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***Montana’s House Bill 113: Knocking on the Door of Youth
Transgender Dignity***

Anne M. Lewis*

I. INTRODUCTION

Although many states work to pass laws to protect transgender persons across the United States, the Montana legislature continues to argue and advance bills that target the transgender community. Some transgender minors seek gender conforming surgeries to “adjust the body to the mind.”¹ Some medical providers argue that the standard practice remains to “normalize” external genitalia of their patients based on medical tests that reveal what gender identity a child will find most comfortable.² However, some Montana legislators argued to enact House Bill 113 (“HB 113”) titled the “Youth Health Protection Act” for the purpose of protecting minors against their own decisions to undergo genital reassignment surgery.³ The proponent for HB 113 cites Article II, § 15 of the Montana Constitution, arguing that the exception provision allows the legislature to constitutionally enact a law that “enhance[s] the protection” of “persons under 18 years of age.”⁴ Montanans maintain a fundamental right to equal protection of the law and protection from discrimination on the basis of sex in Article II, § 4.⁵ Article II, § 4 explicitly states that “the dignity of the human being is inviolable.” Although HB 113 did not pass majority vote, the bill would have precluded transgender youths’ constitutional right to dignity.

II. BACKGROUND ABOUT TRANSGENDER MINORS

A transgender person is an individual whose birth sex does not correspond to their gender identity assigned to them at birth.⁶ Transgender can be used broadly to encompass diverse transgender and non-binary gender identities.⁷ “Trans” is a shorthand term for “transgender.”⁸ Gender identity means the appearance, mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.⁹ Sexual orientation differs from gender identity. Sexual orientation means the direction of one’s sexual attraction towards any gender, and therefore trans individuals also have a sexual orientation.¹⁰

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¹ GENNY BEEMYN, *TRANSGENDER HISTORY IN THE UNITED STATES: A SPECIAL UNABRIDGED VERSION OF A BOOK CHAPTER FROM TRANS BODIES, TRANS SELVES 11* (Laura Erickson Schroth ed., 2014) (e-book).

² Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider’s Guide to Providing Comprehensive Care for Transgender Patients*, 9 *IND. HEALTH L. REV.* 69, 73 (2012).

³ Youth Health Protection Act, H.B. 113, 67th Leg. § 2 (Mont. 2021).

⁴ *Id.*; MONT. CONST. art. II, § 15.

⁵ MONT. CONST. art. II, § 4.

⁶ Michael Scott Leonard, *ACLU Challenges Montana’s Transgender Bathroom Ballot Measure: Hobbaugh v. Montana*, 25 *NO. 7 WESTLAW J. HEALTH L.* 6, 2 (2017).

⁷ *Definition of Terms*, GENDER EQUITY RESOURCE CENTER (2021), <https://perma.cc/2M5X-53JT>.

⁸ *Id.*

⁹ Amy McCrea, *Under the Transgender Umbrella: Improving ENDA’s Protections*, 15 *GEO. J. GENDER & L.* 543, 554 (2014).

¹⁰ *Definition of Terms*, *supra* note 7.

Many social issues inherently exist when an individual identifies as transgender. Trans individuals risk losing acceptance by family and friends regarding their gender identity.¹¹ Many transgender minors feel that they must keep their gender identity a secret from their family and friends for fear of disappointing them or being mistreated or disowned.¹² Consequently, trans persons are more likely to engage in health-harming behaviors, such as attempted suicide and drug or alcohol abuse, as opposed to their gender conforming counterparts.¹³

Trans persons often decide to undergo gender transition surgery in order to align their identity with how society perceives them physically, socially, and legally.¹⁴ While some transgender individuals only question their identity and honestly tell friends and family how they identify, some transgender individuals decide to change their names, undergo hormone treatments, and/or undergo different types of surgery to allow them to feel comfortable in their own body.¹⁵ Common types of surgeries that aid in gender transition include, but are not limited to, chest reconstruction and genital surgery.¹⁶

Minor trans persons face additional hurdles if they decide to undergo a gender transition. Many states require parental consent for minors to receive gender transitioning treatment, meaning that parents have “overriding control” to make decisions regarding their children’s health care.¹⁷ The United States Supreme Court has reinforced this notion in its plurality decision in *Bellotti v. Baird*.¹⁸ The Court stated that “legal restrictions on minors, especially those supportive of the parental role, may be important to [minors’] chances for growth and maturity.”¹⁹ This can present challenges when parents disagree with their minor’s decision to undergo gender reassignment surgery. As a result, some states place the burden on the court to determine the need for gender transitioning treatment.²⁰ Courts will examine the youth’s clinician’s documentation of medical need for the operation to determine whether surgery or any other kind of treatment proves to be in the best interests of the minor.²¹ Courts will then determine whether the minor is “mature” enough to participate in medical treatment.²² If a minor is deemed capable of rendering their own decisions, then the court considers them “mature” enough to issue consent for their informed medical decisions.²³ Youth transgender persons already face a higher and more cumbersome standard to establish their competency and ability to undergo gender transitioning treatment.

¹¹ Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN’S L.J. 281, 282 (2008).

¹² *Id.* at 285.

¹³ Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 No. 3 SOC. F. J. 822 (Sept. 2015).

¹⁴ Kennedy, *supra* note 11, at 282.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 291.

¹⁸ 443 U.S. 622 (1979).

¹⁹ *Id.* at 638–39.

²⁰ Kennedy, *supra* note 11, at 290.

²¹ Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision-Making*, 28 AM. J.L. & MED. 409, 420–21 (2002).

²² Christine M. Hanisco, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 911 (2000).

²³ Hartman, *supra* note 21, at 410.

III. HB 113: YOUTH HEALTH PROTECTION ACT

A. Purpose

Proponents of HB 113 introduced the bill to lawmakers in an attempt to bar transgender youth from receiving gender-affirming health care.²⁴ Under the bill, it would have been illegal for doctors to provide gender transition treatment and surgeries to minors.²⁵ HB 113 stated that its main purpose was to enhance the protection of minors who experience difficulty and distress in identifying with their biological sex from “irreversible” and “drastic” genital and nongenital gender altering surgery.²⁶ HB 113 likewise imposed limitations on medications and medical procedures that health care providers can provide to their patients. HB 113 expressly stated that a health care provider may not prescribe, provide, or administer “gender transition procedures” to a minor or refer a minor to another health care provider for gender transition procedures.²⁷

B. Cause of Action

Individuals and entities could have pursued a cause of action against health care providers under HB 113.²⁸ If a health care provider referred an individual to a physician to perform a gender transition procedure, the health care provider would have been subject to discipline under an appropriate licensing entity under Montana Code Annotated Title 37.²⁹ A plaintiff may have recovered compensatory damages, injunctive relief, declaratory relief, or any other relief the court deemed necessary including attorney fees.³⁰ The bill would have allowed a minor to file suit through a parent or adult friend, and the minor may have also brought an action upon reaching majority.³¹ Any cause of action under HB 113 must have been commenced before the minor reached 38 years of age.³² HB 113 also would have allowed the attorney general to bring an action to enforce compliance with the law.³³

C. Legislature Votes No

The Montana legislature voted against HB 113 when the Motion to Reconsider the bill failed in a surprising turn of events.³⁴ Only two days before the bill failed, the second reading of the bill passed in a 53–47

²⁴ H.B. 113, 67th Leg. § 2.

²⁵ Jordan Hansen, *Opposition Outweighs Support for Bills Focused on Trans Youth*, HELENA INDEPENDENT RECORD (Jan. 18, 2021), <https://perma.cc/7KAQ-ZAXW>.

²⁶ *Id.*

²⁷ H.B. 113, 67th Leg. § 4.

²⁸ *Id.* § 5.

²⁹ *Id.*; MONT. CODE ANN. §§ 37-3-301–25 (covers licensing entities, requirements, qualifications, and violations in the practice of medicine in Montana).

³⁰ H.B. 113, 67th Leg. § 5.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Montana Legislature: Detailed Bill Information* (2021), <https://perma.cc/5Z4Y-CHCP>.

vote.³⁵ After Montana health care professionals, religious leaders, and human rights organizations pushed back against the bill, five representatives changed their minds once the bill came up for a final vote of 49–51 on January 27, 2021.³⁶ One representative who changed his vote believed that the bill would have consisted of government overreach depriving health care providers “simple things” they need to do their job in a way they believe serves the best interests of their patients.³⁷

Proponents of the bill largely built their argument on the grounds that HB 113 protects children from deciding to undergo medical treatments that would seriously and permanently impact their lives.³⁸ Although proponents argued that HB 113 does deny transgender youth “care, compassion, or counseling,” proponents argued that HB 113 proves as a “tool” in which the legislature can protect children.³⁹ Proponents claimed that HB 113 gives transgender minors “the opportunity to reach adulthood before they are subjected to decisions that will affect their lives forever.”⁴⁰

Opponents of HB 113 argued that the bill would cause “irrevocable harm to trans youth.”⁴¹ Opponents stated that HB 113 punishes vulnerable transgender school age children, whom already struggle with safety, bullying, and suicide.⁴² Opponents argued that denying transgender youth medically necessary care and fining health care providers deprives physicians from giving patients the standard of care, citing several health organizations that have medically supported guidelines for providers of gender care.⁴³ Opponents claimed that HB 113 attempted to “disenfranchise” and “discriminate” against gender nonconforming minors.⁴⁴ Opponents ultimately argued that legislators are not qualified to decide what is best for transgender youth because they “deserve an *equal* opportunity to thrive as human beings.”⁴⁵

The rejection of HB 113 signifies that transgender rights, especially those of minors, are beginning to progress forward. However, transgender rights bills remain in question at the Montana legislature.⁴⁶ Since the legislature voted against HB 113, transgender youth continue to have equal access to health care, fewer safety concerns, and a feeling of inclusion within the community because they can seek gender affirming health care without legal ramifications against their medical provider. The healthcare

³⁵ *Id.*; Shaylee Ragar, *Montana Lawmakers Reject Bill Aimed at Regulating Transgender Health Care*, MONTANA PUBLIC RADIO (Jan. 26, 2021), <https://perma.cc/9UEF-PRUS>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Mara Silvers, *Transgender Restriction Bills Advance*, MONTANA FREE PRESS (Jan. 22, 2021), <https://perma.cc/6QZN-PNQ2>.

³⁹ Holly Michels, *Montana House Votes Down Bill Targeting Gender-Affirming Care for Transgender People*, HELENA INDEPENDENT RECORD (Jan. 26, 2021), <https://perma.cc/SZW2-UKMR> (quoting the proponent of the bill, Representative John Fuller).

⁴⁰ *Id.*

⁴¹ Caitlin Borgmann, *ACLU of Montana Statement Against HB 112 and HB 113*, ACLU MONTANA (Jan. 22, 2021), <https://perma.cc/Q2H9-M52W>.

⁴² Dori Gilels, *Opinion: Bills Targeting Transgender Youth are Shameful*, MISSOULA CURRENT (Jan. 22, 2021), <https://perma.cc/QFK4-ZEAD>.

⁴³ *Id.* (noting that The American Psychological Association and American College of Obstetrics and Gynecology have guidelines to help medical providers care for transgender youth); *Letter from Montana Businesses Against HB 112 and HB 113*, ACLU MONTANA, <https://perma.cc/WA27-GCPN>.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ *See, e.g.*, Save Women’s Sports Act, H.B. 112, 67th Leg. (Mont. 2021) (banning transgender athletes from participating in school sports).

industry can continue to promote this standard of care for transgender youth without penalty for violating the law.

IV. DIGNIFYING EQUAL PROTECTION IN TRANSGENDER YOUTH

A. *Equal Protection Jurisprudence*

The Individual Dignity Clause of the Montana Constitution establishes a unique and explicit right to equal protection of the laws.⁴⁷ Article II, § 4 explicitly recognizes the “inviolable” nature of human dignity as a corollary to equal protection, representing an innovative development in state equal protection doctrines.⁴⁸ However, the Montana Supreme Court has not directly interpreted the Individual Dignity Clause in constructing its equal protection jurisprudence.⁴⁹ For example, the Montana Supreme Court missed its opportunity to apply an interpretation of the dignity provision in *Snetsinger v. Montana University System*.⁵⁰ In *Snetsinger*, the Court held that the Montana University System’s policy prohibiting gay employees from receiving insurance for same-sex partners violated the right of equal protection under Article II, § 4 of the Montana Constitution.⁵¹ The Montana Supreme Court has merely incorporated human dignity “to support a broad interpretation of other individual constitutional rights.”⁵² The Court declared that Article II, § 4 of the Montana Constitution provides greater individual protection than the Fourteenth Amendment, but nonetheless has provided the same level of protection as federal equal protection jurisprudence.⁵³

Federal equal protection jurisprudence have classified discriminatory laws as “suspect,” meaning that the laws reflect a “bare... desire to harm a politically unpopular group.”⁵⁴ The United States Supreme Court has held that classifications based on alienage, nationality, and race are “inherently suspect,” but have not added sexual identity or gender to its list of suspect classifications.⁵⁵ Though, courts tend to arbitrarily shift from “class” to “classifications” once a class has been identified as suspect.⁵⁶ Federal courts, unlike the Montana Supreme Court, have “robustly” incorporated dignity in their opinions addressing LGBTQ+ rights.⁵⁷ The United States Supreme Court in *United States v. Windsor*⁵⁸ mentioned

⁴⁷ MONT. CONST. art. II, § 4; Ryan Murphy, *Constitutional Law – Equal Protection – No Real Benefits. How the Montana Supreme Court’s Improper Application of Equal Protection Analysis in Establishing Same-Sex Insurance Benefits Created More Confusion Than It Resolved*, 37 RUTGERS L.J. 1439, 1443 (2006).

⁴⁸ MONT. CONST. art. II, § 4.

⁴⁹ Murphy, *supra* note 47, at 1443.

⁵⁰ 104 P.3d 445 (Mont. 2004).

⁵¹ *Id.* at 453.

⁵² Murphy, *supra* note 47, at 1443–44.

⁵³ See *Cottrill v. Cottrill Serv.*, 744 P.2d 895, 897 (Mont. 1987); see *Snetsinger*, 104 P.3d at 458 (Nelson, J., concurring) (stating that Montana’s equal protection jurisprudence “largely follows federal law” in practice).

⁵⁴ *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 446–47 (1985); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Godfrey v. Montana State Fish & Game Comm’n*. 631 P.2d 1265, 1267 (Mont. 1981).

⁵⁵ *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

⁵⁶ Caitlin E. Borgmann, *Transgender Equality and Dignity Under the Montana Constitution*, 79 MONT. L. REV. 95, 102 (2018).

⁵⁷ *Id.* at 107.

⁵⁸ 133 S. Ct. 2675 (2013).

dignity nearly twelve times, but not always in the context of equal protection or without formally recognizing sexual orientation as a suspect class.⁵⁹ In *Obergefell v. Hodges*,⁶⁰ dignity played a special role in the United States Supreme Court’s decision.⁶¹ Justice Kennedy rightfully recognized that same-sex couples “ask for equal dignity in the eyes of the law” and “[t]he Constitution grants them that right.”⁶²

B. *HB 113 Departs from Equal Protection Jurisprudence*

HB 113 dismissed the Individual Dignity Clause in the Montana Constitution altogether and ignored the concept of human dignity that federal courts have emphasized in case law regarding LGBTQ+ rights. HB 113 cited the exception clause in Article II, § 15 of the Montana Constitution as constitutional grounding for the enactment of the bill:

Rights of Persons Not Adults. The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article *unless specifically precluded by laws which enhance the protection of such persons*.⁶³

HB 113 attempted to enact a law that “protects” minors, but ironically denied them equal *protection* under the law because HB 113 ensured that transgender youth would not receive equal access to health care to achieve their desired gender identity.⁶⁴

HB 113 neglected the express language of Article II, § 15 that gives minors all fundamental rights enumerated in the Montana Constitution.⁶⁵ Article II, § 4 affords minors the fundamental right to equal protection on the basis of sex and provides another layer of equal protection: human dignity.⁶⁶ The fundamental right to equal protection on the basis of sex *and* the “inviolable” right to human dignity under the Montana Constitution allows trans youth to make their own decisions to undergo gender reassignment surgery to feel dignified in their own person.⁶⁷ HB 113 would have unconstitutionally deprived transgender minors of their own human dignity violating Article II, § 4.

IV. CONCLUSION

If HB 113 would have passed a final vote, the Montana courts could have analyzed the bill under heightened constitutional scrutiny because the Montana Constitution allows for additional individual and youth protection regarding a citizen’s dignity.⁶⁸ Montana’s trans youth remains entitled to the Montana Constitution’s dignity provision and must be treated with equal protection under the law. Trans youth have a

⁵⁹ Borgmann, *supra* note 56, at 107; Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076 (2014).

⁶⁰ 576 U.S. 644, 674–77 (2015).

⁶¹ Borgmann, *supra* note 56, at 107.

⁶² *Obergefell*, 276 U.S. at 681.

⁶³ MONT. CONST. art. II, § 15 (emphasis added).

⁶⁴ H.B. 113, 67th Leg. § 2 (emphasis added).

⁶⁵ MONT. CONST. art. II, § 15.

⁶⁶ *Id.* § 4.

⁶⁷ *Id.*

⁶⁸ *Id.*

constitutional right to maintain their dignity while having equal access to health care.