonconformity. Rather, they create space and provide opportunities for individuals to interrogate their gender, to experience it and understand it on their own terms, and to ultimately provide their own theories of being gendered. Cisgender boys and cisgender girls, too, necessarily have their own understandings of their cisgender identities and a process of gender interrogation *can also shore these up*.[50] That is, these factors work by a fundamentally different mechanism than the conforming factors identified above; thus, it is most appropriate to call these factors counterconforming factors rather than, for example, anticonforming factors or nonconforming factors.

The social environment around gender cannot be cleaved so cleanly, however. Beyond conforming and counterconforming factors, there is a question of framing: How do parents, lawmakers, and others receive information about gender conformity and counterconformity? How do they assemble and assimilate it into their own decisionmaking structures? This Note identifies the present frame as a phobic one.[51] This is a frame that denies consensus on the benefits of gender-affirming care and excludes minors' voices, instead treating their parents' perspectives as

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trans kids—had trouble making friends. Online, he had room to explore his identity while living in a home where he wasn't embraced.").

49. See Anneliese A. Singh, Sarah E. Meng & Anthony W. Hansen, "I Am My Own Gender": Resilience Strategies of Trans Youth, 92 J. Counseling & Dev. 208, 211–13 (2014) ("Some participants described counseling, community, and family as supportive sites where they could have specific conversations about how they were defining their gender and, for many, the fluidity involved in this process.").

50. One necessary implication of these arguments is that gender is essentially a continuum, that there is a range of experiences that children might have while considering themselves cisgender; similarly, a range of experiences exist within which children understand themselves as transgender. See Christel Baltes-Löhr, What Are We Speaking About When We Speak About Gender? Gender as a Continuum, 6 J. Cultural Religious Stud. 1, 20 (2018) ("[F]or all dimensions of gender as a continuum, binary attributions apply neither to Jill nor to some of the other so-called girls and so-called boys."). In thinking of gender not within the terms of a male/female or cis/trans binary, gender can be understood more as an identity that is affirmed or weakened by both one's environment and one's careful contemplation of their own relation to gender. An example of such an exercise in contemplation might be John F. Strang et al., The Gender Self-Report: A Multidimensional Gender Characterization Tool for Gender-Diverse and Cisgender Youth and Adults, 78 Am. Psych. 886 (2023).

51. Phobic frame is a novel coinage. It draws on the word "phobic," which like phobia,

> derives from the Greek word 'phobos' meaning panic-fear and terror, and from the deity of the same name who provoked fear and panic in one's enemies. . . . [It refers to] an intense fear which is out of proportion to the apparent stimulus. Such fear cannot be explained or reasoned away and leads to avoidance of the feared situation where possible.

Isaac M. Marks, The Classification of Phobic Disorders, 116 Brit. J. Psychiatry 377, 377 (1970).

central. In a phobic frame, there can be no space for questioning or interrogation—the irrationality of phobia takes hold, provoking panic and defensiveness. The phobic frame makes counterconforming factors look like pressures toward gender nonconformity. In the phobic frame, "anyone who dares utter the possibility that children have desires"[52] (that are different from their parents') threatens children's innocence and parents' "right[] coupled with the high duty" to "direct [children's] destin[ies]."[53]

Where did this phobic frame come from? It is not difficult to see that the phobic frame currently applied to transness has historically been used against queer sexualities—the view of trans children being the victims of indoctrination follows the historical discourse that gay people are grooming or assaulting children.[54] But this Note also names the *New York Times*'s coverage as key to developing this phobic frame,[55] focusing on two particular articles: *The Battle Over Gender Therapy* by lawyer and journalist Emily Bazelon[56] and *When Students Change Gender Identity, and Parents Don't Know* by reporter Katie J.M. Baker.[57]

Bazelon's piece was originally published on June 15, 2022; its abstract claimed that there is deep division within the medical community about

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52. Kevin Ohi, Molestation 101: Child Abuse, Homophobia, and the Boys of St. Vincent, 6 GLQ: J. Lesbian & Gay Stud. 195, 196 (2000).

53. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535–36 (1925).

54. Professor William Eskridge makes this point, almost in passing, in The Brian Lehrer Show, How the Political Right Shifted Its Focus From Homophobia to Transphobia, WNYC, at 16:01 (June 1, 2022), https://www.wnyc.org/story/how-political-right-shifted-its-focus-homophobia-transphobia/ (on file with the *Columbia Law Review*); see also Frank Bruni, Opinion, Republicans' Fresh Fixation on Vintage Homophobia, N.Y. Times, (Apr. 7, 2022), https://www.nytimes.com/2022/04/07/opinion/republican-homophobia-grooming-gay.html (on file with *Columbia Law Review*) ("[P]erhaps the cruelest of the lies about us . . . was that many gay men were child molesters. . . . To leave us alone with children was to give us an opportunity to groom them into sexual activity, so we had to be watched. We had to be stopped.").

55. The critique of the *New York Times* that it provides cover to antitrans disinformation in the name of "journalistic neutrality" is not new; journalist Evan Urquhart's media watchdog site *Assigned Media* has reported on the *Times*' antitrans coverage. See Evan Urquhart, Is the NYT an Anti-Trans Paper?, Assigned (Dec. 6, 2022), https://www.assignedmedia.org/breaking-news/nyt-now-widely-thought-of-as-anti-trans-paper [https://perma.cc/D39Y-WGWQ]. The trans media watchdog site *Translash* produced a podcast, The Anti-Trans Hate Machine: A Plot Against Equality, whose Season 1 Episode 5, "Capturing *The New York Times*," focused on ascertaining the roots of the Times' anti-trans bias, locating it in publisher A.G. Sulzberger's desire to make the paper more appealing to conservative readers. See The Anti-Trans Hate Machine: A Plot Against Equality, Capturing the *New York Times*, Translash (July 13, 2021), https://translash.org/projects/the-anti-trans-hate-machine/ [https://perma.cc/Q6D2-TLFA].

56. Emily Bazelon, The Battle Over Gender Therapy, N.Y. Times Mag. (June 15, 2022), https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html (on file with the *Columbia Law Review*).

57. Baker, supra note 41.

"why" more teens are seeking to transition and how to support them.[58] This is not quite true—a review on the state of gender-affirming care found "a robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals."[59]

The Battle Over Gender Therapy also suffered from oversimplifications bordering on error. Bazelon's piece quoted extensively from a detransitioning[60] youth named Catherine and defined detransitioners as those who "stop identifying as transgender."[61] This simplistic definition belied the scholarly finding that detransition is more complex, often driven by external pressures (such as transphobia, lack of family support, and so on) and that many patients who stop transitioning often continue to identify as trans and continue to desire gender affirmation.[62] While Bazelon highlighted that "the Endocrine Society, the American Psychological Association, the American Psychiatric Association and the American Academy of Pediatrics have endorsed gender-affirming care as the only acceptable approach," Bazelon also characterized the groups as speaking in "broadly supportive terms without specifying how providers should actually do it."[63] In reality, the guidelines by the Endocrine Society are unequivocal and specific about how to treat trans youth, recommending different forms of assessment and treatment for each age group.[64] In grasping for an imagined middle ground, Bazelon's piece abandons scientific consensus and mischaracterizes the facts.

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58. Bazelon, supra note 56.

59. What We Know Project, What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?, Ctr. for the Study of Ineq. at Cornell Univ. (2018), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/ [https://perma.cc/4KW8-ZPUA].

60. Detransitioners are those who begin transitioning socially or otherwise before deciding not to proceed. See Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan & Alex S. Keuroghlian, Factors Leading to "Detransition" Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis, 8 LGBT Health 273, 273 (2021) [hereinafter Turban et al., Factors Leading to "Detransition"] ("Some [transgender and gender diverse (TGD)] people will 'detransition,' a process through which a person discontinues some or all aspects of gender affirmation.").

61. Bazelon, supra note 56; see also Turban et al., Factors Leading to "Detransition", supra note 60, at 273 ("Of note, as with the term 'transition,' the term 'detransition' has become less acceptable to TGD communities, due to its incorrect implication that gender identity is contingent upon gender affirmation processes.").

62. Turban et al., Factors Leading to "Detransition", supra note 60, at 273, 277 ("These experiences did not necessarily reflect regret regarding past gender affirmation, and were presumably temporary, as all of these respondents subsequently identified as TGD, an eligibility requirement for study participation.").

63. Bazelon, supra note 56.

64. Wylie C. Hembree et al., Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline, 102 J. Clinical

In a now-deleted series of tweets, Bazelon claimed that "[m]uch of the criticism of my piece reflects a profound disagreement over the role of journalism on a controversial topic involving a vulnerable group. To me, being a journalist means following the facts where they lead. It isn't advocacy."[65] This defensiveness is archetypal of the phobic frame. In an effort to avoid "advocacy," Bazelon indulges in false balancing,[66] suggesting division when there is actually consensus among credible experts (notably, the main group that Bazelon cites as offering an alternative to the scientific consensus is Genspect, a group that seeks to ban gender transition for anyone).[67]

Beyond obscuring the reality of scientific consensus on best practices for treating transgender youth, Bazelon also chides activists who point out that medical transition reduces suicide risk for trans teens, writing that "[i]n the overheated political moment, however, parents were getting the terrifying message that if they didn't quickly agree to puberty suppressants or hormone treatments, their children would be at severe risk," and noting that the evidence does not demonstrate a causal link between gender transition and decreased risk of suicide.[68] Emphasizing the "overheated"

Endocrinology & Metabolism 3869, 3871 (2017) ("We suggest that adolescents who meet diagnostic criteria for [gender dysphoria (GD)]/gender incongruence, fulfill criteria for treatment, and are requesting treatment should initially undergo treatment to suppress pubertal development.").

65. Andrea James, Emily Bazelon's Responses Following 2022 Transgender Youth Article, Transgender Map, https://www.transgendermap.com/politics/media/emily-bazelon/replies/ [https://perma.cc/V6W3-YKS2] (last visited Aug. 14, 2024) (quoting now-deleted tweets by Emily Bazelon on June 15, 2022).

66. Derek J. Koehler, Can Journalistic "False Balance" Distort Public Perception of Consensus in Expert Opinion?, 22 J. Experimental Psych.: Applied 24, 24 (2016) (investigating "how 'balanced' presentation of conflicting comments" can influence public perception on "the overall distribution of expert opinion on an issue").

67. See, e.g., Ernie Piper, 'Focus Relentlessly on Under 25': Leaked Chats Reveal Influential Gender-Critical Group's Plan to Use Children to Push for Bans on Transitioning, Daily Dot (July 25, 2023), https://www.dailydot.com/debug/genspect/ [https://perma.cc/WAN9-M8T9] (last updated July 30, 2023) (noting that Genspect's public-facing language positions it as a group of advocates for gender nonconforming youth, but that it privately operates a forum trafficking in transphobia connected with numerous far-right political organizations); see also Lee Leveille, Leaked Audio Confirms Genspect Director as Anti-Trans Conversion Therapist Targeting Youth, Health Liberation Now! (Apr. 2, 2022) https://healthliberationnow.com/2022/04/02/leaked-audio-confirms-genspect-director-as-anti-trans-conversion-therapist-targeting-youth/ [https://perma.cc/DZN7-NXCA] (demonstrating that Genspect's director is explicitly targeting trans youth and believes that pornography is responsible for youth being trans, a far-right conspiracy theory).

68. Bazelon, supra note 56. Bazelon cites "Christine Yu Moutier, a psychiatrist and the chief medical officer for the American Foundation for Suicide Prevention" as raising doubts about the connection between suicide risk and gender-affirming care, but Bazelon does not note whether Moutier had access to the *Standards of Care* eighth edition that Bazelon was reporting on, or whether either Bazelon or Moutier had seen Statement 12.21, recommending that "health care professionals maintain existing hormone therapy if the transgender and gender diverse individual's mental health deteriorates and assess the reason for the deterioration, unless contraindicated." E. Coleman et al., Standards of Care

moment and the "terrifying message," Bazelon frames pushes for gender-affirming care as driven by irrational passions rather than reason, and parents who have mediated access to that care as capitulating to fear rather than making considered decisions. [69]

As Derek Koehler suggests, journalistic false balance muddies the waters of public knowledge by obscuring the reality of expert consensus with uncertainty and disagreement.[70] This manufactured obscurity leads decisionmakers (legislators, parents, and others) to feel less confident in the choices they make.[71] Koehler finds that "the mere presence of disagreement" in coverage "may trigger the perception of conflict that in turn produces a sense of general uncertainty . . . mak[ing] it more difficult to form a coherent representation (i.e., a 'good story') of the issue in question, and consequently diminish[ing] confidence in any inferences made regarding that issue."[72] In insisting on disagreement, Bazelon's reporting heightened the sense of uncertainty that readers might feel around gender-affirming care and diminished confidence in readers' decisions about minors seeking to transition, in some sense satisfying the aims of a phobic framing.

Politicians have capitalized on this uncertainty, with the Missouri Attorney General promulgating an emergency rule that framed gender-affirming interventions as "experimental" while explicitly citing Bazelon's reporting.[73] In the same vein, several states, including Missouri and Texas, submitted an amicus brief to the Eleventh Circuit in the case of *Eknes-Tucker v. Governor of Alabama* citing Bazelon's article (and other *New York Times* coverage) as evidence of the "controversy."[74] However much

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for the Health of Transgender and Gender Diverse People, Version 8, 23 Int'l J. Transgender Health S1, S126 (2022) [hereinafter SOC8]. It is also unclear why Bazelon directly contradicted the elaboration of that statement:

> [A] recent systematic review found pubertal suppression in TGD adolescents was associated with an improved social life, decreased suicidality in adulthood, improved psychological functioning and quality of life. Because evidence suggests hormone therapy is directly linked to decreased symptoms of depression and anxiety, the practice of withholding hormone therapy until these symptoms are treated with traditional psychiatry is considered to have iatrogenic effects.

Id. (citations omitted). Although three separate updates were made to Bazelon's article, the last in March 2023, no update addressed this omission from Bazelon's account. Bazelon, supra note 56.

69. Bazelon, supra note 56.

70. Koehler, supra note 66, at 24.

71. Id. at 34.

72. Id. at 26.

73. Mo. Code Regs. Ann. tit. 15, § 60-17.010(2)(D) n.32 (2023) (terminated May 16, 2023).

74. Brief of the States of Arkansas et al. as Amici Curiae Supporting Defendants-Appellants at 4, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707), 2022 WL 2669151.

Bazelon and her ilk claim to be "following the facts where they lead,"[75] the impact is the same—stories like Bazelon's are constructing a phobic frame that supports transphobic legislation and litigation.

Where Bazelon's feature centered on purported disagreement about clinical guidelines, Katie J.M. Baker's *When Students Change Gender Identity and Parents Don't Know* is far more explicit about its normative commitments. Baker's article describes parents whose children began socially transitioning at school, a step that may involve using a different name than the one parents use or using a different set of pronouns.[76] In Baker's account, "how schools should address gender identity cuts through the liberal and conservative divide. Parents of all political persuasions have found themselves unsettled by what schools know and don't reveal."[77] That is, there is no safe harbor for a reader of Baker's article: Every parent should worry about schools' overreaching influence and interference with parental rights. Baker highlights one student's mental comorbidities, including diagnoses of ADHD, autism spectrum disorder, PTSD, and anxiety. While dedicating two short paragraphs to a student's perspective,[78] Baker provides more space to parents.[79] Baker's article quotes one parent in closing, "'The school is telling me that I have to jump on the bandwagon and be completely supportive,' Mrs. Bradshaw said. 'There is only so much and so far that I'm willing to go right now and I would hope that, as a parent, that would be my decision.'"[80] The claim that a student's gender identity should be a parent's decision, not the school's, reflects the oft-misapprehended nature of developmental control; if traditional views of children and child coverture reflect presumed unity between parents' interests and children's interests, it is worth noting how Bradshaw's statement (quoted in Baker above) vanishes her trans child's perspective, one in clear disagreement with his mother.

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75. James, supra note 65 (internal quotation marks omitted) (quoting Emily Bazelon (@emilybazelon), Twitter (June 15, 2022), https://web.archive.org/web/20220623154206/https://twitter.com/emilybazelon (on file with the *Columbia Law Review*)).

76. Baker, supra note 41.

77. Id. Baker suggests that "internet support groups for 'skeptical' parents of transgender children," where "some want to ban gender-affirming care for minors, or have amplified the voices of people who call transgender advocates 'groomers'" are "some of the only places [for parents] to ask questions and air their concerns." Id. Baker notes that detractors call these groups transphobic but suggests that these are the only places for open questioning, apparently denying the existence of groups that seek to support trans youth *and* their parents with accurate information. See Evans et al., supra note 48, at 134–35 (noting that both trans youth and their caregivers found that online support groups had offered information and a feeling of camaraderie).

78. There, the student noted that he had "tried to come out to his parents before . . . but they didn't take it seriously, which is why he asked his school for support." Baker, supra note 41. Like his parents, Baker apparently did not take this account seriously either. Id.

79. Id.

80. Id. (quoting Jessica Bradshaw).

This allows for a clear view of the phobic frame and its constituent parts. From birth, children are typically peppered with pressures urging conformity to the cisgender gender-sex equation, what this paper calls conforming factors.[81] On the other hand are counterconforming factors, elements of life such as trans visibility and resources for individuals to critically interrogate their gender identifications.[82] Within the phobic frame, counterconforming pressures appear not to open space for gender interrogation so much as they appear to threaten parents' ability (and rights) to raise their children. The frame is marked by its denial of consensus on the benefits of gender-affirming care for minors,[83] its exclusion of minors' voices, and its treatment of parents' perspectives as central.[84]

II. SEX DISCRIMINATION AND MINORS' RIGHTS IN DOCTRINE

This Part argues that the present doctrinal landscape is inadequate for protecting minors' access to gender-affirming care. Section II.A summarizes the legislative environment for laws banning different forms of gender-affirming care and policy and frames those laws as part of a broader project to eradicate trans life. Section II.B considers the decision in *Bostock* and finds it insufficient for protecting trans minors, in part because of its narrow scope addressing Title VII. Subsequently, section II.C argues that the abortion rights cases *Bellotti v. Baird* and *Planned Parenthood v. Danforth* provide a broader theory of how minors and parents negotiate parental rights even beyond the context of abortion.

A. *Laws Interrupting Minors' Access to Gender-Affirming Care*

As of this writing, twenty-four states have banned the provision of best-practice medical care for trans youth.[85] Twenty-five states prevent trans youth from participating on sports teams that align with their gender identity.[86] Thirteen states have implemented bans on trans youths' access to bathrooms—and the state of Florida has made it a criminal offense for

81. See supra notes 37–41 and accompanying text.

82. See supra notes 42–49 and accompanying text.

83. See supra notes 55–79 and accompanying text.

84. See supra note 78 and accompanying text.

85. See Movement Advancement Project, Equality Maps: Bans on Best Practice Medical Care for Transgender Youth 3 (2024) https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf [https://perma.cc/9KJ2-R8SQ] [hereinafter MAP, Bans on Medical Care for Trans Youth] (summarizing state policies banning best-practice medical care for trans youth). Such best-practice care includes puberty blockers and surgery, except in Arizona, where only surgery is affected. Id.

86. See Movement Advancement Project, Equality Maps: Bans on Transgender Youth Participation in Sports 3 (2024) https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf [https://perma.cc/ZC7G-V75B] [hereinafter MAP, Bans on Trans Youth in Sports] (summarizing trans youth participation bans in sports in the United States).

any trans person to use the facilities consistent with their gender identity.[87] Taking a broad view of gender-affirming care to include social transition, bans on gender affirming care like those described in section I.A create obstacles for minors in nearly every facet of their lives: In addition to worse mental health outcomes,[88] minors in states with gender-affirming care bans may find themselves unable to play sports with their peers,[89] unable to use bathrooms that align with their gender identities,[90] faced with the prospect of moving states[91] or of being forcefully outed to parents,[92] and even subject to invasive medical examinations.[93] That these laws target youth in particular might be understood in two different ways—first, for the reasons set out above:[94] States are able to exercise interests in minors' lives under the veil of parens patriae,[95] leading states to deprivations of rights that would be harder to swallow if the rights of adults were at stake, rather than those of minors.

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87. Movement Advancement Project, Equality Maps: Bans on Transgender People's Use of Bathrooms & Facilities in Government-Owned Buildings & Spaces 3 (2024), https://www.lgbtmap.org/img/maps/citations-bathroom-facilities-bans.pdf [https://perma.cc/BCS2-UP74] [hereinafter MAP, Bans on Trans Bathroom Access] (summarizing bans on trans people's access to bathrooms that align with their gender identities).

88. See Amy Novotney, 'The Young People Feel It': A Look at the Mental Health Impact of Transgender Legislation, Am. Psych. Ass'n (June 29, 2023), https://www.apa.org/topics/lgbtq/mental-health-anti-transgender-legislation. [https://perma.cc/J7LT-F4NR] (last updated June 3, 2024) ("Research overwhelmingly shows these bills and laws, which target access to health care, sports participation, and school policies, have resulted in heightened levels of anxiety, depression, and suicide risk among LGBTQ+ youth.").

89. See MAP, Bans on Trans Youth in Sports, supra note 86.

90. See MAP, Bans on Trans Bathroom Access, supra note 87, at 3.

91. See Novotney, supra note 88 ("[F]amilies fear for the safety of their trans and nonbinary youth and are fleeing states where these bills are being passed."); see also Kiara Alfonseca, "Genocidal": Transgender People Begin to Flee States With Anti-LGBTQ Laws, ABC News (June 11, 2023), https://abcnews.go.com/US/genocidal-transgender-people-begin-flee-states-anti-lgbtq/story?id=99909913 [https://perma.cc/4L29-VV6U] (detailing the stories of several individuals who moved states after laws restricted gender-affirming care in their home state).

92. Movement Advancement Project, Equality Maps: Forced Outing of Transgender Youth in Schools 2 (2024), www.mapresearch.org/equality-maps/youth/forced_outing [https://perma.cc/X36E-FZFP] [hereinafter MAP, Forced Outing] (describing how eight states require the disclosure of students' trans identities to families and five other states promote such outing).

93. See MAP, Bans on Trans Youth in Sports, supra note 86, at 5–6 (describing how youth must provide evidence of their sex at birth, which may include original birth certificates, affidavits from parents, and/or affidavits signed by physicians after conducting physical exams of youth's genitalia).

94. See supra notes 5–6 and accompanying text.

95. See Parens patriae doctrine, Ballentine's Law Dictionary (3d ed. 1969) ("The doctrine that all orphans, dependent children, and incompetent persons, are within the special protection, and under the control, of the state."); see also Parham v. J.R., 442 U.S. 584, 603 (1979) (noting that states may constrain parental discretion in dealing with children whose physical or mental health is jeopardized).

Second, as some scholars and writers have argued, the nature of anti-trans legislation and discourses might meet the general United Nations definition of genocide.[96] That the United Nations' definition of genocide (codified in 1948 in the wake of the Shoah)[97] does not consider gender-based violence as a kind of genocide does not preclude the value of genocide as an interpretive framing for examining transphobic violence. Contemporary genocide scholars have begun to consider how the "gendered study of genocide" requires understanding how perpetrators understand power through gender; how gender organizes both perpetrator and victim societies; "the gendered strategies pursued in the course of group destruction; . . . the use of gender in propaganda and in denial strategies; the gendered inflection of justice systems; and so forth."[98] More precisely, anti-trans legislation and anti-trans violence "are not isolated incidents . . . but instead share the common impetus of the perpetrators' desiring to eradicate a group of people who violate a widely held and popularly reinforced norm of binary gender with a connection to heteronormative sexuality."[99] Laws that target trans youth and force youth to detransition[100] not only force youth to disidentify from their trans identities (akin to the forcible group transfer that constitutes genocide), but at their logical end could lead trans youth to suicide or severe mental distress, preventing trans youth from becoming trans adults—or from

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96. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 279; Jeremy D. Kidd & Tarynn M. Witten, Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities, 6 J. Hate Stud., no. 1, 2007, at 31, 32 ("[T]he treatment of the transgender population, with respect to violence and abuse, could be viewed, . . . as crimes of genocide against the transgender-community members in the U.S. and other countries."); see also Katelyn Burns, Opinion, Greg Abbott's Death Wish for Trans Kids, MSNBC (Mar. 3, 2023), https://www.msnbc.com/opinion/msnbc-opinion/texas-twisted-attack-trans-kids-just-got-worse-n1290792 [https://perma.cc/VF87-Q7E6] (arguing the same).

97. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 279. Article II of the Convention reads, in full:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

98. Elisa von Joeden-Forgey, Gender and the Future of Genocide Studies and Prevention, *in* Genocide and Gender in the Twentieth Century: A Comparative Survey 298, 300 (Amy E. Randall ed., 2015).

99. Kidd & Witten, supra note 96, at 51.

100. See MAP, Bans on Medical Care for Trans Youth, supra note 85, at 3 (noting that most of the states banning gender-affirming care require youth, where not "grandfathered in," to "wean" off puberty blockers or cross-sex hormones, forcing those youth to detransition).

becoming adults at all. The purpose of this discussion is to suggest that lawmakers' focus on trans youth should not allow the frame to become underdetermined; laws targeting trans youth are not about parental rights or children's health but instead partially constitute a coordinated plan for eradicating trans gender possibilities.

B. *Harms Accruing to Minors Because of Denial of Care*

Much of the research focusing on risks accruing to trans minors centers on the risk of suicide. This is for good reason: Some studies have found lifetime suicide attempt rates among trans youth to be nearly five times that of their cisgender peers.[101] Receiving gender-affirming hormone therapy when a trans youth wants it demonstrably reduces the risk of suicide and experiences of suicidality.[102] In that vein, rates of self-harm among trans youth are roughly three times that of cisgender peers.[103]

But those dire mental health harms are not the only harms resulting from denial of gender-affirming care, particularly when gender-affirming care is defined broadly to include forms of social intervention (such as being permitted to use bathrooms that align with one's identity, being referred to with appropriate names and pronouns, etc.). Trans teens are more likely to leave school because of discrimination and to be verbally or physically assaulted.[104] Trans women of color are more likely to become

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101. See Nastasja M. de Graaf et al., Suicidality in Clinic-Referred Transgender Adolescents, 31 Eur. Child Adolesc. Psychiatry 67, 68 (2022) ("For self-reported suicide attempts over the past 12 months, the percentage for the transgender students was 19.8% in Clark et al. and 34.6% (n = 1069) in Johns et al. compared to 4.1% and 7.4% (n = 67,711), respectively, in the non-transgender students." (citations omitted)).

102. See Amy E. Green, Jonah P. DeChants, Myeshia N. Price, Carrie K. Davis, Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth, 70 J. Adolesc. Health 643, 647 (2022) (showing that teens using puberty blockers had lower rates of suicidal contemplation).

103. See Terryann C. Clark, Mathijs F. G. Lucassen, Pat Bullen, Simon J. Denny, Theresa M. Fleming, Elizabeth M. Robinson, & Fiona V. Rossen, The Health and Well-Being of Transgender High School Students: Results From the New Zealand Adolescent Health Survey (Youth '12), 55 J. Adolesc. Health 93, 98 tbl.4 (2014) (showing that transgender youths' self-harm rates are around twenty-two points higher than non-transgender youth); de Graaf et al., supra note 101, at 68 ("In two studies, self-reported self-harm over the past 12 months for transgender students was 45.3% (total n = 95) and 55.0% (total n = 1941) . . . compared to 23.4% (total n = 7710) and 14.3% (total n = 74,134) for the non-transgender students, respectively." (citations omitted)).

104. See Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 131 (2016) https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/B848-U9TF] ("Fifty-four percent (54%) of people who were out or perceived as transgender in K–12 were verbally harassed, and 24% were physically attacked. Seventeen percent (17%) . . . left a K–12 school because the mistreatment was so bad, and 6% were expelled.").

homeless and to be denied an apartment than their cisgender peers.[105] Trans people of color are more likely to have been harassed, assaulted, or raped by police,[106] and trans women of color generally (but Black trans women in particular) are more likely to be incarcerated.[107] While gender-affirming care is not a panacea to the array of discrimination that trans people face, it is clear that these forms of discrimination are interlinked (housing security, educational attainment, and law enforcement involvement, for example). Legal security for gender-affirming care might do two things: First, to the extent that one's experience of gender dysphoria can create distress, forms of care such as using preferred names, permission to use the bathroom aligned with one's identity, and so on, may reduce that distress.[108] Second, securing gender-affirming care may reduce transphobic bias among individuals in society, much as the legalization of gay marriage has accelerated the decrease in anti-gay bias.[109]

There may also be a broader developmental harm in failing to provide minors the ability to interrogate and solidify their own genders. Pediatric research has observed that children's independent play—without either parental involvement or supervision—significantly improves children's psychological well-being.[110] Similar research found that teens with part-time jobs (many away from their parents) were happier than unemployed

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105. See id. at 178–79; see also The Trevor Project, Homelessness and Housing Instability Among LGBTQ Youth 1, 12 (2022), https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf [https://perma.cc/3SU4-SKEX] ("Transgender women and girls represent 2% of youth who had not experienced housing instability but 4% of youth who reported past housing instability and 6% of youth who reported being currently homeless.").

106. See James et al., supra note 104, at 186–87 ("More than half (58%) of respondents who interacted with a law enforcement officer who thought or knew that they were transgender were verbally harassed, physically or sexually assaulted, or mistreated in another way in the past year.").

107. See id. at 190 ("Transgender women of color, including Black (9%) and American Indian (6%) women, were more likely to have been incarcerated in the past year . . . ."); see also Kris Rosentel, Ileana López-Martínez, Richard A. Crosby, Laura F. Salazar & Brandon J. Hill, Black Transgender Women and the School-to-Prison Pipeline: Exploring the Relationship Between Anti-Trans Experiences in School and Adverse Criminal-Legal System Outcomes, 18 Sexuality Rsch. Soc. Pol'y 481, 488 (2021) (noting that young Black transgender women who had been excluded from school due to being transgender were over nine times more likely to be incarcerated).

108. It is worth noting that these are utterly fundamental components of social dignity.

109. See Eugene K. Ofosu, Michelle K. Chambers, Jacqueline M. Chen & Eric Hehman, Same-Sex Marriage Legalization Associated With Reduced Implicit and Explicit Antigay Bias, 116 Proc. Nat'l. Acad. Scis. 8846, 8846 (2019) ("While antigay bias had been decreasing over time, following local same-sex marriage legalization antigay bias decreased at roughly double the rate . . . .").

110. See Peter Gray, David F. Lancy & David F. Bjorklund, Decline in Independent Activity as a Cause of Decline in Children's Mental Well-Being: Summary of the Evidence, 260 J. Pediatrics, 113352, 2023, at 1, 2 (noting that "the implicit understanding shifted from that of children as competent, responsible, and resilient to the opposite, as advice focused increasingly on children's needs for supervision and protection").

peers and attributed their happiness to both the money they received and their feelings of independence.[111] The broader implication is well supported by research: The freedom to act independently and the belief that one has control over their own life (a strong sense of an internal locus of control) is associated with psychological well-being in children and adults alike.[112] Conversely, as Gray and colleagues suggest, "If children have little experience taking control of their own lives, they are unlikely to develop a strong sense that they can exert such control,"[113] an insight that accords with Buss's intuition that "children's experience exercising decisionmaking control will likely facilitate their development of decisionmaking skills, and hence, increase their competence as rights exercisers in adulthood."[114] Minors' ability to freely interrogate their gender identities and to consolidate them over the course of their lives might be understood as a vital part of a minor's sense of an internal locus of control, perhaps even more so than a child's ability to choose whether they will have chocolate or vanilla ice cream for dessert. This does not mean that parents must remain hands-off as their children explore their genders—parents can be, in matters of gender as elsewhere, adaptive and open to surprise. Perhaps most importantly, as one study has found, parents can remain supportive, affectionate, open, and curious as their children experiment with and consolidate their gender identities.[115]

But does the failure to do so constitute a harm?[116] Legally, the question has yet to be answered authoritatively; in civil law, parenthood imposes a duty of care only in particular situations (such as sexual

111. See Lyn Robinson, Austl. Council for Educ. Rsch., The Effects of Part-Time Work on School Students, at v (1999), https://research.acer.edu.au/cgi/viewcontent.cgi?article=1017&context=lsay_research [https://perma.cc/JKL3-JL8C] (noting that employed students were more likely to be happy with aspects of their lives, such as their wages, social life, and sense of independence, relative to unemployed peers).

112. Gray et al., supra note 110, at 3 (highlighting that "over the same decades that children's opportunities for independent activity have declined greatly, so has children's mental health").

113. Id. at 5.

114. Buss, supra note 7, at 35.

115. See Arthur E. Hale, Solana Y. Chertow, Yingjie Weng, Andrea Tabuenca & Tandy Aye, Perceptions of Support Among Transgender and Gender-Expansive Adolescents and Their Parents, 68 J. Adolesc. Health 1075, 1078 (2021) (describing the most significant forms of parental support as adopting minors' preferred names and pronouns and general affection (hugs, kisses, etc.)).

116. California's AB-957 (2023) sought to amend § 3011 of the California Family Code to instruct courts making custody determinations to consider "a parent's affirmation of the child's gender identity or gender expression" in its determination. Assemb. B. 957, 2023–2024 Leg., Reg. Sess. (Cal. 2023). Governor Gavin Newsom vetoed the bill, citing the possibility that attempts to "dictate—in prescriptive terms that single out one characteristic—legal standards for the Judicial branch to apply" could lead other elected officials to "diminish the civil rights of vulnerable communities." Veto Message, Gavin Newsom, Off. Governor, to Members of the California State Assemb. (Sept. 22, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/AB-957-Veto-Message.pdf [https://perma.cc/UQN9-DQY6].

violence).[117] The Children and the Law Restatement has a to-be-drafted section on minors' access to puberty-blocking medication, section 19.4, but broadly authorizes parents to make medical decisions for their children.[118] Certainly, depriving children of the capacity to develop an autonomous understanding of gender might be disfavored on the grounds of being suboptimal, but that would not rise to the level of a legal violation. Yet the above discussion might hint at another possibility for thinking through parents' responsibilities. In the Restatement's fourth Tentative Draft, section 1.20 smacks of Blackstone[119] in stating that:

> Parents have a duty to ensure that their children receive a sound, basic education. A sound, basic education is one that enables children to acquire the knowledge and skills necessary to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance.[120]

While schools have taken a central role in some of the debate around gender affirmation (because of both schools' roles in teaching youth about gender and sexuality and in offering a place for social transition), the duty of education specifically falls to parents. This Note reads the call to knowledge broadly in light of the reality that the education one receives in schools is insufficient for an effective and responsible adult life. In a world in which gender continues to be an organizing principle for society, one might conceive of the ability to understand one's own gender deeply and on one's own terms as necessary for effective and responsible

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117. See Romualdo P. Eclavea, Annotation, Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases, 6 A.L.R.4th 1066, § 3 (1981) ("In a number of cases . . . it has been held or recognized . . . that a parent . . . is immune from liability for personal injuries suffered by such child because of the negligence of the parent . . . at least in the absence of various special circumstances . . . .").

118. Restatement of the Law, Children and the Law § 2.30 (Am. L. Inst., Tentative Draft No. 1, 2018). ("(1) Authority. (a) A parent or guardian has broad authority to make medical decisions for a child. . . . (2) Responsibility. (a) A parent, guardian, custodian, or temporary caregiver has a duty to provide necessary medical care for the child."). This Note relies on the Restatements as a reasonable stand-in for the diversity of common-law approaches across the United States and its jurisdictions, following the claim that "the [American Law] Institute, beginning with its Restatements . . . [contributed] to unifying as well as simplifying and clarifying the law, primarily (although not exclusively) state law." Michael Traynor, The First Restatements and the Vision of the American Law Institute, Then and Now, 32 S. Ill. U. L.J. 145, 146 (2007). This is not without some caution, since the Restatements' ability to reflect the reality of common law is refracted by the interpretive acts of the judges and other interpretive legal bodies that use them. See Shyamkrishna Balganesh, Relying on Restatements, 122 Colum. L. Rev. 2119, 2122 (2022) ("[W]oefully little is known about the techniques and methods employed by courts in their use of Restatements . . . . [C]ourts are required to engage in the task of *interpretation*, a process that has itself been the subject of rather significant methodological disagreement."). § 19.4 of the Restatement of the Law, Children and the Law remains unpublished as of this writing.

119. See supra note 12 and accompanying text.

120. Restatement of the Law, Children and the Law § 1.20 (Am. L. Inst., Tentative Draft No. 4, 2022).

participation in society and vital to developing competence in exercising gendered rights in the future (rights around reproduction, sports, family organization among them). If parents fail to provide this kind of education, one might ask whether that education was satisfactory and whether such parents have satisfied their duties, at least as described in the Restatement. There are, of course, risks and harms that accrue from allowing states to monitor parental behavior and maintain a periscope into family life.[121] But if there is a parental duty to educate one's children to develop the capacity for maintaining steadiness in the face of trans gender possibilities, this at least bars states from preventing parents from fulfilling their duty and perhaps produces a constellation of normative lodestars to guide parental thinking on the appropriate course of action when faced with a child who expresses gender curiosity or creativity.

C. Bostock*'s Inadequacy to Protect Trans Minors*

Understandably, LGBTQ+ advocates cheered the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that firing someone for being transgender or gay violated Title VII of the Civil Rights Act of 1964.[122] The Court's embrace of the "sweeping standard" of but-for causation in gender discrimination led to its conclusion that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[123] In its simplest form, *Bostock* affirms the proposition that "anti-LGBT discrimination punishes individuals for not adhering to sex stereotypes and is therefore a form of sex discrimination"[124] and that discrimination against trans people requires sex discrimination.

Although the Court maintained that its conclusion only applied to Title VII employment discrimination because those were the only facts at

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121. See Erin Sugrue, Evidence Base for Avoiding Family Separation in Child Welfare Practice 8–10 (2019), https://www.ncsc.org/__data/assets/pdf_file/0031/18985/alia-research-brief.pdf [https://perma.cc/7P27-J5K4] (summarizing outcomes for minors who were removed from their homes in the course of child protective proceedings, finding mixed outcomes at best and harms at worst).

122. See Bostock v. Clayton County, 140 S. Ct. 1731, 1745 (2020) ("But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules."); Julie Moreau, Supreme Court's LGBTQ Ruling Could Have "Broad Implications," Legal Experts Say, NBC News (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 (on file with the *Columbia Law Review*) ("The Supreme Court's landmark ruling in Bostock v. Clayton County, Georgia—which was widely praised by LGBTQ advocates but condemned by social conservatives—will likely have broad ramifications that go far beyond employment protections, according to several legal experts.").

123. *Bostock*, 140 S. Ct. at 1739, 1741.

124. Erik Fredericksen, Note, Protecting Transgender Youth After *Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection, 132 Yale L.J. 1149, 1156 (2023).

bar,[125] courts since *Bostock* have interpreted its logic to be more broadly applicable in Title IX cases and elsewhere.[126] In cases involving trans minors, Title IX cases are particularly relevant because of schools' roles in social transition, and numerous federal courts have cited *Bostock*, noting that their decisions either accorded with *Bostock* or adopted its persuasive logic.[127] *Bostock* may have its place as precedent in cases like those that have cited it: cases in which schools are involved in denying minors access to gender affirmation either through medical care or through social transition, creating a statutory violation.

The more controversial question is whether *Bostock*'s analysis should hold weight in the equal protection context. Theoretically, *Bostock*'s logic might protect trans youth from state laws discriminating on the basis of gender identity: In states where cis youth experiencing precocious puberty[128] could lawfully receive puberty blockers, state laws preventing

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125. See *Bostock*, 140 S. Ct. at 1753 (specifying that the holding today is about the actions of employers).

126. See, e.g., Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27985 (May 25, 2021) (codified at 45 C.F.R. pts. 86, 92) ("[C]onsistent with the Supreme Court's decision in *Bostock* and Title IX, . . . [the HHS] will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("Although Bostock interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." (citation omitted)); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., C.R. Div., DOJ, to Fed. Agency C.R. Dirs. & Gen. Couns. (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/dl [https://perma.cc/K4ZX-2K5F] ("[L]ike Title VII, Title IX applies to sex discrimination against individuals. The *Bostock* Court focused on this feature of Title VII in reaching its holding."). But see Neese v. Becerra, 640 F. Supp. 3d 668, 676 (N.D. Tex. 2022) (holding that *Bostock* does not control beyond the Title VII context).

127. See, e.g., *Grimm*, 972 F.3d at 616–17 (relying on *Bostock* in holding that refusing to allow Grimm to access the bathroom appropriate for his gender violated Title IX); Brandt v. Rutledge, 551 F. Supp. 3d 882, 889–92 (E.D. Ark. 2021) (enjoining the enforcement of Act 626, an Arkansas law that banned gender-affirming care for minors, and citing *Grimm* while noting its accord with *Bostock*); Hecox v. Little, 479 F. Supp. 3d 930, 974 (D. Idaho 2020) (noting that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" in enjoining a ban on trans women's participation in women's sports (alteration in original) (internal quotation marks omitted) (quoting *Bostock*, 140 S. Ct. at 1741)), vacated in part, 104 F.4th 1061 (9th Cir. 2024).

128. The class of drugs delaying puberty in trans youth are used to the same effect as the standard treatment for treating precocious puberty in cis youth. See Jadranka Popovic, Mitchell E. Geffner, Alan D. Rogol, Lawrence A. Silverman, Paul B. Kaplowitz, Nelly Mauras, Philip Zeitler, Erica A. Eugster & Karen O. Klein, Gonadotropin-Releasing Hormone Analog Therapies for Children with Central Precocious Puberty in the United States, 10 Frontiers in Pediatrics at 1, 2 (2022) ("Gonadotropin-releasing hormone (GnRH) agonists (GnRHa's) are standard treatment for CPP." (citation omitted)); see also Puberty Blockers for Transgender and Gender-Diverse Youth, Mayo Clinic (June 14, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/V5A5-Y4PR] ("Puberty blockers can be used to delay the changes of puberty in transgender and gender-diverse youth who have started

trans youth from accessing puberty blockers seem to deny trans minors equal protection of the laws on the basis of sex. The argument might proceed by saying that trans youth are being discriminated against because their trans gender expression does not match with stereotypical expectations about that youth's gender expression based on that youth's perceived "sex," thus constituting discrimination on the basis of sex.[129] Both the Sixth and Eleventh Circuits have rejected comparable arguments.[130] Further challenges are likely to fail on the basis that gender-affirming care bans do not constitute discrimination on the basis of sex but instead constitute discrimination on only the basis of age, with its consequent lower burden on the discriminator.[131] This points again to the

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puberty. The medicines most often used for this purpose are called gonadotropin-releasing hormone (GnRH) analogues.").

129. This is, of course, one of the arguments put forth by Eknes-Tucker. See Response Brief for Plaintiffs-Appellees at 24–25, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707) 2022 WL 3369279 ("The Act cuts off adolescents' medically needed care and exposes parents and medical professionals to criminal consequences for the parents' exercise of their constitutional rights to seek established care for their minor children."). Fredericksen similarly argues that state laws banning gender-affirming care rely on a sex stereotype of the "confused transgender child." Fredericksen, supra note 124, at 1190 (explaining that "[t]his is based on a longstanding stereotype: queer or transgender identity is for minors a confused and temporary phase, while cisgender and heterosexual identity is not"). Fredericksen goes further:

> [Opponents] do not voice any doubts about the decisions of presumed cisgender minors to choose medical interventions into their sexual development that align with their sex assigned at birth. . . . The law thus punishes . . . those who deviate from the state's own normative judgment as to how a child should mature sexually . . . based on the stereotype . . . that transgender minors are generally confused or misled about their own identity.

Id. at 1200.

130. See *Eknes-Tucker*, 80 F.4th at 1224–25 ("[W]ithout any historical analysis specifically tied to the medications at issue, Plaintiffs have not shown it to be likely that the Due Process Clause of the Constitution guarantees a fundamental 'right to treat [one's] children with transitioning medications subject to medically accepted standards.'" (alteration in original) (quoting *Eknes-Tucker*, 603 F. Supp. 3d. at 1145)); see also L.W. ex. rel. Williams v. Skrmetti, 73 F.4th 408, 420–21 (6th Cir. 2023) ("*Bostock v. Clayton County* does not change the analysis. . . . *Smith v. City of Salem* does not move the needle either. . . . It did not hold that every claim of transgender discrimination requires heightened scrutiny, least of all . . . whether a State may limit irreversible medical treatments to minors facing gender dysphoria." (first citing *Bostock*, 140 S. Ct. 1731, then citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)), cert. granted sub nom. United States v. Skrmetti, 144 S. Ct. 2679 (2024). Notably, all the (minor) plaintiffs in *Skrmetti* were only seeking hormonal therapies (puberty-blockers or cross-sex hormone therapy). See Complaint for Declaratory and Injunctive Relief ¶¶ 97, 113–115, 129, *Skrmetti*, 679 F. Supp. 3d. 668 (M.D. Tenn. 2023) (No. 23CV00376), 2023 WL 3034949. This is in line with physicians' recommendations. See Hembree, supra note 64, at 3871; see also SOC8, supra note 68, at S111. Both forms of cross-sex hormone therapy are reversible (puberty-blockers entirely so and cross-sex hormones mostly so), see SOC8, supra note 68, at S43, so *Skrmetti*'s ruling relies on a fundamental misunderstanding of the facts.

131. These were the findings, after all, of the courts in *Eknes-Tucker*, 80 F.4th at 1227 ("[W]e agree with Alabama that section 4(a)(1)–(3) is best understood as a law that targets

insidious brilliance of gender-affirming care bans that target youth; the bans are not presumptively unreasonable sex discrimination, but instead presumptively reasonable age discrimination. The success of this framing is in part a testament to the phobic frame's success, that gender-affirming care can be framed as an issue primarily about protecting children (whose voices are largely excluded from court opinions) rather than seen for what it is: an unscientific element of a broader plan to restrict gender expression and trans gender possibilities. This suggests that any workable argument against gender-affirming care bans must directly address minors' rights *as minors*.

The broader problems, then, are twofold: First, *Bostock*, as a Title VII case, is rightly lauded but not broad enough to do all that advocates might hope it can do. That is, *Bostock* might secure for trans people the negative liberty to be free from certain forms of institutional discrimination, but it does not cover the more fundamental question of whether trans people will be afforded the same rights as cis people to live in the gender of their choice, a right that remains unelaborated and beyond the scope of *Bostock*. The second problem is that the gender-affirming care bans have so far been considered as reasonable cases of age discrimination in which a state's interest in the welfare of its children faces off with the particularized interests of a parent in their own child. States and parents theoretically have compatible interests in children: Both are interested in the welfare of children, en masse and as individuals respectively, and have different, incommensurable types of knowledge.[132] As a result of this incommensurability, there is no tie-breaking interest. Under a theory of child coverture that suggests that children's interests are united with those of their parents, parents' rights seek to fill this lacuna but will not do so as completely as the child might if able to verbalize their interests themselves.[133]

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specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic under the Equal Protection Clause. Section 4(a)(1)–(3) is therefore subject only to rational basis review . . . .") and *Skrmetti*, 83 F.4th at 485 *("*[T]he laws . . . deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority. A concern about potentially irreversible medical procedures for a child is not a form of stereotyping.").

132. States, as Buss argues, have the capacity and competence to marshal expertise about population-wide effects. Buss, supra note 7, at 34 ("[R]egulation of harmful conduct should be limited to contexts where the harm is conceived as universal (such as child abuse), rather than child-specific (as it is in the relational context)."). Parents, by contrast, are "generally more competent than the state at assessing, and acting on, their [own] children's best interests . . . in part because they know their children better, in part because they care about them more, and in part because their own interests are tied more tightly to the interests of their children." Id. at 31.

133. Buss, for her part, suggests that the child exercises control "simply by being the developmental subject," through her reactions to the environment as it is shaped by the state and by parents. Id. at 34. This is a thin vision of control, though—as Buss notes later on—there is a good developmental justification for affording children rights under appropriate circumstances. Id. at 35; see also supra notes 110–121.

Hinging the argument for minors' access to gender-affirming care on parental rights also fails on two counts: First, the minors who are arguably most in need of gender-affirming care (that is, minors who are most likely to be lacking support from family, teachers, or peers) are those minors whose parents oppose their receiving gender-affirming care.[134] These minors are not served by strengthened parental rights. Second, parental rights cut both ways—parents have made claims on the basis of parental rights that they should be able to provide gender-affirming care to their children;[135] parents have also claimed that their parental rights allow them to deny gender-affirming care to their children.[136] As noted in section I.C, this discourse operates in a phobic frame, allowing parental claims to entirely eclipse children's needs and desires. The solution, this Note argues, is to move toward recognition of the more complete interests of minors in their own bodily autonomy, a right that has been elaborated in the abortion context.

D. Bellotti, Danforth, *and the Divergent Interests of Parents and Children*

One narrow area in which the law has recognized the fact that minors' interests may differ from their parents is the question of abortion access. *Bellotti v. Baird* invalidated a Massachusetts statute that required parents to consent to a minor's abortion on the basis that a minor's desire for an abortion should outweigh their parents' objections.[137] Under the invalidated statute, a minor could obtain judicial consent to an abortion when a judge "finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion,' [but the judge] is entitled to withhold consent 'in circumstances where [the judge] determines that the best interests of the minor will not be served by an

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134. Cf. Bruna L. Seibel et al., The Impact of the Parental Support on Risk Factors in the Process of Gender Affirmation of Transgender and Gender Diverse People, 9 Frontiers Psychology 399 (2018) ("[P]arental support was associated with self-esteem. In addition, low family acceptance can be related to the necessity of moving home, and becoming homeless could prevent access to hormonal therapy and sex reassignment surgery, further impairing the self-esteem of TGD individuals.").

135. See Complaint for Injunctive and Declaratory Relief, supra note 130, ¶ 152 ("The Ban also discriminates against the parents of Minor Plaintiffs, denying them the same ability to secure urgently-needed medical care for their children that other parents can obtain, and does so on the basis of transgender status- and sex-based grounds.")

136. See John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 623 (4th Cir. 2023) (exemplifying parent-plaintiffs who sought to prevent schools from providing social transition to children); Regino v. Staley, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *1–2 (E.D. Cal. July 10, 2023), appeal docketed (U.S. App. LEXIS 19361 (9th Cir. Aug. 2, 2024)) (exemplifying a parent-plaintiff suing school board on the grounds that socially transitioning plaintiff's child violated her parental rights).

137. See Bellotti v. Baird, 443 U.S. 622, 650 (1979) (plurality opinion) ("We therefore agree with the District Court that § 12S cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.").

abortion.'"[138] That is, the judge could overrule the decision of a minor *even when* the minor has demonstrated the capacity to give informed consent. At the district level, the court immediately recognized that the statute did not seek to protect minors, but to recognize "independent rights of parents . . . . The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own [to decide the question of abortion for their children]?"[139] The Supreme Court found no such right, either for parents or for courts, noting that "if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently."[140] In *Planned Parenthood v. Danforth*, the court noted that it could not "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy"[141] and similarly on the question of minors' rights to an abortion that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[142] Mutatis mutandis, one might educe from this that minors may assert a similar right to gender transition:[143] If a minor has demonstrated the capacity for understanding the impact of gender transition and appreciation for the consequences (positive and negative), neither the state nor parents should have the right of an absolute veto.

An approach to ensuring the right to gender-affirming care that centers the analytical moves of *Bellotti*, however, encounters a key difficulty: *Bellotti* is largely abrogated by the Court's decision in *Dobbs*, which found no constitutional right to abortion for individuals of any age.[144] The *Bellotti* decision was premised on *Roe*'s finding of a constitutional right to abortion and on cases such as *Danforth*, which did not see interests beyond ensuring

138. Id. at 630 (quoting Baird v. Att'y Gen., 360 N.E.2d 288, 293 (Mass. 1977)).

139. Baird v. Bellotti, 393 F. Supp. 847, 856 (D. Mass. 1975), aff'd sub nom. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

140. *Bellotti*, 443 U.S. at 650.

141. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (internal quotation marks omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975)). The statute in *Danforth* was similar to that in *Bellotti*, requiring minors to get parental permission for abortions, though the statute in *Danforth* also required married women to get permission from their husbands. Id. at 58.

142. Id. at 74.

143. Canadian legal scholar Florence Ashley has written about the analogy between gender transition and reproductive rights. See Florence Ashley, Adolescent Medical Transition Is Ethical: An Analogy With Reproductive Health, 32 Kennedy Inst. Ethics J. 127, 128 (2022) [hereinafter Ashley, Adolescent Medical Transition Is Ethical] ("Birth control, abortion, and adolescent medical transition are analogous insofar as they intervene on healthy physiological states such as puberty, sexual traits, fertility, and pregnancy, by reason of the person's fundamental self-conception and desired life.").

144. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) (reversing earlier decisions that found a federal right to an abortion).

the capacity to give informed consent as outweighing a person's decision to abort their pregnancy for either adult women or minors.[145] Moreover, the *Bellotti* court repeatedly emphasized the "unique" nature of the decision to have an abortion,[146] which leaves questions as to its applicability in other contexts.

While the analysis of abortion rights has been abrogated by the *Dobbs* decision, *Bellotti* and *Danforth* should also be understood as cases concerned with the rights of minors over their own bodies—rights of bodily autonomy that adults continue to have outside of the abortion context when it comes to gender transition. While states have sought to curb access to gender-affirming care based on the state's interest in the welfare of children, states have been less able to restrict access to gender-affirming care for adults.[147] One might read *Bellotti* and *Danforth* (opinions that were issued together) as about what justifies the distinctions between the rights allowed to adults and those allowed to children.

> [O]ne could not seriously argue that a minor must submit to an abortion if her parents insist, and [the dissenting district court judge] could not see "why she would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician."[148]

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145. See Bellotti v. Baird, 443 U.S. 622, 639 (1979) (plurality opinion) (noting that the statute in controversy tried to reconcile a pregnant person's interest in termination with interest of the State in encouraging a minor to seek the advice of their parents).

146. Id. at 643 (referencing "the unique nature and consequences of the abortion decision"); id. at 650 ("But we are concerned here with the exercise of a constitutional right of unique character.").

147. See Azeen Ghorayshi, Many States Are Trying to Restrict Gender Treatments for Adults, Too, N.Y. Times (Apr. 22, 2023), https://www.nytimes.com/2023/04/22/health/transgender-adults-treatment-bans.html (on file with the *Columbia Law Review*) (explaining that while some states are attempting to restrict adult access to gender-affirming care, these efforts are more contentious and face greater legal challenges compared to restrictions on care for minors). This fact may allow one to infer that even trans-hostile states recognize that there are strong autonomy interests in individuals' ability to live as the gender they wish to and that restrictions are less easily explained for adults than they are for children (where reference is made to the limited evidence base for certain trans-affirming medical interventions). But see Ashley, Adolescent Medical Transition is Ethical, supra note 143, at 128 (arguing that the "limited evidence base" for gender-affirming care should not override the autonomy concerns for gender-affirming care). Among the autonomy interests, vital in both the context of abortion and gender transition is that "[t]he decision to undergo medical transition, like the decision to undergo an abortion, fundamentally shapes what life you lead and what kind of person you get to be. . . . Wanting to 'be yourself' is a legitimate desire, one that deserves respect and support even if it comes at the cost of marginalization." Id. at 136.

148. Planned Parenthood v. Danforth, 428 U.S. 52, 73–74 (1976) (internal quotation marks omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975)).

That is, restrictions on minors cannot exist for their own sake or for the simple fact of minority; rather, those restrictions must be justifiable. In *Bellotti*, the court found "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[149] The Court examined whether any of these three reasons might justify the restrictions at issue and found no permissible justification.[150] The analysis that follows, infra Part III, takes up these three reasons and the question of whether gender transition is similar enough to abortion to justify a result comparable to *Bellotti* and *Danforth*—that is, whether "the abortion decision" is not unique, but one of a class of decisions that justify greater deference to the rights and needs of minors than they are typically afforded.[151]

III. TOWARD A CHILD'S RIGHT TO GENDER-AFFIRMING CARE

This Part, following from the above discussion, lays out a different paradigm for thinking about children's rights and their exercise of them in the context of gender-affirming care.

A. *The Right, Simply*

Children, as explained above, develop a sense of their own genders amidst a field of conforming and counterconforming factors.[152] Children, cisgender and transgender, internally develop understandings of their own gender and, where safe to do so, will express this gender identity. The

149. *Bellotti*, 443 U.S. at 634–39.

150. See id. It is noteworthy that the analysis of all three factors only described negative cases where a child's preferences could be rightfully subordinated to that of the state. Arguably, *Bellotti* continued its vulnerability analysis when the Court considered the minor's "probable education, employment skills, financial resources, and emotional maturity" in concluding that "unwanted motherhood may be exceptionally burdensome for a minor," id. at 642, and clarified its stance on parental interests in noting that parents have no more right to an absolute veto over a minor's abortion than any other third party would. Id. at 654.

In *Danforth*, the Court offered a more thorough analysis of the parental interest, questioning whether the statute there might provide for the parental interest in the "safeguarding of the family unit and of parental authority" but concluded that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." 428 U.S. at 75.

151. Admittedly, broader normative questions continue to hang in the air unanswered: First, why it is that children's needs and rights are presumptively subordinate to those of their parents? Second, do lawmakers' understanding of minors' competency match the actual competency of those minors? The answer to the second question, at least, is a tentative no, since the law's general character forces it to assume a certain average competency for minors, which some minors will exceed and of which others will fall short. A fuller response is beyond the scope of this short Note, however.

152. See supra section I.C.

difference in their experiences, socially speaking, will be whether parents and other institutional actors accept the gender identity of the child, and whether it will be safe for a child to express their gender. This Note argues that the right to gender-affirming care amounts to the right to live in an environment where, first, it is safe for children to express their gender, and second, children are afforded the capacity to live comfortably in their developing gender expression.

Who should have this right? At present, cis-identified children both presume to have this right and are free to exercise it. Despite parents' concerns that children are being urged into trans identification,[153] the reality is that children are witnessing and experiencing counterconforming factors that illuminate the multiple possibilities for gender and gender expression and express that gender is not immutable but instead an orientation to the world that one cultivates.[154] The description of a child's entitlement to safe gender expression and development as a right speaks to its universal character, as well as its basis in the law.

Where can this right come from? In reading *Bellotti* and *Danforth* as primarily about age discrimination and the relationship between parents and children, there are several bodies of law from which the right to gender-affirming care might arise. One might be the common law tradition; as discussed in the context of Blackstone and the Restatement, the common law has historically required parents to provide for their children, not only in terms of maintenance but also in terms of education and protection.[155] Parents can also become liable when they fail to provide necessary medical care to children.[156] Regardless of whether a court finds that gender-affirming care falls into one of the above categories of education, protection, or medical care, a court may also find that the harms accruing to minors who are denied gender affirmation[157] might trigger a comparable duty of protection and care. Alternatively, a court might look to *Danforth*, finding that in any jurisdiction where adults are permitted to transition, minors must have the right to do the same so long as they are able to demonstrate competence.[158] This is particularly justifiable on prudential grounds, since denying access to puberty blockers can lead to changes that require surgical intervention to reverse,[159] whereas the effects of puberty blockers are reversible, making it more

153. See Baker, supra note 41, and accompanying text.

154. See supra notes 43–50 and accompanying text.

155. See supra notes 13, 117–119 and accompanying text.

156. See Restatement of the Law, Children & the Law § 2.25 (Am. L. Inst. Tentative Draft No. 6, 2022).

157. See supra section II.B.

158. See infra section III.C.

159. See Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation, Pediatrics, Feb. 2020, e20191725, at 89, 92 [hereinafter Turban et al., Pubertal Suppression].

prudent to permit access. While *Dobbs*'s analysis casts doubt on the "right of privacy" that *Danforth* envisions,[160] *Danforth* and *Bellotti* are more properly understood as examining the question of what independent rights parents might have on which to ground a veto to transition (a question *Danforth* answered in the abortion context with "none") and what kinds of justifications might allow age discrimination when it comes to definitional medical care.[161]

B. *Addressing Justifications for Age Discrimination as Laid Out in* Bellotti

Two key concerns broadly animate objections to minors' rights to gender-affirming care—elements mapping onto the vulnerability and decisionmaking capacity concerns elaborated in *Bellotti*. First, there are concerns about comorbidities.[162] Those concerns are meaningful: One meta-analysis found that 21% of the sample of a gender identity clinic's patients had an anxiety disorder, 7.8% had co-occurring Autism Spectrum Disorder (ASD), and "9.3% of the sample had attempted suicide."[163] But that same meta-analysis reflected the consensus and reality that at least some of the psychiatric conditions (such as anxiety and depression) that develop among trans youth are the result of gender dysphoria or related social difficulties.[164] Medical consensus also indicates that treating gender dysphoria with puberty blockers or cross-sex hormone therapy improves mental health outlooks for patients,[165] and clinical practice guidelines counsel against interrupting gender dysphoria treatment when mental health changes occur.[166]

A second concern is that minors might change their mind about their gender. Indeed, the literature on "desisters" or "detransitioners" suggests that some percentage of trans-identified youth will not ultimately become

160. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267–68 (2022) (arguing that the Court's holdings invoking privacy as a rationale for the right to have an abortion had "conflated two very different meanings of the term" and cited cases that "involved personal decisions that were obviously very, very far afield.").

161. See supra notes 148–150. While *Bellotti* offers three possibilities, these do not generally apply in the question of gender-affirming care. See infra section III.B.

162. See, e.g., Baker, supra note 41 (noting that the son of one family had been previously diagnosed "as being on the autism spectrum, as well as with attention deficit hyperactivity disorder, PTSD and anxiety" and that his mother "said she resented the fact that the school had made her feel like a bad parent").

163. Tabitha Frew, Clare Watsford & Iain Walker, Gender Dysphoria and Psychiatric Comorbidities in Childhood: A Systematic Review, 73 Austl. J. Psych. 255, 259 (2021).

164. Id.

165. Brett Dolotina & Jack L. Turban, A Multipronged, Evidence-Based Approach to Improving Mental Health Among Transgender and Gender-Diverse Youth, JAMA Network Open, Feb. 25, 2022, at 1, 1.

166. See SOC8, supra note 68, at S126.

trans adults.[167] There are three reasons that this concern should not act as an obstacle to minors' access to gender-affirming care.

First, as defined in this Note and elsewhere in the literature, gender-affirming care refers to the broad set of interventions that allow individuals to live comfortably in the gender that they identify with.[168] While medical interventions such as puberty blockers, cross-sex hormone therapy, and gender-affirmation surgery are important elements of gender-affirming care, they are only components of the broader ethos, which emphasizes an individual's ability to self-determine their gender through open-ended reflection.[169] Some state bans on gender-affirming care target nonmedical interventions, such as changing names or pronouns or using bathrooms

167. While for ethical reasons it is preferable not to cite directly to the literature on detransition, one might find purported rates for regret or detransition in meta-analyses such as Rowan Hildebrand-Chupp, More Than 'Canaries in the Gender Coal Mine': A Transfeminist Approach to Research on Detransition, 68 Socio. Rev. 800, 805–06 (2020); see also Florence Ashley, The Clinical Irrelevance of "Desistance" Research for Transgender and Gender Creative Youth, 9 Psych. Sexual Orientation & Gender Diversity 387, 391 (2022) (arguing that "desistance" research should not underdetermine the possibility of providing gender-affirming care to trans youth).

168. See Matouk & Wald, supra note 9 ("Gender-affirming care is highly individualized and focuses on the needs of each individual by including psychoeducation about gender and sexuality (appropriate to age and developmental level), parental and family support, social interventions, and gender-affirming medical interventions.").

169. See supra notes 42–49 and accompanying text; see also Currah, supra note 37, at 11–13 (citing Eve Kosofsky Sedgwick, Epistemology of the Closet 1 (1st ed. 1990)). Currah argues that while the minoritizing view, according to Eve Sedgwick, "would understand state rules for sex classification as harmful only to a very small and distinct population of people," according to which the "policing of sex definitions does not pose problems for the vast majority of people: those who develop and hold fast throughout their life course to a gender identity that conforms to expectations for the sex stamped on their birth certificate." Currah, supra note 37, at 11. A more universalizing view would recognize that "the barriers to sex reclassification that transgender people face reinforce the credibility of sex as a metric of identity for everyone," id. at 12, a fact laid bare in recent years by racist transphobia directed at several cis women Olympic athletes, including Imane Khelif and Caster Semenya. See, e.g., Gerald Imray, The Scrutiny Khelif and Lin Face Over Their Sex at the Olympics Is a Repeating Problem in Sports, AP News, https://apnews.com/article/olympics-2024-gender-sports-khelif-lin-semenya-b0075988d5e67b0e5ccd7ad284e5033c [https://perma.cc/9THE-2FU9] (last updated Aug. 9, 2024) ("Female athletes of color have historically faced disproportionate scrutiny and discrimination when it comes to sex testing . . . ."); see also Claire Rudy Foster, Opinion, White Fragility & the Ruling Against Caster Semenya, Allure (Sep. 11, 2020) https://www.allure.com/story/caster-semenya-ruling-op-ed (on file with the *Columbia Law Review*) ("'These kind of people [like Caster Semenya] should not run with us,' Elisa Cusma of Italy . . . said in a post-race interview with Italian journalists . . . . 'For me, she's not a woman. She's a man.'"). The resonance of the language of racism ("these kind of people") with transphobic language that underdetermines gender only affirms the work of scholars of race and gender that have pointed at the co-constitution of gender binarism and whiteness; for examples, see Marquis Bey, Anarcho-Blackness: Notes Toward a Black Anarchism 92–114 (2020); Sally Markowitz, The Gender Binary and the Invention of Race 47–87 (2024).

that accord with an individual's gender identity.[170] Bans on these nonmedical forms of gender-affirming care are likely to do three things: intimidate and harass non-cis youth and supportive families,[171] create significant psychological and physical distress for non-cis youth,[172] and foster an environment that sanctions increasing hostility toward gender counterconformity.[173] Concerns over detransition in the context of medical interventions have no prudential bearing on social forms of gender-affirming care.

Second, the primary form of gender-affirming care for minors aged roughly nine to sixteen is puberty blockers,[174] a medical intervention that has been used for cis and trans youth and is reversible; discontinuing puberty blockers will typically allow for the initiation of endogenous puberty (when cross-sex hormones are not used) or for the initiation of exogenous puberty (when cross-sex hormones are used for treatment).[175]

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170. See, e.g., Fla. Stat. Ann. § 1000.071 (West 2024) (declaring sex an immutable biological trait and banning the use of gender pronouns that do not correspond to a person's sex); see also id. § 553.865(3)(l), 11(b) (defining sex as "classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role" and making it a misdemeanor for a person of one sex to enter the facility of another sex in public buildings); Ind. Code Ann. § 20-33-7.5-2 (West 2024) (requiring schools to notify parents when a student wishes to change their name or pronouns). Parental notification constrains gender counterconformity by preventing students from being able to meaningfully interrogate what it might feel like, for example, to be referred to with a different name or different pronouns, since it immediately triggers parental notification (and forces students into making decisions without having enough experience to know if shifting identities will stick). While it does not amount to a complete ban like the Florida statute, statutes like Indiana's create a veto power and are likely to create fractures between parents and children, an interest that discouraged the Court in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (noting that it is not likely that "veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure").

171. See Roberto L. Abreu, Jules P. Sostre, Kirsten A. Gonzalez, Gabriel M. Lockett, Em Matsuno & Della V. Mosley, Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures' Perspective, 36 J. Fam. Psych. 643, 649 (2022) ("Participants expressed concern over how legalized discrimination would increase anti-TGD sentiment, violence, and further invalidate the existence of TGD people everywhere.").

172. See id. at 647–48 ("Thirty-four parental figures discussed how these law and bills would decrease the safety of TGD youth and the TGD community overall such as increasing exposure to antitransgender sentiment, violence, and discrimination.").

173. See id. Like the use of counterconforming factors above, this term indicates only resistance to foreclosing possibilities in gender identity and expression.

174. See SOC8, supra note 68, at S112–14 (encouraging physicians to prescribe gonadotropin releasing hormone agonists for adolescents at Tanner Stage 2). For descriptions of the Tanner Stages and their rough corresponding ages, see generally Jean Claude A. Guidi & Amit Sapra, Physiology, Sexual Maturity Rating, *in* StatPearls (2022), https://www.ncbi.nlm.nih.gov/books/NBK551691/ [https://perma.cc/22HH-2ZHA] (outlining the Sexual Maturity Rating's stages throughout puberty and its implications for sexual development).

175. See Turban et al., Pubertal Suppression, supra note 159, at 90 ("GnRHa therapy is unique among gender-affirming medical interventions in that the resultant pubertal

By contrast, not using puberty blockers and allowing endogenous puberty to proceed leads to pronounced and irreversible changes in "bone structure, voice changes, breast development, and body hair growth" that are likely to worsen minors' feelings of gender dysmorphia and increase psychological distress.[176] In light of this, given the irreversibility of endogenous puberty versus the reversibility of puberty-blocking treatment—in conjunction with the distress that endogenous puberty can create versus the reduced risk of psychological distress when puberty-blocking treatment is offered[177]—puberty blockers clearly win out on balance, even if youth later decide to discontinue puberty blockers and experience endogenous puberty unabated. This constitutes a prudential rationale for allowing easy, rights-based access to puberty-blocking treatment.

Finally, there are normative concerns as well. "[A]ccess to irreversible endogenous puberty requires no evaluation and is available to adolescents who have never given the matter any thought at all," as bioethicists B.R. George and Danielle Wenner have argued.[178] By contrast, the Standards of Care recommend adolescents receive hormone therapy only when an adolescent's "experience of gender diversity/incongruence is marked and sustained over time" and only after undergoing a "comprehensive biopsychosocial assessment," treatment of mental health concerns, and counseling about fertility and its preservation.[179] While it might be partially justified on the grounds that exogenous puberty is a medical intervention and requires patients to give informed consent, the exceptionally high bar needed for access to puberty blockers alone exceeds informed consent, and creates an ethically problematic double standard with endogenous puberty.[180] Concern over future detransition also ignores the circularity that at least partially underpins many detransitioners' experiences: Large pluralities of detransitioners cited pressure from family members, difficulties finding employment, and social stigma as reasons for

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suppression is fully reversible, with the resumption of endogenous puberty after their discontinuation.").

176. Id. at 92 ("[W]hen comparing those who received pubertal suppression with those who did not, receiving pubertal suppression was associated with decreased odds of past-year suicidal ideation, lifetime suicidal ideation, and past-month severe psychological distress." (citation omitted)).

177. See id. at 5 ("Treatment with pubertal suppression among those who wanted it was associated with lower odds of lifetime suicidal ideation when compared with those who wanted pubertal suppression but did not receive it.").

178. B.R. George & Danielle M. Wenner, Puberty-Blocking Treatment and the Rights of Bad Candidates, Am. J. Bioethics, Feb. 2019, at 80, 81.

179. SOC8, supra note 173, at S48, S50, S60.

180. See Ashley, Adolescent Medical Transition Is Ethical, supra note 143, at 131–34 ("Applying different standards to comparable situations is a paradigmatic form of injustice, violating the formal principle of justice that likes must be treated alike." (citing Stefan Gosepath, Equality, Stan. Encyc. Phil. (Edward N. Zalta ed., Mar. 27, 2001), https://plato.stanford.edu/entries/equality/ (on file with the *Columbia Law Review*) (last updated Apr. 26, 2021))).

detransition. A large majority (82.5%) cited at least one external factor as contributing to their decision to detransition, compared to only 15.9% of individuals who cited at least one internal factor such as uncertainty around gender.[181] That is, detransition happens largely because transitioning is so difficult, not necessarily because gender dysphoria is not a real felt problem. The authors of that study concluded that so-called desisters may seek gender affirmation at some point in the future, implicitly in a future that is less trans-antagonistic.[182]

On these bases, then, a state's prudential and normative analyses would weigh against bans on gender-affirming care for minors.

C. *Minors and Competent Decisionmaking*

If the above section addresses the question of whether a state should prevent a family unit from accessing gender-affirming care, one question remains about what to do when parents and children disagree: When a child wants to transition, but the parents disagree, what should the outcome be? In Statement 6.12.c, the World Professional Association for Transgender Health's Standards of Care provide that adolescents must demonstrate "the emotional and cognitive maturity required to provide informed consent/assent" for any medical interventions (puberty blockers, cross-sex hormone therapy, surgery where indicated).[183] Decisionmaking capacity as described in the Standards of Care draws on the work of Paul Appelbaum and Petronella Grootens-Wiegers, requiring (1) the capacity to communicate and express a choice; (2) the ability to understand the information provided about a treatment; (3) the ability to identify and weigh risks and benefits; and (4) the ability to appreciate the nature and relevance of different options to the situation at hand.[184] While this might allow for assessment of capacity tout court, it doesn't necessarily provide a framework for assessing the particular decisionmaking capacities needed to consent to gender-affirming care. Florence Ashley suggests the following criteria: "(1) the patient is guided by their gender subjectivity and other values, cares, and commitments; (2) they act based on reasons prescribed by their gender subjectivity, values, cares, and commitments; (3) they are open to seeing reasons to the contrary."[185] That is, an individual should be able to connect the particular gender-affirming medical intervention to their desire to live as a particular gender and should be able to see and understand (though it is not necessary to accept)

181. Turban et al., Factors Leading to "Detransition", supra note 60, at 277.

182. Id. at 277.

183. SOC8, supra note 68, at S48–50, S61.

184. Id.; Petronella Grootens-Wiegers, Irma M. Hein, Jos M. van den Broek & Martine C. de Vries, Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects, 17 BMC Pediatrics, no. 120, 2017, at 1, 3–4.

185. Florence Ashley, Youth Should Decide: The Principle of Subsidiarity in Paediatric Transgender Healthcare, 49 J. Med. Ethics 110, 112 (2023).

the reasons weighing against an intervention. Neither of these frameworks is prophylactic against regret, but that is in the nature of decisionmaking itself, nor are mistakes the exclusive province of adults. To the extent that any adult might regret a tattoo or piercing, an abortion or having children, transitioning or not, it is not the role of government to protect even children from the consequences of their decisions.

Here, *Danforth* becomes useful again. Like abortion, the decision to access gender-affirming medical interventions is a form of "definitional medical care."[186] It is fundamentally a question of identity—does an adolescent wish to live as a pregnant person or not? Does an adolescent wish to be a mother? Does an adolescent wish to live as a cisgender boy or a transgender girl? If a minor is competent to become pregnant (presumably, through consensual sex), the Court in *Danforth* suggested, that minor must be afforded a right to privacy that allows them to make decisions without the input of anyone but their physician.[187] Similarly, if a minor has developed the capacity to articulate their gender identity and wishes to transition guided by their own gender subjectivity, that minor should be permitted to initiate the process of arresting puberty in like fashion, through consultation with their physician.

This leads even well-intentioned jurists to a quagmire: If the trans minor should, as in *Bellotti* and its successive statutes, go to court to seek a judicial bypass to secure either puberty-blocking or cross-sex hormone treatment, how does this not merely allow the state to stand in and override parental decisionmaking? The key in *Bellotti* was that courts could answer up to two questions: First, was the minor competent to make the decision themselves? If yes, then the court had no further right beyond affirming the minor's decision. If the minor was not competent to make that decision, then the court was to assess whether an abortion was in the best interests of the minor. Yet, drawing on the above framework for capacity developed by Ashley, this Note argues that only the first question need be apposite. If a minor has the capacity to articulate their gender subjectivity and their desire to either arrest puberty or go on cross-sex hormone therapy and then goes to court in search of a judicial bypass, the minor is likely competent enough to make the decision in consultation with their physician and without third-party input, though a court might record the consideration for procedure's sake.

If a child has secured a judicial bypass, parents may object and may even make life difficult for their trans child—parents may kick their children out of their homes (as they already do)[188] or otherwise harm their

186. See Ashley, Adolescent Medical Transition Is Ethical, supra note 143, at 133 (internal quotation marks omitted).

187. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (holding that it is unlawful to require a "special-consent provision" as a prerequisite for a minor seeking an abortion).

188. The Trevor Project, supra note 105, at 10, 12 (showing that trans and nonbinary youth experience higher rates of homelessness and housing insecurity than their cis peers,

child (as they already do).[189] But a minor who opts to pursue gender-affirming medical and social interventions in the face of these risks has already demonstrated the depth of their commitment to living in their gender. As in *Danforth*, it does not strengthen the family or parental rights to prevent a minor from pursuing puberty blockers or gender transition; the very transness of the child already has fractured the family structure.[190]

CONCLUSION

Legislatures, courts, and media outlets have manufactured legal and scientific uncertainty around gender-affirming care. This is the result of a phobic frame that vanishes the perspectives of minors and reduces decisionmakers' confidence. Gender-affirming care bans for minors should not be understood primarily as forms of sex discrimination, but instead as a form of age discrimination; governed properly by precedent, such age discrimination cannot stand. The solution, necessarily, must question and overturn assumptions about decisionmaking competency for minors, rather than relying on an equal protection or a sex discrimination analysis like that in *Bostock*. This Note argues that courts need only inquire into whether a minor can articulate their gender subjectivity and understand the consequences of gender-affirming treatment in allowing for judicial bypass of parental opposition to minors receiving gender-affirming care.

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and that significant percentages of LGBTQ+ youth attribute their homelessness or insecurity to being kicked out by parents or mistreatment/fear of mistreatment by parents related to their identity).

189. See Brian C. Thoma, Taylor L. Rezeppa, Sophia Choukas-Bradley, Rachel H. Salk & Michael P. Marshal, Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents, Pediatrics, Aug. 2021, at 22, 27 (finding trans adolescents "are more likely to report psychological, physical, and sexual abuse during childhood compared with heterosexual" cisgender adolescents).

190. This is, of course, a paraphrase of the observation in *Danforth* that "the very existence of the pregnancy already has fractured the family structure." 428 U.S. at 75.