Gender self-determination as a medical right

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Transgender people face many formal barriers to gender-affirming care, sometimes known as "gatekeeping." Gender-affirming care refers to a wide range of medical interventions that patients pursue to affirm, actualize, or embody their sense of gender. Common forms of gender-affirming care include transition-related surgeries, hormone therapy, puberty blockers, and hair removal. Health care providers may refuse to offer gender-affirming care to transgender patients without an assessment of the person's gender identity or dysphoria. Adolescents may, moreover, need to show that they have experienced gender dysphoria for several years before receiving care and may be denied care until they satisfy a strict age requirement.

I argue that physicians should rethink barriers to gender-affirming care in light of the principle of gender self-determination. By considering gender self-determination as a presumptive right, physicians are more likely to avoid unnecessary barriers to care. This presumption can be rebutted by showing that encroachments are adequately justified under standards detailed later in this article. Presumptive rights contrast with absolute rights, which cannot be rebutted or derogated from.

Being transgender is a matter of diversity, not pathology.[1] When providers create barriers to gender-affirming care, they impair their patients' ability to live out their sense of gender. Not every transgender person wishes to pursue gender-affirming interventions — it is a deeply personal choice — but many do. In Canada, 73% of transgender people want to or have pursued some form of gender-affirming care, and another 16% are unsure.[2] Yet, only 26% of transgender people have received all the gender-affirming care they desire.[2]

Medical autonomy and everyday autonomy

At the heart of medical ethics lies the principle of autonomy, according to which patients must be free to act "in accordance with a self-chosen plan."[3] Autonomy is the reason that patients have a right to refuse care, and it underpins health care providers' duty to properly inform patients so that they can decide whether to accept a proposed treatment. Medical autonomy is, however, asymmetric. Whereas patients have the right to refuse an intervention, medical autonomy does not typically afford them the right to demand a specific intervention from their doctor.[3] Nor does medical autonomy generally prevent providers from imposing discretionary restrictions and conditions on access to care.

Gender-affirming care, however, also engages the principle of gender self-determination, which is related to "everyday" autonomy: a person's right to decide the shape of the life they want to live. Gender is a critical factor in how others refer to you, what facilities you use, whom you date, which peers you have, how others treat you, and which social norms are applied to you. Furthermore, a person's primary and secondary sexual characteristics play a central role in social and sexual intercourse; bodily features influence whether others perceive you as a man, a woman, or nonbinary, or as trans- or cisgender; and having certain body parts also influences your ability to do many things, such as use urinals or have penetrative sex. If you do not feel like your body reflects your sense of gender, you may experience persistent discomfort in everyday life and struggle to flourish in your social or romantic life. Feeling misperceived may also cause you to withdraw from meaningful relationships and can be a source of substantial distress.

Gatekeeping gender-affirming care therefore imposes important limits on liberty, dictating critical aspects of transgender individuals' social, interpersonal, and embodied life. The impact on transgender people of gatekeeping gender-affirming care extends far beyond the medical realm, permeating the deepest reaches and crevices of transgender people's lives and defining their ability to live as themselves.

The principle of gender self-determination

Gender self-determination means that individuals have a right to define, express, and embody their gender identity as they see fit. It is one of the cornerstones of the Yogyakarta Principles, developed in 2006 by leading human rights experts, which state that

> Each person's self-defined … gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. … No one shall be subjected to pressure to conceal, suppress or deny their … gender identity.[4]

The principle of gender self-determination can be derived from and is supported by many long-recognized rights, including the right to free speech,[5] equality,[6] privacy, identity, and dignity, and to live and act with integrity.[7,8] As explained by Loukēs G. Loukaidēs, later of the European Court of Human Rights: "For [someone] to be able to function freely, in the full sense of the term, [they] must have the possibility of self-definition and self-determination: the right to be [oneself]."[9] Gender self-determination is implicitly and explicitly recognized by multiple international actors, including the European Court of Human Rights and the Inter-American Court of Human Rights.[10,11]

Gender self-determination as a medical right

The principle of gender self-determination shapes the ethical obligations of health care providers. Given the impact of gender-affirming care on people's ability to express, embody, and live out their gender in everyday life, a presumptive right to gender-affirming care for transgender people would seem essential to supporting the principle of gender self-determination. Transgender patients are, in this sense, in a special situation that expands the traditional scope of medical autonomy, a reasoning perhaps best expressed in the decision of the European Court of Human Rights in *Van Kück v. Germany*, which explained that "the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in the field of one of the most intimate private-life matters, appears disproportionate."[10]

Medical care often constrains everyday liberty, but there are differences of kind and degree when it comes to gender-affirming care. Gender-affirming care is a way for the person to shape themselves from a gendered perspective, not a means of treating an underlying pathology. If transgender existence is understood, as it should be, in terms of diversity rather than pathology, gender self-determination comes to the fore as a medical right, and approaches to gender-affirming care rooted in a conventional diagnostic-and-cure model seem out of place.[1,8,12] Gender-affirming care can be considered along similar lines as abortion, which is also desired for its own sake and often framed as a right.[6] For additional readings on gender self-determination, see Appendix 1 (available at www.cmaj.ca/lookup/doi/10.1503/cmaj.230935/tab-related-content).

Reconsidering barriers to gender-affirming health care

Gender self-determination is a presumptive right, meaning that it can be outweighed by other considerations. The burden of justifying barriers to care should fall on the health care providers who erect them and not on those seeking care to affirm their gender. A barrier to gender-affirming care would be justified if there were clear and compelling evidence that it prevents harms of sufficiently great magnitude to unambiguously outweigh the barrier's negative impacts on gender self-determination and well-being. The harm that barriers seek to prevent must be sufficiently serious to outweigh individuals' autonomy in defining the most fundamental aspects of their personal identity, bearing in mind also that impairing one's ability to live out one's sense of gender is psychologically and socially harmful. It is important to remember that autonomy includes the right to make bad decisions for oneself. The freedom to make only good decisions would be meaningless.

For illustrative purposes, I wish to briefly touch on 2 common barriers to gender-affirming care: the requirement that adolescents prove several years of gender incongruence and rigid age requirements. The requirement that adolescents experience "several years of persistent gender diversity/incongruence"[12] before initiating hormone therapy or surgery is not grounded in evidence that immediate access to gender-affirming interventions, without waiting several years, is associated with regret or negative mental health outcomes.[12] Similarly, the use of rigid age requirements for certain interventions lacks empirical evidence and does not take into consideration differences in youths' cognitive and emotional maturation. Contemporary understandings of autonomy recognize its gradual development and heterogeneity across the population,[13] an understanding that is recognized in Canadian law under the mature minor doctrine. In the words of the *Convention on the Rights of the Child*, youths' views must be "given due weight in accordance with the age and maturity of the child." This calls for an individualized approach that is incompatible with rigid age lines. In the future, providers should also consider whether there is sufficient evidence justifying requirements for transgender adolescents and adults to prove their gender identity or dysphoria before offering care.[14]

Conclusion

In this article, I have argued that providers of gender-affirming care have an ethical duty to respect the gender self-determination of patients and accordingly bear the burden of justifying the barriers they erect on access to gender-affirming care. Health care providers working with transgender communities should carefully examine their gatekeeping practices to ascertain whether they are justified by clear and compelling evidence and abandon those that cannot meet this justificatory threshold.

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