

# Legal Balance: Where Parental Obligations and Responsibilities Lie in the Current Legal Landscape Concerning Gender-affirming Treatments for Transgender Minors in the United States and the United Kingdom

Fuhong Huang\*

Chinese International School, Hong Kong, Hong Kong

\* Corresponding Author: [huangfuhong101@gmail.com](mailto:huangfuhong101@gmail.com)

**Abstract.** This research paper critically examines the regulatory role of legislation in governing parental responsibility concerning gender-affirming treatments for transgender minors in the United States and the United Kingdom. Drawing on secondary sources, including legal frameworks, human rights conventions, and scholarly articles, the study explores the complex dynamic between state control and parental autonomy in decision-making processes regarding the well-being of transgender minors. Findings reveal a concerning trend in the United States, with an increasing number of states implementing restrictions on gender-affirming care for minors. In contrast, the United Kingdom has made significant strides in transgender rights, yet uncertainties persist regarding their application to minors. Striking the right balance is crucial, as excessive state control may hinder access to vital treatments, jeopardizing the mental health and overall well-being of transgender minors. Conversely, granting unchecked parental autonomy may expose vulnerable youth to potential abuse or future regrets. Thus, the research underscores the necessity of carefully crafted legislation that safeguards the rights and well-being of transgender minors, ensuring decisions are made in their best interests while respecting parental responsibilities. This study contributes to the ongoing discourse on legal frameworks surrounding gender-affirming treatments for transgender minors, highlighting the importance of finding a balanced approach that protects the rights and well-being of this vulnerable population.

**Keywords:** Parental obligations; Transgender minors; Gender-affirming treatments; Parental autonomy; Legal balance.

## 1. Introduction

Gender-affirming treatment, as defined by the World Health Organization, “can include any single or combination of a number of social, psychological, behavioural or medical interventions designed to support and affirm an individual’s gender identity [1].” in the context of transgender minors, these treatments are a cornerstone to their general well-being and development, both physically and mentally. The most common gender-affirming treatments for adolescents and children include hormone therapy, puberty blockers, and gender affirmation therapy. These interventions can alleviate gender dysphoria, defined as “a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity [2].” Gender-affirming treatments have been shown to improve mental health outcomes, increase quality of life, and contribute to better overall self-esteem and social functioning for transgender individuals.

Legislation plays a vital role in defining and regulating parental responsibility regarding gender-affirming treatments for transgender minors. It provides a legal framework to ensure that decisions regarding these treatments are made in the best interest of the child, as is required by many human rights conventions. Legislation is often used to attempt to create a healthy power balance between the parties involved and outline standards of care. It can also address issues related to informed consent, age of consent, and the rights of transgender minors to access appropriate healthcare without undue barriers.

The impact of getting the correct balance of autonomy between the courts, parents, and the child cannot be understated. If the treatments are too state-controlled, parents have been recorded to express fear of worsening mental health and increased risk of suicide for their children, and if there is too much autonomy given to the households, it might subject children to abuse and leave too much room for regret as the children mature [3].

The United States and the United Kingdom have been selected for analysis of current legislation surrounding such a topic as their legal systems are relatively developed and have often spearheaded legal transformations around the world. They hold rather large populations of those who identify as transgender, gender fluid, or non-binary, both averaging at around 2% of the total population [4]. As progressive nations, the US and UK should carefully consider the extent of regulation needed to ensure the well-being and rights of transgender minors in the context of gender-affirming treatments.

## **2. Current Legal Landscape in the United States**

The legal landscape surrounding gender-affirming care, especially around adolescent teens, appears to be getting more and more restrictive. To begin with, it's essential to locate the identification of gender dysphoria. The first instance of gender dysphoria is in the 1980 version of APA's Diagnostic and Statistical Manual of Mental Disorders, which "abandoned the psychodynamic formulations that informed the first two DSM editions and instead adopted a neo-Kraepelian, descriptive, symptom-based framework drawing upon contemporary research findings of the time [5]." This version included the gender identity variation in both children, adolescents, and adults. In future versions, this definition was then revised to mention gender dysphoria by name, classifying them as gender dysphoria in children and gender dysphoria in adolescents and adults respectively. At the same time, the International Statistical Classification of Diseases and Related Health Problems has moved on from the classification of "gender identity disorder" to "gender incongruence of childhood", moving it from the mental disorder section in order to prevent further stigma and prejudice on those that suffer from such a condition. Unfortunately, the US is behind and has not taken such a step to follow the ICD yet [5].

Since 2021, the legislation surrounding Gender Affirmation Care (GAC) has been under constant turmoil and development. This new trend of limiting GAC began with Arkansas' Save Adolescents from Experimentation (SAFE) Act, "making it the first state to introduce a ban on physicians giving hormones or puberty-delaying drugs to anyone with GD/GI under age 18. Physicians who provide such care can lose their professional licenses and be sued for medical malpractice." This seemingly opened the floodgates for similar legislation in other states, with the number of legislations restricting minor access to gender-affirming care having "increased more than five-fold" by 2024 [6]. This results in (as of April 9th 2024) 24 states having implemented legislation/policies that restrict the availability to GAC for the youth, 38% of transgender youths living in a state with such restrictive legislations and policies, as well as 22 states that has since established professional or legal penalties on health care practitioners providing minors with GAC [6].

This general trend of restricting the right to autonomy of transgender youth and their parents is occurring throughout the country, below are some relevant provisions that place restrictions on GAC with relevance to parents at varying degrees.

In 2022, Alabama enacted legislation that criminalized providing some GAC to transgender adolescents and required school staff to reveal the gender identity of transgender youth to their parents. The criminalization of certain GACs to adolescents will increase the difficulty in attaining treatment, particularly for those who were in the process of certain GACs at the time. The revelation of gender identity to parents' hands appears to give more autonomy to parents concerning the child's treatment and lifestyle, however, the conjoined ban on certain GACs means that in the end parents are forced to stop certain GAC treatments for their children. This has caused a lot of backlash, and families have been attempting to appeal the ban [7].

Another such provision passed in 2022 is the criminalization of some gender-affirming medical or surgical care to transgender adolescents in Louisiana. Following in Alabama's footsteps, school staff are prohibited from withholding information concerning minors' gender from parents or legal guardians. Going one step, however, Louisiana created civil liability for providers and parents in violation. This ban has reportedly left trans teens "terrified" of its repercussions and once again there is a call for a greater amount of autonomy by the parents, who are forced to abide by the rules of the courts, showing that a decreased parental autonomy yields negative results for both the child and the parents [8].

In Missouri, the licenses of medical professionals who provide GAC to transgender adolescents are once again threatened. State legislation also established that "parents or guardians who obtain some gender-affirming medical or surgical care for transgender adolescents shall be reported to the state's child welfare division [9]." The threat of taking away medical licenses will make the process of receiving GACs much harder and riskier, ultimately resulting in a much lower number of adolescents receiving the treatments they want. Here there is additional responsibility placed on the parents, but in this case to go against what their child wishes for their wellbeing. This can result in a conflicting and complicated relationship with life-altering consequences.

Finally in Texas, an infamously conservative state, the Governor issued an Executive Directive in 2022 to initiate investigations into parents and medical facilities providing healthcare to transgender adolescents. This executive directive was based on a non-binding interpretation from the attorney general that classified gender-affirming care as child abuse. This extreme directive just emphasizes the already-established point that too little parental control and parental responsibilities placed wrongly can have extremely detrimental effects.

It is also paramount to note that these legislations are part of a larger political extremism and polarisation around perceived 'woke' issues, in this case, transgender care for minors. This climate could be extremely dangerous for those who suffer from such mental conditions and place further stress on them to find help.

### **3. Current Legal Landscape in the United Kingdom**

In terms of the legal landscape regarding transgender rights as a whole in the United Kingdom, below are some key features. An ever-important aspect of transgender rights is the ability to alter legal documents to reflect their preferred gender. In the UK, the ability to change passport and driving licenses to indicate preferred gender has been permitted since at least 1970. In regards to birth certificates, the UK parliament passed the Gender Recognition Act of 2004 after the case of *Goodwin v United Kingdom* (2002) by ECtHR found that the prevention of legal gender change violated the European Convention of Human Rights. In terms of the legal recognition of marriage involving transgender persons, the process has been historically complicated. The ruling of *Corbett v Corbett* (1970) led to the conclusion that marriage depended on the couple's biological gender from birth, and if they were not opposites, "the so-called marriage was void" [10]. This ruling was overruled in 2013 in conjunction with the introduction of same-sex marriage, meaning spouses were legally permitted to display their preferred gender legally without requiring a divorce, the only exception of which is Northern Ireland, which changed its laws at a later date.

With regards to anti-discrimination measures, they have existed since 1999 through The Sex Discrimination (Gender Reassignment) Regulations (1999) which were an extension to the existing Sex Discrimination Act. This specific regulation made it unlawful to engage in discrimination based on gender reassignment, but this was limited to the realms of employment and vocational training. Transgender rights were then further developed by the Equality Act (2010), which included Gender reassignment as a protected characteristic, seen from the extract below:

A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex [11].

There are issues, however, concerning this piece of landmark legislation in regard to minors. Critics claim that “no binding case-law whatsoever exists which applies such an expansive definition of what is meant by a ‘proposal to undergo gender reassignment’ as to include young children” and that it is difficult for an “adolescent brain” to hold the same adult capacity for risk assessment [12].

Moving on from this wide landscape view, the legal obligations of parents around minors' gender affirmation process require a more narrow scope. To begin with, the United Kingdom holds an obligation to respect the United Nation's Convention on the Rights of the Child in its legislation surrounding the regulation of parental control. The convention states that the state “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” to act in the best interests of the child as a primary consideration [13].

Proceeding to the narrower issue of puberty blockers, which are an essential part of minors' transition process and a topic of heated debate in recent years, there are a few landmark cases worth analyzing. The first, and widely considered the most important, is the case of *Bell v Tavistock*, which on appeal was decided that “it was for clinicians rather than the court to decide on competence” of the minors to consent to puberty blockers. However, up until March 2021, when the High Court ruled in the separate case of *AB v CD* and others that parents were allowed to consent to their child receiving puberty blockers, a judge's approval was needed to attain them. Another twist in legislation and policy development occurred in early 2024, when the NHS made an announcement stating that it would discontinue the prescription of puberty blockers to minors for non-clinical research trial purposes. However, those who were already undergoing puberty-blocking treatment through NHS England will be allowed to finish their treatment process. This decision was based on the rationale that there is currently “not enough evidence to support the safety or clinical effectiveness” of puberty-suppressing hormones [14]. This new process is part of a larger trend of a backward step in autonomy in terms of gender-affirming treatments with regard to minors, taking away the power from parents and children alike as a greater acknowledgment of the impact gender affirmation has on a minor's life.

For a further understanding of an adolescent's ability to make personal decisions with regard to medicare, the standard test would be the “Gillick Competency” test. This standard was formed in 1985 based on *Gillick v West Norfolk and Wisbech Area Health Authority*, a judicial decision from the House of Lords, making it a binding case-law. The theory behind this test, as explained by the widely considered creator of the test Lord Scarman, is that “the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed [15].” It is important to understand the ruling is not meant for the interpretation that the conflict between parental rights and a minor's autonomy are black and white but a scale; with parental authority diminishing as a child gains maturity.

Finally, regarding the culture around transgender healthcare in the UK, the general public appears to be split on multiple issues surrounding the topic, and a general consensus appears to be opposed to the continued development of transgender rights [16].

#### **4. Comparative Analysis and Recommendations**

The key difference between the current legislative landscape is most obviously the legal system under which they operate. The United States provides more room under the federal government for states to set their own legislations and provisions. This in conjunction with the current political environment has caused its policies and laws to be more extreme, leaving less space for versatility and personalized care, which is extremely important in the case of GACs. However, the legal approach of the United

States leaves a wide range of legislation, which can potentially benefit those who would prefer to live under laws that align with their personal values. In the case of the United Kingdom, its judicial system can only interpret and apply laws, meaning its core legal values will be more consistent throughout the country. This means that individual communities could not amend their laws to fit the wishes of the community, increasing equality but lowering versatility, which could be argued is good for the transgender community which requires protection. The UK, however, lacks comprehensive eligibility in certain aspects of GACs, including puberty blockers, as they have recently realized that their principles did not align with the statistics.

Recommendations for the United States are to provide a threshold of care for transgender minors at a federal level, protecting certain rights states cannot take away. This gives the right responsibility to parents--the responsibility to take care of their child's needs as well as allowing more flexibility for minors to communicate with their parents as they mature and the dynamic of the treatments shift. Research has shown that mental health clinicians and parents are better at addressing the problems of transgender adolescents than legislators are, and therefore autonomy should be given to them instead [17]. The United States also should revise its definition and category of gender dysphoria, possibly aligning with the international standard of grouping gender dysphoria under a condition instead of an illness.

For the United Kingdom, a feasible and suitable plan for a nationwide system for GACs is needed with clear guidelines and eligibility. There is also a need to rely on the data researchers have produced as part of the plan to prevent future regrets. The parents' obligations should also be more clearly established and concrete, instead of fluctuating with fluctuating laws, court decisions, and societal debates. At the end of the day, stability is key in part of a life-changing process like gender affirmation.

It also appears that a consensus on many components of GAC is needed in both countries. The conflicting stakeholder perspectives make it difficult to develop clear, evidence-based policies and for parents to judge whether a certain treatment is fit for their offspring. Adequate autonomy cannot be given to parents if there is a lack of understanding of its repercussions. Even with a substantial amount of research now into the sector of gender-affirming treatments, perspectives on what the evidence shows still differ and are a matter of heated debate. There is also a clear central oversight and coordination issue surrounding this topic. Gender-affirming care is often very personal and can vary greatly from person to person, and the legislation needs to reflect that. Currently, the fragmentation between the involved parties ultimately undermines the ability to provide the right amount of care.

In the current systems, parental autonomy is often undermined by legal legislation and is not treated with the amount of importance it has. There are negative impacts of over-allocating power to the parents and such concerns are valid. However, the option to allow certain treatments when a consensus is reached between the parents, child, and healthcare provider should always be available.

## **5. Conclusion**

The question of how legislation in the United States and the United Kingdom should regulate parental responsibility concerning gender-affirming treatments for transgender minors is complex and multifaceted. The existing legal frameworks in both countries provide a degree of guidance but leave room for interpretation and debate.

In the United States, the legal landscape surrounding gender-affirming care for adolescent teens is becoming increasingly restrictive. The lack of proper federal-level provisions and basic legislation outlining the standard of care has led to a wide variety of state-level legislation with vast impact. Such divisions have since caused a landslide of distress from those living under more constraining legislation. Parental autonomy has appeared to increase, as many states passed legislation forcing school staff to reveal gender identity to their parents, however, the choice the parents have in actually aiding their offspring in their journey has faded.

In the United Kingdom, the legal landscape is different, with the involvement of the courts and medical professionals in decision-making processes, including the incorporation of the Gillick Competency test. Its transgender rights legislation is also anchored on its obligation under the UN Convention on the Rights of the Child. Issues surrounding gender-affirming treatments are also under constant debate and legislative changes, and public opinion remains divided on transgender rights. In the end, legislations lack clarity and have appeared to shift away from parental and minor autonomy as evidence increases.

Ultimately, it appears that both countries' regulations are veering towards the tightening of laws surrounding gender-affirming treatments for minors, whether it is due to misguided political inclinations or data on the impacts of such treatments remain unclear. However, there are certainly limits to the level of autonomy given to all stakeholders which should be respected. In the end, crafting legislation on parental responsibility concerning gender-affirming treatments for transgender minors requires a nuanced approach that upholds the principles of autonomy, non-discrimination, and the best interests of the child. It should be informed by ongoing research, medical expertise, the experiences and perspectives of transgender individuals, and the evolving understanding of gender identity. By striving for a balanced and evidence-based approach, we may one day reach the perfect balance.

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