

POLICY FORUM

Transgender Rights as Human Rights

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Abstract

Arguments to support transgender rights often rely on “born that way” arguments, which assert that gender identity is innate, immutable, and unassociated with choice. These arguments are vulnerable to attack on several grounds, including on the basis of emerging scientific data. Stronger support for transgender rights arises from human rights arguments.

Introduction

In March 2016, North Carolina enacted legislation requiring public school students to use the school bathroom consistent with their birth gender [1]. The state law aimed to supersede a Charlotte, North Carolina, ordinance permitting students to use gender-segregated facilities aligned with their expressed gender, irrespective of the gender assigned them at birth [2]. These dueling laws garnered considerable controversy, yet they form only one small chapter in the story of rights for transgender people today.

Proponents of the North Carolina “bathroom bill” claim that such laws prevent violence against women, arguing that “predatory” men, under the auspices of trans-friendly bathroom policies, will enter women’s bathrooms and harm girls and women [3, 4]. However, transpeople and supporters deny there is increased harm to other women from transwomen and note that there is instead a high level of violence against transmen and transwomen [5], even compared to the high level of violence against other members of the lesbian, gay, bisexual, and transgender (LGBT) community [6]. While rates of homicide generally have dropped across the US over the last decade [7], the same is not true of homicide rates for transwomen, and in particular for transwomen of color, who account for a percentage of homicides far out of proportion to their numbers in the transgender population [8].

The need to uphold transgender rights has never been more pressing or more important than today. Although laws regarding choice in bathroom facilities are symbolically important in establishing that transpeople deserve respect, transpeople suffer active [discrimination](#) in arguably more important domains, including employment, housing, and access to general and specialized health care [9]. Compelling arguments and concerted action to support transgender rights are crucial. But which arguments

offer the strongest and most broadly applicable support for transgender people in the current political climate?

Arguments for Recognition and Expanded Protection of Transpersons' Rights

Many in the LGBT community rely on arguments that we refer to collectively as “born that way” arguments, namely, arguments for LGBT rights based on the idea that sexual orientation and gender identity are innate, immutable, or unassociated with choice. Two of the authors (TP and ES) have previously addressed the difficulties of using “born that way” arguments in relation to sexual orientation [10, 11]. We now extend that critique to arguments for transgender rights. We argue that “born that way” arguments rely on both shaky science and imperfect logic, and thus fail to provide a solid basis for transgender rights. We find more solid ground in arguments based on [human rights](#).

Interpretations and Critiques of “Born that Way” Arguments

In *The Mismeasure of Desire*, one of us (ES) has addressed three interpretations of the “born that way” argument, and we briefly summarize those arguments in the context of gender identity.

Innate. We find several problems with the claim that gender identity is innate. First, the claim is essentially unprovable. Gender identity, as with any aspect of human identity, develops over time. An infant cannot be said to experience a fully formed identity of any kind—that sort of self-awareness requires advanced cognitive development, including a nuanced concept of gender that develops over years. Similarly, we are skeptical of the claim that gender identity—one’s perceived sense of belonging to a particular gender, independent of gender assigned at birth—is genetically determined. There is limited biological research supporting such a claim and no semblance of a scientific consensus on it. Gender identity and expression are complex, incorporating ideas of the self along with a vast array of behaviors, thoughts, and feelings. Contemporary biological evidence does not support the notion that gender identity results solely from a single gene or even from the presence of a specific number of X and Y chromosomes. Rather, gender identity emerges from multiple interactions among genes, the environment, and other factors, including personal feelings of authentic gender expression [12].

Immutable. Another interpretation of “born that way” connotes immutability. This concept is problematic because possibilities for change are not necessarily related to whether a factor is present at birth. Even factors that are primarily determined by genes can change over the life course: hair color and texture are genetically determined, but hair can be present or absent at birth, change color over time, revert from curly to straight or vice versa, and develop different patterns of baldness as a person ages. In contrast, immunity to a disease like measles is not inherited, but vaccination or disease exposure can result in a permanent change in one’s immunological profile. These

arguments undermine the link between a trait's being present at birth and its inalterability.

However, there are additional compelling reasons to avoid relying on immutability as a foundation for transgender rights. Although the scientific study of gender identity has yet to answer many important questions, it does suggest that gender identity is not immutable in everyone. Specifically, gender identity can change in prepubescent children. Indeed, the majority of younger children who experience gender dysphoria do not go on to become transgender adults [12, 13]. Given the evidence of the fluidity of gender identity over time in many children with gender uncertainty, arguments that assume immutability seem particularly unconvincing. True, transgender adults generally do persist in their gender identity [14]. Nonetheless, [gender as a concept](#) is understood as more fluid and less rigid today than in the past. Research indicates that various aspects of sexuality, including both gender identity and sexual orientation, are more fluid than previously understood, especially in youth [15].

Rather than adhering to a rigid male/female binary, many scholars and activists describe gender as existing on a spectrum. Ideas about which attributes are socially appropriate for either male or female gender—or both or neither—have rapidly evolved over the last century. One hundred years ago, in some places, a woman could be arrested for wearing pants in public. Thirty years ago, women encountered more extreme barriers and fewer legal protections than they do today in many occupations, including soldier, pilot, or orthopedic surgeon, to name a few. Even today, men who stay home as full-time parents face questions about their “manliness.” Preserving transgender rights supports the ability of all people to align their gender expressions with a comfortable location for them on the gender spectrum. Insistence on the immutability of gender identity ignores its fluidity during development and the need to adapt to continually evolving standards of gendered behavior.

Not chosen. A third interpretation of “born that way” indicates lack of choice, and this aspect of LGBT identity is often referenced both regarding sexual orientation and gender identity. Transgender people do not typically describe their gender identity as a matter of choice. As one blogger wrote, “nobody really wants to be a trans woman, i.e. nobody wakes up and goes whoa, maybe my life would be better if I transitioned, alienating most of my friends and my family, I wonder what’ll happen at work, I’d love to spend all my money on hormones and surgeries” [16]. More typically, transpersons describe a growing realization of their gender identity over time. They might experience distress from social or other pressures to conform to a binary birth-assigned gender that does not match their authentic experience of gender identity. While gender identity is not subject to conscious choice, the overt expression of gender identity includes many choices, including dress, hair, naming, and all the other options that indicate one gender or another—including which public bathroom to use. Those opposed to transgender

rights wish to deny transgender people (and everyone else) these choices. Opponents do not express concern about transpersons' inner sense of identity but about outwardly expressed choices. To defend transgender rights is to defend the right to choose how one expresses gender and gender identity. Choice, far from being unimportant, is a critical aspect of transgender rights. In sum, "born that way" arguments on behalf of transgender rights are easily undermined on the basis of reasoning and scientific evidence.

Transgender Rights as Human Rights

We argue, in contrast, that transgender rights stem from human rights, i.e., those fundamental rights belonging to every person. Persons with either cisgender (in which assigned and experienced gender are the same) or transgender identities deserve to live and flourish in their communities—with freedom to learn, work, love, and play—and build lives connected with others at home, in the work place, and in public settings without fear for their safety and survival. These deeply personal decisions are and should be the prerogative of the individual and deserve the law's protection. The United States protects religious freedom in the First Amendment, and religion is quintessentially a choice. We owe the same respect to all members of our communities. We don't yet know if gender identity emerges from genes, hormones, environmental factors or, most likely, an intricate combination of all these factors and more. It is unlikely that people with a transgender identity simply choose their gender identity, any more than cisgender people do. However, it is crucial that associated choices about the expression of gender—affecting vital aspects of identity in school, the workplace, and the community—are supported by our laws and policies. Supporters of transgender rights should avoid arguments that are logically flawed and that fail to acknowledge current scientific evidence about gender identity. Our best arguments must rely on the concept of inalienable human rights, including the rights to live safely, freely, and without fear of discrimination.

References

1. Public Facilities Privacy and Security Act, 2016 NC Sess Laws 3. <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf>. Accessed August 1, 2016.
2. Harrison S. Charlotte City Council approves LGBT protections in 7-4 vote. *Charlotte Observer*. February 28, 2016. <http://www.charlotteobserver.com/news/politics-government/article61786967.html>. Accessed August 31, 2016.
3. Philips D. North Carolina limits bathroom use by birth gender. *New York Times*. March 24, 2016. <http://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html>. Accessed September 1, 2016.

4. Allen S. GOP wants men to use women's bathrooms. *Daily Beast*. March 25, 2016. <http://www.thedailybeast.com/articles/2016/03/25/gop-wants-men-to-use-women-s-bathrooms.html>. Accessed September 29, 2016.
5. Stotzer RL. Violence against transgender people: a review of United States data. *Aggress Violent Behav*. 2009;14(3):170-179.
6. Russell ST, Ryan C, Toomey RB, Diaz RM, Sanchez J. Lesbian, gay, bisexual, and transgender adolescent school victimization: implications for young adult health and adjustment. *J Sch Health*. 2011;81(5):223-230.
7. FBI. Crime in the United States. <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1>. Accessed August 31, 2016.
8. Human Rights Campaign; Transgender People of Color Coalition. Addressing anti-transgender violence: exploring realities, challenges and solutions for policymakers and community advocates. <http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/HRC-AntiTransgenderViolence-0519.pdf>. Accessed Sept 22, 2016.
9. Institute of Medicine Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities. *The Health of Lesbian, Gay, Bisexual and Transgender People: Building a Foundation for Better Understanding*. Washington, DC: National Academies Press; 2011.
10. Stein E. *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation*. New York, NY: Oxford University Press; 1999.
11. Powell T, Stein E. Legal and ethical concerns about sexual orientation change efforts. *Hastings Cent Rep*. 2014;44(suppl 4):S32-S39.
12. World Professional Association for Transgender Health. *Standards of Care for Transsexual, Transgender, and Gender Non-Conforming People*. 7th version. World Professional Association for Transgender Health; 2012. https://amo_hub_content.s3.amazonaws.com/Association140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf. Accessed August 5, 2016.
13. Drescher J, Pula J. Ethical issues raised by the treatment of gender-variant prepubescent children. *Hastings Cent Rep*. 2014;44(suppl 4):S17-S22.
14. Bockting W, Coleman E, Deutsch MB, et al. Adult development and quality of life of transgender and gender nonconforming people. *Curr Opin Endocrinol Diabetes Obes*. 2016;23(2):188-97.
15. Rosario M, Schrimshaw EW, Hunter J, Braun L. Sexual identity development among gay, lesbian, and bisexual youths: consistency and change over time. *J Sex Res*. 2006;43(1):46-58.
16. Goodreads. Imogen Binnie quotes. https://www.goodreads.com/author/quotes/6430658.Imogen_Binnie. Accessed July 29, 2016.

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