Dissecting Anti-Trans Legislation's Relationship with Transitioning: A Surgical Analysis

By Leon Trey Garcia

Given the recent reactionary backlash to the building social acceptance of transgender people, the practice of transitioning necessitates a critical analysis of how it structures gender norms. While medical transitioning would open a space for those who wish to break the binarizing logic of sex and gender, gatekeeping measures have proven to be problematic, as it maintains a cisnormativity and heteronormativity that many transgender people were and are wishing to break. In this paper, I deconstruct how the essence of sex is maintained by the field of medicine and offer a change to the process of transitioning, guided by the opinion of many in the field of medicine.

I. Introduction

While liberal feminist thought touts a distinction between gender and sex, one that distinguishes, respectively, between the "social" and "natural" aspect of one's identity, there still remains social markings maintained to uphold the view of sex as a "natural kind." Alyssa Ney

defines natural kind as "a group of objects in which each member of the group shares some objective, mind-independent similarity,"[1] while all members of a social kind share "some similarity based on existing social practices, institutions, or conventions."[2] When it comes to sex, what makes one "naturally" a woman or man? Is it the body or the chromosomes one has? Does one require a certain level of estrogen or testosterone in their bloodstream before becoming a sex? Even as one tries to identify a different way to describe the phenomenon of how individuals become gendered, there is a core issue that remains in the relationship between gender and sex in the paradigm of liberal feminism. The "natural" female and male sex signify universals that shape how gender should be performed and constructed. One maintains that the male gender must conform in such a way to be in line with what is standard for the male sex. In this paper, I examine how the essence of sex is constructed by way of analyzing recent anti-trans(gender) legislation in two states (Idaho and Arkansas) and how the justifications of those laws espouse and maintain underpinnings of heteronormativity and cisnormativity. These underpinnings ultimately reveal that the markings of sex are socially contingent and, as Judith Butler says, "sex, by definition, will be shown to have been gender all along."[3]

II. Idaho

In Idaho, the House of Representatives garnered national attention for passing H.B. 675, which punished parents and medical practitioners who aided in providing children with gender-affirming healthcare by codifying such care as child abuse and making it prosecutable.[4] The justification given for such a law is that children are too young to determine their own gender identity. Within this

[1] Alyssa Ney. *Metaphysics: An Introduction* (New York, Routledge 2014), 261.

[2] Ney, *Metaphysics*, 262.

[3] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990), 11.

[4] House Bill No. 675, 66th Leg., 2nd Sess. (Idaho 2022), https://legislature.idaho.gov/sessioninfo/billbookmark/?yr=2022&bn=H0675.

argument is the cisnormative justification that one should default to the gender that conforms with the sex they were assigned at birth. It should be noted, however, that there is an inherent understanding behind the justification for such a bill that gender and sex are both natural kinds. From an American conservative view, gender and sex are, in their essence, interchangeable; there is no distinction to be made. As a result, one defends the bill on the assumption that children should maintain the gender identity that conforms to the sex they were assigned at birth and go through puberty. One was born a boy, so he must become a man.

Recently, Idaho Senate Republicans backed down from voting on the bill, maintaining a position that while they do still oppose gender-affirming medical treatment for children, they " believe in parents' rights and that the best decisions regarding medical treatment options for children are made by parents, with the benefit of their physician's advice and expertise."[5] In their statement, caucusing Republican Senators recognize the fact the Idaho Medical Association has not recommended sex reassignment surgery (SRS) for minors and that SRS has never taken place in Idaho. SRS for minors is not practiced at a national level and, as far as I have researched, there has not been a single example of a minor undergoing SRS cited by proponents of bills similar to H.B. 675.

Although it is certainly reassuring that anti-trans politicians have backed off in this specific instance and deferred to medical practitioners, the discourse surrounding gender-affirming healthcare ignores the days, months, and years spent by trans children questioning their own identity. American conservatives seem to imagine that children simply wake up one day and say, "Today, I want to change my gender!" and then immediately go to the doctor and start injecting hormones before the day is over. On the contrary, as I discuss in more detail below, transitioning is a very rigorous process that requires strict and constant evaluation by medical professionals.

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[5] Mark Harris, "Idaho Senate Republicans Statement on House Bill 675," *Idaho Capital Sun*, March 15, 2022, https://idahocapitalsun.com/wp-content/uploads/2022/03/Idaho-Senate-Republicans-Statement-o n-HB-675-4.pdf.

III. Arkansas

In 2021, Arkansas Governor, Asa Hutchinson, received praise for vetoing legislation (H.B. 1570), passed by the Arkansas State Senate and House and enacted over Hutchinson's veto, that banned children from seeking and receiving gender-affirming care,[6] similar to H.B. 675 in Idaho. Hutchinson justified his veto by denying the state's right to dictate medical care. While Hutchinson vetoed the most recent anti-trans legislation, he previously signed laws that prevented trans women and girls from competing in sports and allowed doctors to refuse gender-affirming treatment. One could argue that Hutchinson vetoed H.B. 1570 merely to save face and receive some good press since the Senate overrode the veto anyway. But even if that was the case, there still is value in looking into his own justification for the veto. Hutchinson writes in the *Washington Post*: "H.B. 1570 puts the state as the definitive oracle of medical care, overriding parents, patients and health-care experts. While in some instances the state must act to protect life, the state should not presume to jump into the middle of every medical, human and ethical issue. This would be—and is—a vast government overreach."[7] In a later NPR interview with Ari Shapiro, Hutchinson notably says, "Let's give some more deference to the medical professionals." [8] In contrast with his party colleagues, Hutchinson passes on the responsibility of controlling the healthcare trans people can access rather than having the state directly determine healthcare outcomes.

A shift away from the state directly dictating how one should perform their own gender allows for social and cultural influences to

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[6] House Bill No. 1570, 93rd Leg., Reg. Sess. (Arkansas 2021).

[7] Asa Hutchinson, "Why I vetoed my party's bill restricting health care for transgender youth," *Washington Post*, April 8, 2021, https://www.washingtonpost.com/opinions/asa-hutchinson-veto-transgender-health-bill-youth/2021/04/08/990c43f4-9892-11eb-962b-78c1d8228819_story.html.

[8] Asa Hutchinson, "Gov. Asa Hutchinson On Vetoing A Bill Banning Gender-Affirming Care For Trans Youth," interview by Ari Shapiro, *All Things Considered*, NPR, April 6, 2021. Audio, 4:13. https://www.npr.org/2021/04/06/984829976/gov-asa-hutchinson-on-vetoing-a-bill-banning-gender-affirming-care-for-trans-you.

shape how medical practitioners administer healthcare as it relates to how sex is defined in medicine. While medicine recognizes sex as a natural kind, by using particular physiological markers to identify it, there are social aspects to gender that exist independent of natural physiological features that one can shape to influence their gender identity. One can use medicine to transition and change their bodily gender performance to better conform with their gender identity. As Simone de Beauvoir famously wrote, "One is not born, but rather becomes, a woman."[9] Beauvoir's iconic quote affirms that, while the female sex exists, social processes create the subject, "woman." Hutchinson does not maintain a sophisticated liberal feminist view on gender; still, his justification for vetoing H.B. 1570 opens space for crafting a social kind of gender, while maintaining the view that sex is biologically determined as a natural kind.

IV. Medical Gatekeeping

While the current framing of medical transitioning is called "gender-affirming," there is history and justification behind the practice; the terms used at the time provide insight into how sex is still socially conceived. A prime example would be the term "transsexual," now considered a derogatory way to refer to a trans person. This word maintains the assumption that transitioning is a process that changes the sex, not gender, of a person. While one could argue that the distinction between gender and sex was not conceptualized at the time of the coining of the term, people who transitioned were understood as being a different sex and thus treated as such. For example, to this day, you can change the "sex" on your government identification.

Transitioning was promoted as changing one's sex. Medical gatekeeping was a functional necessity to maintain the legitimacy of the process.

> In the 1960s, the German-born endocrinologist Harry Benjamin became the foremost doctor in the United States helping people transition, but the work was so controversial that it threatened his reputation. Dr. Benjamin and others like him realized they would

[9] Simone de Beauvoir, *The Second Sex*, trans. by H.M. Parshley (New York: Alfred A. Knopf, 1993), 281.

> need guidelines, ways of ascertaining who was legitimately trans, both to shore up their authority and to guard themselves against the specter of the fraudulent transgender person, the one who might be trying to trick them, or who was simply deluded.[10]

Without any significant barriers, the practice would have been quickly outlawed during the mid-twentieth century.

What steps must one take if they hope to express and perform their gender differently from the gendered expectations of the sex they were assigned at birth? For instance, what must one assigned male at birth (AMAB) do in order to become a woman? In many cases of transitioning, one must first pass a "real-life test" or "real-life experience:"

> In order to be conservative and avoid harm, most transgender hormone guidelines in the past suggested that transgender individuals undergo a 'real-life test' living in chosen gender prior to hormone therapy. Undergoing a 'real-life test' was thought to ensure that patients would be prepared for the social transition to desired gender.[11]

The first step one must take in performing gender incongruent with that assigned at birth is regulating their own image. The most essential part of performing gender is maintaining an image projected socially before one can even hope to receive any further intervention. The following step is hormone replacement therapy. In the case of AMAB, one must take estrogen to reconfigure their own physiology. There should be physical attributes and markers on the body that allow a person to identify the subject as a woman. Only after one passes the "real-life experience," uses hormone therapy for 12 consecutive months, and is approved by a panel of psychiatrists, are they allowed

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[10] Alex Marzano-Lesnevich, "Who Should Be Allowed to Transition?" *New York Times*, March 4, 2022, https://www.nytimes.com/2022/03/04/opinion/trans-laws-doctors-healthcare.html.

[11] Ivy H. Gardner and Joshua D. Safer, "Progress on the Road to Better Medical Care for Transgender Patients," *Current Opinion in Endocrinology & Diabetes and Obesity* 20, no. 6 (2013): 553-558, doi:10.1097/01.med.0000436188.95351.4d.

to receive SRS.[12] The most serious form of gatekeeping regulates how one experiences and expresses their own sexuality. At the time, the rigorous standards that protected SRS allowed for one to discover one's own sexuality!

The gatekeeping that once maintained the legitimacy of transitioning as a medical practice has transformed gender into a signifier just as rigid as sex. In transitioning, there is a hierarchy of the elements of what constitutes the category of sex. The first step one must take in order to become a sex is the image one presents and performs. Trans people are required to perform their gender without any medical intervention and conform to the already existing gender norms in order to pass. This requirement can notably be problematized when one considers the environment under which trans people must live to be their gender. Those who are not able to pass without any medical intervention face everyday marginalization and discrimination due to their gender identity, all the while facing intense scrutiny from a psychiatrist who can refuse treatment over the slightest indication that their patient does not conform to how a man or woman should behave. The required ongoing psychiatric evaluation also poses a barrier in and of itself against those who are non-binary and do not fall into a clearly defined category. Transitioning as a practice is not free for one to liberate themselves from the socially and culturally imposed norms of gender when one can be denied treatment if they are not "masculine enough" to be a man.

The medical field exacerbates the cisnormativity already present in how people are influenced culturally and socially, especially as children. As one moves towards receiving hormones, there is a pervasive expectation that trans people must live towards embodying the ideal man or woman so they can be seen as legitimate to the psychiatrists evaluating their medical needs. It is no longer simply the image one presents, but also how hormone changes affect their own pattern of behavior that must cleanly fit into the socially defined category of "masculine" or "feminine."

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[12] "Gender Affirmation Surgery and Hormone Therapy," *BlueShield BlueCross of North Carolina*, accessed March 20, 2022, https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender_affirmation_surgery_and_hormone_therapy.pdf.

Lastly, the gatekeeping of SRS works to shape the sexual expression of the subjects produced and deemed worthy of the surgery. As the influence of heteronormative and cisnormative psychiatry regulates how one should present the image of their sex so as to conform to a Western universal of man or woman, there remain underlying influences that shape how the universal man and woman should express their own sexuality as it relates to the "end product" bodies they maintain.

V. Objection

There is certainly a compelling objection to merely doing away with any categorization of sex as a natural aspect of identity based in the idea that natural sex categorization is medically necessary. The argument goes that there are certain types of diseases and conditions that females and males are uniquely susceptible to, such that drawing a distinction, however it may be, can and should be done out of medical necessity. I respond that maintaining such a rigid view of sex, a distinction that codifies difference between man and woman, diminishes the existence of people who are intersex and nonbinary who cannot conform to the binarizing medical classification. Upon accepting the binary conception of sex, the empirical response has been to pathologize those who were not born conforming to such a category. Parents are forced to "choose" what sex they want their child to be. "Choice" implies that sex must be one or the other and that there is no possibility of the binary where one can express an identity worthy of acceptance. There are still social implications that are inherently attached to how one tries to maintain some natural kind of sexual distinction between what is man and what is woman. There may very well be a better way to conceive of a natural kind of sex, but there has empirically been a cisnormative exclusion of people who do not fall strictly into the binarized categories constructed.

VI. Conclusion

While I pose harsh criticisms of how gender-affirming healthcare is practiced, I maintain the importance for trans people to be protected in their own pursuit of transitioning and receiving the medical assistance they need. Progressing past the way the essence of sex has

been constructed reveals its inner workings in how the "ideal" trans person transitions and demonstrates how the same social and cultural norms feminism critiques are still maintained in trying to justify sex, an aspect of identity that is still understood as naturally determined. Critiquing the idealism and normativity of gender is not mutually exclusive with supporting trans and nonbinary people wanting to adopt certain aspects that are seen as "normal" into their own performance of gender! The proper response to heteronormativity and cisnormativity is not to do away with all those aspects; the purpose of critique is to break away from the strict binarizing logic that essentializes gender and sex to only be visible through certain markers. People should be free to generate meaning from those markers for themselves as they perform their own gender! There should be a decoupling between the markers of image, the body, and expression of sexuality from gender.

When it comes to addressing practice, I do not have a comprehensive resolution. However, there have been notable changes for the better made in how transitioning is practiced, such as doing away with the "real-life test." There are some states that do "self-identification" such that one does not need to pass the "real-life test," so long as they see a psychiatrist and get approval after some evaluation.[13] What was not mentioned in the earlier citation from BlueShield BlueCross of North Carolina's policy sheet was that there was a way for patients to avoid doing the real-life test, but they would need "the treating clinician [to] submit information indicating why it would be clinically inappropriate to require the candidate to meet these criteria [of the real-life experience]."[14]

Social and cultural biases of gender still do have a lurking effect within psychiatric evaluation, as doing away with the "real-life test" does not eliminate it entirely. Still, there is progress to be made in helping trans people:

> In addition to promoting resilience by enhancing peer support and other ameliorating assets among affected individuals and communities, interventions, advocacy, and public policy initiatives are needed to confront the social structures (e.g., gender-

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[13] Marzano-Lesnevich, "Who Should Be Allowed to Transition?"

[14] "Gender Affirmation," *BlueCross BlueShield.*

> segregated restrooms and social groups), norms (e.g., gender role expectations), and attitudes (e.g., prejudice in the workplace) that produce minority stress to reduce the high rates of psychological distress found among transgender and other minority populations.[15]

There is no resolution that takes place with the snap of a finger and progress will stifle and stall out if only made through liberal incrementalism; there is an absurdity how Arkansas has allowed one to legally identify as nonbinary while one can readily see the demonization of parents who affirm and support their children in discovering their own gender identity. Homophobia did not vanish in the blink of an eye when the Supreme Court ruled on *Obergefell vs. Hodges*;[16] at best, eliminating anti-trans laws shifts the problem of transphobia from the institutional level to the social and cultural space. Even in the case of Hutchinson's veto, deferring to medical professionals who are free to refuse medical care for trans children still harms them all the same. There are a variety of non-medical measures that can be taken to improve the lives and well-being of those who transition, though it would be beyond the scope of this paper to enumerate each individual step of progress one could take. However, there are actions and steps one can take, at least on an individual level. We must work to build an environment more accepting and affirming of people's own gender identity, while actively confronting our own biases and beliefs about how gender must be performed.

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[15] Walter O. Bockting et al., "Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population," *American Journal of Public Health* 103, no. 5 (2013): 943-951, doi:10.2105/AJPH.2013.301241.

[16] Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al., 576 U.S. 1 (2015).

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Leon Trey Garcia is pursuing a double major in political science and economics with a minor in philosophy. Garcia's interests include 20th-century continental philosophy and Nietzsche.