GENDER REASSIGNMENT SURGERY IN PRISONS: HOW THE EIGHTH AMENDMENT GUARANTEES MEDICAL TREATMENTS NOT COVERED BY PRIVATE INSURANCE OR MEDICARE FOR LAW-ABIDING CITIZENS

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ISSUE

Whether taxpayers should foot the bill for prisoners to have gender reassignment surgery. Some prisons and detention centers are currently paying for the reassignment surgery with tax dollars, but only if an inmate has reached a certain point in his/her hormone therapy and for the safety of the particular inmate, as well as for all inmates. However, a district court judge in Massachusetts ruled in September 2012 for the first time in history that it is a violation of an inmate's Eighth Amendment rights to deny the surgery if the inmate suffers from gender identification disorder. This mandated surgery is paid for by the prison system, meaning that taxpayers are footing the bill for surgery they could not get themselves through their insurance plans.

I. INTRODUCTION

Gender Dysphoric individuals feel a strong identification with the opposite sex and often try to achieve the physical appearance of the sex with which they identify through cosmetics, hormones, and gender reassignment surgery.[2] Adults with Gender Dysphoria often live as the opposite sex, frequently withdraw from social interactions, and feel alone, depressed, and anxious.[3] Forty-one percent of transgender people attempt to commit suicide,[4] which is much higher than the national average.[5]

As of December 2012, Gender Dysphoria is no longer classified as a mental illness by the American Psychiatric Association (APA),[6] the same group that once classified homosexuality as a mental illness, and then declassified it as such thirty-nine years ago. It has become increasingly clear that

[2] *Gender Identity Disorder*, WEBMD, http://www.webmd.com/sex/gender-identity-disorder (last visited Mar. 16, 2014).

[3] AM. PSYCHIATRIC ASS'N, Answers to your Questions About Transgender People, Gender Identity, and Gender Expression 1 (2011), available at http://www.apa.org/topics/sexuality/transgender.aspx.

[4] Clara Moskowitz, *High Suicide Risk, Prejudice Plague Transgender People* (Nov. 19, 2010, 3:34 AM), http://www.livescience.com/11208-high-suicide-risk-prejudice-plague-transgender-people.html.

[5] In 2007, the overall rate was 11.3 suicide deaths per 100,000 people, and an estimated eleven attempted suicides per every suicide death. *Suicide in the U.S.: Statistics and Prevention*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/suicide-in-the-us-statistics-and-prevention/index.shtml (last visited Mar. 16, 2014).

[6] *American Psychiatric Association to remove term 'gender identity disorder' from manual*, LGBTQNATION (Dec. 3, 2012), http://www.lgbtqnation.com/2012/12/american-psychiatric-association-to-remove-term-gender-identity-disorder-from-manual/ [hereinafter LGBTQNATION]. This is being applauded by some as a step in the right direction for transgender individuals, although there is some concern that declassifying it as a mental illness will make services less accessible.

while there are other, less drastic treatments for transgender[7] individuals (such as hormone therapy, voice and communication therapy, electrolysis, breast binding or padding, genital tucking or penile prostheses, and padding of hips or buttocks), severe cases require surgery to change sex characteristics. While the surgery is typically not covered by insurance, the Fourth Circuit and the District Court of Massachusetts have recently ruled it a medical necessity for transgender inmates.

II. UNDERSTANDING GENDER DYSPHORIA IS A PREREQUISITE TO DETERMINE WHETHER TREATMENTS ARE A MEDICAL NECESSITY FOR TRANSGENDER INDIVIDUALS.

Gender Dysphoria was known as Gender Identity Disorder (GID) until December 2012, when the APA declassified it as a mental illness,[8] in what is colloquially known as the

[7] According to the APA,

> Transgender is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female, or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. "Trans" is sometimes used as shorthand for "transgender." While transgender is generally a good term to use, not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person. The ways that transgender people are talked about in popular culture, academia, and science are constantly changing, particularly as individuals' awareness, knowledge, and openness about transgender people and their experiences grow.

AM. PSYCHIATRIC ASS'N, *supra* note 3, at 1.

[8] LGBTQNATION, *supra* note 6. It was previously known as "Gender Identity Disorder."

"psychiatrist's bible,"[9] the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).[10] This same group once qualified homosexuality as a mental illness, and declassified it as such thirty-nine years ago.[11]

In an interview with the LGBT magazine *The Advocate*, Jack Drescher, a member of the APA subcommittee working on the revision explained, "[w]e know there is a whole community of people out there who are not seeking medical attention and live between the two binary categories. We wanted to send the message that the therapist's job isn't to pathologize." [12] According to Dana Beyer, who helped the Washington Psychiatric Society make recommendations on matters of gender and sexuality, "the new term implies a temporary mental state rather than an all-encompassing disorder, a change that helps remove the stigma transgender people face by being labeled 'disordered.'"[13] There are mixed implications of this new

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[9] Dana Beyer, *The End of Transgender as a Mental Illness*, HUFFINGTON POST (Dec. 5, 2012, 9:34 PM), http://www.huffingtonpost.com/dana-beyer/the-end-of-transgender-as-a-mental-illness_b_2238147.html.

[10] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (5th ed. 2013).

[11] *Id.*; *see also The History of Psychiatry & Homosexuality*, LGBT MENTAL HEALTH SYLLABUS, http://www.aglp.org/gap/1_history/ (last visited Mar. 17, 2014). Homosexuality was first officially classified as a mental disorder in the APA's first Diagnostic and Statistical Manual of Mental Disorders (DSM-1) in 1952. *The History of Psychiatry & Homosexuality*, *supra* note 11. According to the Association of Gay & Lesbian Psychiatrists:

> There it was designated as a "sociopathic personality disturbance." Viewing homosexuality as a mental illness was not controversial at the time as it coincided with prevailing societal attitudes. DSM-II, published in 1968, listed homosexuality as a sexual deviation, but sexual deviations were no longer categorized as a sociopathic personality disturbance.

Id.

[12] Camille Beredjick, *DSM-V to Rename Gender Identity Disorder 'Gender Dysphoria,'* ADVOCATE (July 23, 2012, 7:00 PM). http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria.

[13] *Id.*

classification. On one hand, a transgender woman who fathered children before her transition faces the risk of losing her children because GD can be seen as a "severe, chronic mental illness that might be harmful to the child."[14]

On the other hand, a GD diagnosis justifies insurance coverage for gender reassignment surgery and other medical procedures that sometimes accompany a transition: "Having a diagnosis is the difference between a necessary medical procedure and something that can be perceived as cosmetic surgery that insurance won't cover, Drescher says."[15] Some fear, however, that this new classification is potentially harmful to transgender individuals, stating that a "potential shortcoming of the APA decision is that insurance companies have been more willing to cover the expenses associated with transition under the former language, because treatment for a disorder is considered medically necessary, rather than cosmetic."[16]

Some are celebrating the new classification as a monumental step forward in the fight for civil rights for transgender individuals.[17] One year prior to the APA's decision, in December 2011, the Eleventh Circuit ruled that transgender individuals are a protected class for the purposes of the Fourteenth Amendment.[18]

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[14] *Id.*

[15] *Id.*

[16] LGBTQNATION, *supra* note 6.

[17] *Id.*

[18] Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011). The plaintiff was a male-to-female transgender employee of the state of Georgia, who claimed she was fired due to her GD. *Id.* at 1313. The plaintiff came to work dressed as a woman on Halloween, when the employees were told they could come to work dressed in costume. *Id.* at 1314. This was just months after Glenn told her supervisor that she was a transsexual in pursuit of becoming a woman. *Id.* The following year, she informed her supervisor that she was beginning her transition to becoming a woman, that she was changing her name, and that she was going to begin coming to work dressed as a woman. *Id.* Her supervisor informed the head of the department, who then fired her, stating that "Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." *Id.* The Eleventh Circuit found that, like gender classifications, "discriminating against someone on the basis of his or her

No one knows for certain what exactly causes GD. However the prevalent theories suggest that it may be caused by "genetic (chromosomal) abnormalities, hormone imbalances during fetal and childhood development, defects in normal human bonding and child rearing, or a combination of these factors."[19] It is more common in males than females, and most people with the disorder realize it by adolescence.[20]

Children with GD are often disgusted by their own genitals, to the point that boys will pretend not to have a penis, while girls fear growing breasts and menstruating, and sometimes even refuse to sit while urinating.[21] They often believe that they will actually become the opposite sex when they grow up, and dress and behave in a manner that is more typical of the opposite sex.[22] Adults with the disorder desire to live as the opposite sex, frequently withdraw from social interactions, and feel alone, depressed, and anxious.[23] They also desire to be rid of their own genitals.[24]

The cause is as of yet unknown: "to date, no definitive neurological, structural, chromosomal, or other explanation has been identified with certainty. Abnormal karyotype[25] and Gender Dysphoria is the exception rather than the norm."[26] The previous APA description, which may or may not change with

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gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause." *Id.* at 1316.

[19] *Gender Identity Disorder*, *supra* note 2.

[20] *Id.*

[21] *Id.*

[22] *Id.* For example, girls will wear boys' underwear. *Id.*

[23] *Id.*

[24] *Gender Identity Disorder*, *supra* note 2.

[25] Karyotype refers to the chromosomes of a cell, usually displayed as a systemized arrangement of chromosome pairs in descending order of size. *Karyotype*, DICTIONARY.COM, http://dictionary.reference.com/browse/karyotype (last visited Mar. 17, 2014).

[26] Kevan R. Wylie & David Steward, *A Consecutive Series of 52 Transsexual People Presenting for Assessment and Chromosomal Analysis at a Gender Identity Clinic*, 10(3–4) INT'L J. TRANSGENDERISM 147, 147 (2008).

the new name, states that "[m]any experts believe that biological factors such as genetic influences and prenatal hormone levels, early experiences, and experiences later in adolescence or adulthood may all contribute to the development of transgender identities."[27] The new description includes the description of Gender Dysphoria as "the emotional distress that can result from a marked incongruence between one's experienced/expressed gender and assigned gender."[28]

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[27] AM. PSYCHIATRIC ASS'N, *supra* note 3, at 2.

[28] LGBTQNATION, *supra* note 6.

III. PRIVATE INSURANCE AND MEDICARE ARE NOT CURRENTLY REQUIRED BY LAW TO COVER GENDER REASSIGNMENT SURGERY AND TYPICALLY DO NOT; INMATES ESSENTIALLY RECEIVE BENEFITS NOT AFFORDED TO LAW-ABIDING CITIZENS.[29]

Courts have decided that insurance companies do not have a duty to cover gender reassignment surgery,[30] nor is the surgery covered by Medicare,[31] although the implementation of

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[29] It can, however, count as a tax deduction. The United States Tax Court decided for the first time in 2010 the issue of availability of the medical expense deduction for the costs of hormonal and surgical sex reassignment for a transsexual individual. *See* O'Donnabhain v. Commissioner of Internal Revenue, 134 T.C. 34, 53 (2010). The Tax Court held that a sex change operation can count towards a tax deduction, but noted that the accompanying breast augmentation surgery did not. *Id.* at 70, 72. The court held that GD falls within Section 213 of Title 26 of the Internal Revenue Service Code, because:

> (1) [GD]'s widely recognized status in diagnostic and psychiatric reference texts as a legitimate diagnosis, (2) the seriousness of the condition as described in learned treatises in evidence and as acknowledged ... experts in this case; (3) the severity of petitioner's impairment as found by the mental health professionals who examined her; (4) the consensus in the U.S. Courts of Appeal that [GD] constitutes a serious medical need for purposes of the Eighth Amendment.

Id. at 63.

[30] *See* Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 767 (2d Cir. 2002). Marc Mario, born Margo Mario, sued his employer when he received notice that his hormone therapy and mastectomy would be denied, as well as any further claims related to his gender reassignment. *Id.* at 761, 762–63. The Second Circuit ruled that the plan administrator's determination survived a de novo standard of review, and affirmed the district court's ruling. This was based on the administrator's extensive investigation that included research on "the issue of transsexualism, inquiry into the policies of other employers and insurance carriers concerning coverage of gender reassignment procedures, consultation with medical centers having specialized knowledge of transsexualism and sexual reassignment surgeries, and consultation with medical personnel employed by [the plan administrator]" before she denied the claim. *Id.* at 765–66.

[31] NAT'L CENTER FOR TRANSGENDER EQUAL., MEDICARE BENEFITS AND TRANSGENDER PEOPLE 1 (2011), *available at*

the Affordable Care Act may change this.[32] Major health insurance providers do not cover gender reassignment surgery in most situations,[33] and the requirements for genital reconstructive surgery are strict.[34]

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http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

[32] Michelle Andrews, *HHS Takes Steps Toward Protecting Transgender People Under Health-Care Law*, WASH. POST (Sept. 3, 2012), http://www.washingtonpost.com/national/health-science/hhs-takes-steps-toward-protecting-transgender-people-under-health-care-law/2012/08/31/83fef586-6a2c-11e1-acc6-32fefc7ccd67_story.html.

[33] Clinical Policy Bulletin: Gender Reassignment Surgery, AETNA (Jan. 22, 2013),

http://www.aetna.com/cpb/medical/data/600_699/0615.html. The surgery is covered only when the following extensive circumstances are met:

A. Two referral letters from qualified mental health professionals, one in a purely evaluative role (see Appendix); and

B. Persistent, well-documented Gender Dysphoria (see Appendix); and

C. Capacity to make a fully informed decision and to consent for treatment; and

D. Age of majority (18 years or older); and

E. If significant medical or mental health concerns are present, they must be reasonably well controlled; and

F. Twelve months of continuous hormone therapy as appropriate to the member's gender goals (unless the member has a medical contraindication or is otherwise unable or unwilling to take hormones)

Id.

[34] *Id.* Aetna requires the following:

A. Two referral letters from qualified mental health professionals, one in a purely evaluative role; and

B. Persistent, well-documented Gender Dysphoria; and

C. Capacity to make a fully informed decision and to consent for treatment; and

D. Age of majority (age 18 years and older); and

The World Professional Association for Transgender Health is an international professional association whose mission is "to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health,"[35] and whose focus includes developing best practices and supportive policies worldwide that promote health and equality for transsexual, transgender, and gender nonconforming people in all cultural settings.[36] It published "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People," and released the following Standards of Care for transgender individuals, which suggest several, non-surgical therapies for transgender individuals.[37] These include hormone therapy; psychotherapy; peer support; voice and communication therapy to help individuals develop verbal and non-verbal

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E. If significant medical or mental health concerns are present, they must be reasonably well controlled; and

F. Twelve months of continuous hormone therapy as appropriate to the member's gender goals (unless the member has a medical contraindication or is otherwise unable or unwilling to take hormones); and

G. Twelve months of living in a gender role that is congruent with their gender identity (real life experience).

Id. The provider further states that accompanying surgeries, such as breast augmentation, or other plastic surgery completed in an attempt to achieve a more masculine or feminine appearance, are strictly cosmetic, and therefore not covered by insurance. *Id.*; *see also Clinical UM Guideline*, EMPIRE BLUE CROSS BLUE SHIELD, http://www.empireblue.com/medicalpolicies/guidelines/gl_pw_a051166.htm (last reviewed Mar. 17, 2014); Tamsen Butler, *Insurance Plans to Cover Gender Reassignment Surgery*, LOVE TO KNOW INS., http://insurance.lovetoknow.com/Insurance_Plans_to_Cover_Gender_Reassignment_Surgery (last visited Mar. 17, 2014).

[35] E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People,* 13 INT'L J. OF TRANSGENDERISM 165, 166 (2011), *available at* http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

[36] *Id.*

[37] *Id.*

communication skills that facilitate comfort with their gender identity; hair removal through electrolysis, laser treatment, or waxing; breast binding or padding, genital tucking or penile prostheses, padding of hips or buttocks; and finally surgery to change sex characteristics.[38]

The United States Library of Medicine describes similar treatment options, including individual and family therapy for children, which is recommended to create a supportive environment at home and in school.[39] Individual and, if appropriate, couples therapy is recommended for adults.[40] Importantly, it notes that sex reassignment through surgery and hormonal therapy is an option, but it maintains that identity problems may continue after this treatment.[41]

Gender Dysphoria is, by all accounts, a serious health condition that often leads to depression and even suicide in transgender individuals. As such, the question is not whether gender reassignment surgery should be provided to transgendered individuals in general but rather the question is whether the surgery should be provided for inmates at the cost of taxpayers.

On average, states spend as much on correctional facility management as they do on public transportation.[42] It has been suggested that opposing the notion of taxpayers funding gender reassignment surgery for convicted felons is "rooted in skepticism toward and general ignorance of gender-related

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[38] *Id.* at 171–72.

[39] *Gender Identity Disorder*, U.S. NAT'L LIBRARY OF MED. (Feb. 13, 2012), http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495/.

[40] *Id.*

[41] *Id.*

[42] Brad Plumer, *Where Our Tax Dollars Go, in Two Charts,* WASH. POST (Apr. 17, 2012, 1:38 PM), http://www.washingtonpost.com/blogs/wonkblog/post/where-our-tax-dollars-go-in-two-charts/2012/04/17/gIQAzWyNOT_blog.html. States spend an average of five percent on both transportation and correctional facilities, whereas only one percent is spent on public assistance for the poor. *Id.*

health care."[43] It is not a lack of sympathy or skepticism of the reality of GD as a serious medical condition from which opposition to tax-funded surgery for inmates arises. However, the issue of medical necessity begs the question: is gender reassignment surgery a basic human right?[44] Is it really analogous to bypass surgery or chemotherapy? For an inmate who is serving a life sentence for murder, and who is already receiving hormone therapy, many have argued that the answer has to be "no."[45] At least not while private insurance companies deny coverage to private, law abiding citizens.

However, times are slowly changing, starting (not surprisingly) on the nation's "left coast." San Francisco became the first city to provide sex change operations for its city employees in 2001, and in 2007 it became the first city to provide the surgery to all uninsured transgender residents.[46] In January 2013, Oregon settled a lawsuit, agreeing to change its policies so gender reassignment surgery is now covered by

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[43] Alvin Lee, Student Article, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J. L. & GENDER 447, 449 (2008).

[44] Peter Ubel, *Is Sex Reassignment Surgery a Basic Human Right?*, FORBES (Oct. 4, 2012, 2:15 PM), http://www.forbes.com/sites/peterubel/2012/10/04/is-sex-reassignment-surgery-a-basic-human-right/. Dr. Ubel, a physician and behavioral scientist at Duke University, explores the question by looking at chromosomal variations in individuals with GD. *Id.* While he does not answer his own question, the article suggests that Dr. Ubel believes that it may be a fundamental right, and inmates should have access to the surgery. *See id.*

[45] *See generally* Jim Lopata, *Local Leaders on Why Michelle Kosilek is Not the Problem* (Dec. 19, 2012, 11:31 PM), http://www.boston.com/lifestyle/blogs/bostonspirit/2012/12/local_leaders_on_why_michelle.html. Executive Director of the Massachusetts Transgender Coalition fields questions such as, "Why is Kosilek up for getting treatment paid for by the state that they themselves can't get from their own health insurance? Do I need to go to jail to get the health care that I need? How did a murderer become the face of transgender health care rights?" *Id.*

[46] Heather Knight, *San Francisco to Cover Sex Change Surgeries for All Uninsured Transgender Residents*, SFGATE (Nov. 17, 2012), http://blog.sfgate.com/cityinsider/2012/11/17/san-francisco-to-cover-sex-change-surgeries-for-all-uninsured-transgender-residents/.

insurance for state employees.[47] And, in what is probably the nation's most liberal university, University of California – Berkeley, students are automatically enrolled in an insurance policy that covers up to $75,000 for students who would like to undergo a sex-change operation.[48] This includes travel expenses, because there are a limited number of providers in the immediate vicinity of the school.[49]

Whether this is an actual trend or a reflection of the population in these states has yet to be determined. Statistical data on the transgender population is hard to come by; however studies estimate that 0.3% of the U.S. population, 0.3% of residents of Massachusetts, and 0.1% of Californians are transgender.[50]

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[47] *Oregon Man Who Needed Hysterectomy Settles Lawsuit*, ASSOC. PRESS, Jan. 24, 2013, *available at* http://www.columbian.com/news/2013/jan/24/oregon-man-who-needed-hysterectomy-settles-lawsuit/. Alec Esquival, a female-to-male transgender, received $36,000 in the settlement agreement, along with the promise that the policies that barred insurance coverage for transgender individuals seeking reassignment surgery would be changed. *Id.*

[48] Oliver Darcy, *UC Berkeley Healthcare Plan Provides Up to $75,000 for Sex-Change Operations, Documents Reveal*, CAMPUS REFORM (Aug. 28, 2012), http://www.campusreform.org/blog/?ID=3140. Students can, however, apply for a waiver to opt-out of the insurance policy. *Id.*

[49] *Id.*

[50] "The Massachusetts Behavioral Risk Factor Surveillance Survey represents one of the few population-based surveys that include a question designed to identify the transgender population." GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE TRANSGENDER? (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. Its 2007 and 2009 surveys suggest that 0.5% of adults aged 18–64 identified as transgender. *Id.* "The 2003 California LGBT Tobacco Survey found that 3.2% of LGBT individuals identified as transgender." *Id.*

IV. THE STANDARD FOR CORRECTIONAL OFFICERS TO BE HELD LIABLE UNDER EIGHTH AMENDMENT IS DELIBERATE INDIFFERENCE, AS ARTICULATED BY THE SUPREME COURT IN *FARMER V. BRENNAN*.[51]

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[52] This has been interpreted by the Supreme Court to mean that an Eighth Amendment claim by an inmate against a corrections officer must show that the officer acted with "deliberate indifference" to a risk of harm to the prisoner, which requires subjective knowledge by the officer of the risk against an inmate.[53] To prove liability, the inmate must show that the officer "kn[ew] and disregard[ed] an excessive risk to inmate health or safety; the official must both [have] be[en] aware of facts from which the inference could be drawn . . . and he must also [have] draw[n] the inference."[54] In that case, the plaintiff Dee Farmer was a pre-operative transgender individual before he went to prison for credit card fraud.[55] Before his arrest, he had begun estrogen therapy, and he projected feminine characteristics, wearing his shirt off of one shoulder.[56] More importantly, he had received silicone breast implants and had submitted to an unsuccessful testicle removal surgery.[57]

The Seventh Circuit set the standard that "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards

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[51] 511 U.S. 825 (1994).

[52] U.S. CONST. amend. VIII.

[53] *Farmer*, 511 U.S. at 837.

[54] *Id.*

[55] *Id.* at 829.

[56] *Id.*

[57] *Id.*

that risk by failing to take reasonable measures to abate it."[58] Corrections officers must "take reasonable measures to guarantee the safety of the inmates."[59]

In 2008, Wisconsin went so far as to implement the Inmate Sex Change Prevention Act,[60] (Act 105) which banned the use of state and federal funds to pay for gender reassignment surgery.[61] The Seventh Circuit, however, ruled in 2011 that Act 105 violated the Eighth Amendment in the case of *Fields v. Smith*.[62] In *Fields v. Smith*, three male-to-female transgender inmates filed a lawsuit after their access to hormone therapy had been cut off following the enactment of Act 105.[63] The court based most of its reasoning in the decision on the fact that the prison official defendants produced no evidence that there was an effective equivalent treatment to hormone therapy.[64] Hormone

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[58] *Id.* at 847.

[59] *Farmer*, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

[60] WIS. STAT. ANN. § 302.386(5m)(a)–(b) (2008). The provision provided:

> 1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender.
>
> 2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.
>
> (b) The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).

Id.

[61] *See id.*

[62] Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1810 (2012).

[63] *Id.* at 552–53.

[64] *Id.* at 559.

therapy, therefore, is recognized as a medical necessity for transgender inmates.[65] The court affirmed the district court's decision for the plaintiffs, striking down Act 105 and ordering that their hormone treatment be reinstated.[66] The court drew an analogy between denying an inmate's cancer treatments and said that, if that were the case, the court "would have no trouble concluding that the law was unconstitutional."[67] Thus, the court held that "[p]rison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display 'deliberate indifference to serious medical needs of prisoners.'"[68]

The question of what defines a medical necessity has not been definitively answered; however, guiding factors have been set forth in a non-exhaustive list that includes: "(1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' (2) whether the medical condition significantly affects daily activities, and (3) 'the existence of chronic and substantial pain.'"[69]

A. THERE IS AN INHERENT RISK OF SEXUAL ASSAULT IN PRISONS BY VIRTUE OF INCARCERATION.

The fact that prisoners face a fundamental risk of sexual assault in prison is widely known. The Bureau of Justice Statistics reports that nearly one in ten prisoners report having been raped or sexually assaulted by other inmates, staff, or

[65] *See generally id.*

[66] *Id.*

[67] *Id.* at 556–57.

[68] *Id.* at 554 (quoting Greeno v. Daley, 414 F.3d 645, 652–53 (7th Cir. 2005) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976))).

[69] Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003).

both.[70] Therefore, the Prison Rape Elimination Act of 2003 was implemented to establish a zero-tolerance standard.[71]

Overcrowding further threatens inmate safety, according to a recent report by the United States Government Accountability Office on the Bureau of Prisons (BOP).[72] The report states that "BOP officials reported increased use of double and triple bunking, waiting lists for education and drug treatment programs, limited meaningful work opportunities, and increased inmate-to-staff ratios. These factors, taken together, contribute to increased inmate misconduct, which negatively affects the safety and security of inmates and staff."[73] Throughout the system, BOP prisons exceed their desired capacities by thirty-nine percent.[74] One effect of the overcrowding is an undesired and prolonged amount of time shared between violent individuals, bringing a higher risk of violence and more potential victims.[75] The California inmate classification system exemplifies a typical manner in which inmates are housed. They are classified by a scoring system whereby they fall into one of four categories that correspond to

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[70] David Person, *Column: Nightmare of Prison Rape,* USA TODAY (June 26, 2012, 5:52 PM), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-06-26/prison-rape-sexual-assault/55844922/1.

[71] 42 U.S.C. § 15602(1) (2003). The "Prison Rape Elimination Act" establishes a zero-tolerance standard for prison rape and developed and implemented national standards for the detection, prevention, reduction, and punishment of prison rape. *Id.* § 15602(1)–(3). It does this by increasing availability of incidence data; standardizing the definitions used for collecting data; increasing accountability of prison officials who fail to detect, prevent, and punish prison rape; and protecting the Eighth Amendment rights of federal, state, and local prisoners. *Id.* § 15602(4)–(8). One of the goals is to reduce the costs that prison rape imposes on interstate commerce. *Id.* § 15602(9).

[72] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE (2012), *available at* http://gao.gov/assets/650/648123.pdf.

[73] *Id.* at *What GAO Found.*

[74] *Id.*

[75] *See id.* at 18.

the institution's four housing and security levels, with higher scores equating to a higher level of security.[76]

B. SEXUAL ASSAULT IS A THREAT FOR ALL INMATES.

It is common knowledge that sexual assault is prevalent in the federal prison system. The Department of Justice reports the following statistics:

- An estimated **9.6% of former state prisoners reported one or more incidents of sexual victimization** during the most recent period of incarceration in a jail, prison, and post-release community-treatment facility.

- Among all former state prisoners, 1.8% reported experiencing one or more incidents while in a local jail, 7.5% while in a state prison, and 0.1% while in a post-release community-treatment facility.

- About **5.4% of former state prisoners reported an incident that involved another inmate.** An estimated 3.7% of former prisoners said they were forced or pressured to have nonconsensual sex with another inmate, including

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[76] DEP'T OF CORR. & REHAB., EXPERT PANEL STUDY OF THE INMATE CLASSIFICATION SCORE SYSTEM 3 (2011), *available at* http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf. Furthermore,

> Each institution is assigned a housing level based on physical construction. There are six Custody Designations used in general population housing settings: Close A, Close B, Medium A, Medium B, Minimum A, and Minimum B. Custody is assigned to denote the level of supervision the inmate requires within the institution with greater supervision at the higher custody levels. Close custody inmates require direct and constant staff supervision while minimum custody inmates may work in the community with little staff supervision.

Id. at 4.

manual stimulation and oral, anal, or vaginal penetration.

- About **5.3% of former state prisoners reported an incident that involved facility staff**. An estimated 1.2% of former prisoners reported that they unwillingly had sex or sexual contact with facility staff, and 4.6% reported that they "willingly" had sex or sexual contact with staff.[77]

The Human Rights Watch released a report in 2001, providing insight into the prison system and risk of sexual assault.[78] It states that inmates with small body frames face an especially difficult time in prison.[79] The Human Rights Watch interviewed a five-foot tall Texas prisoner,

> [W]ho said he was so vulnerable he felt like "a hunted animal" most of the time. He claimed to have been sexually abused on countless occasions. Strong, physically imposing inmates are safer from sexual abuse. An inmate's size and strength is particularly important in terms of fending off unwanted advances from cellmates, a fairly common problem. Yet size and strength alone, inmates emphasized, are never an absolute guarantee against abuse. "I don't care how big and bad you are, if you've got five dudes up against you, you're in trouble," one prisoner pointed out.[80]

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[77] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS 5 (2008), *available* at http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf (emphasis added).

[78] HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), *available at* http://www.hrw.org/legacy/reports/2001/prison/report4.html#_1_25.

[79] *Id.* at n.199.

[80] *Id.* at n.199–201.

C. THE RISK OF SEXUAL ASSAULT FOR TRANSGENDER INMATES IS SIGNIFICANTLY HIGHER THAN THE RISK FOR GENDER-TYPICAL INMATES.

The Department of Justice (DOJ) created standards to protect transgender inmates from sexual assault and abuse. A 2012 report by the DOJ confirmed that:

> LGBT people face shocking rates of sexual abuse; an analysis of that report by the [National Center for Transgender Equality] NCTE shows that more than one in three transgender former inmates was sexually abused. Studies have shown that trans women are 13 times more likely than others to be sexually assaulted while incarcerated.[81]

The Human Rights Watch's report further illustrates this. It reports that transgender inmates "face unrelenting sexual harassment unless another inmate is protecting them. Such inmates nearly always have an inmate 'husband,' someone powerful enough in the inmate hierarchy to keep other inmates away."[82]

These risks are intuitive—an inmate in a federal prison who has undergone hormone therapy to feminize her[83] body, but who has not completed gender reassignment surgery—is an obvious conundrum for the prison system. If a person looks like a female and is put in the male cellblock, the risk of sexual assault is apparent. However, if this person who is on her way to becoming a female still has male genitals, she simply cannot be housed with other women for the same reasons she is at risk if she is housed with the males.

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[81] Shaun Knittel, Contributor, *DOJ Standards Protect Transgender Inmates from Rape and Abuse*, EDGE (July 26, 2012), http://www.edgeboston.com/news/national/features//135458/doj_standards_protect_transgender_inmates_from_rape_and_abuse.

[82] *See* HUMAN RIGHTS WATCH, *supra* note 78, n.212.

[83] As it is preferable to call gender dysphoric individuals by the pronoun with which they identify, all male-to-female individuals will be referred to in the feminine, and all female-to-male individuals will be referred to in the masculine.

V. AFTER *FARMER*, THE DENIAL OF HORMONE THERAPY TO GENDER-DYSPHORIC INDIVIDUALS IS A VIOLATION OF THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The First Circuit ruled that it is a violation of the Eighth Amendment to deny hormone therapy to gender-dysphoric individuals in *Battista v. Clarke*.[84] Sandy Battista, born David Megarry, was convicted of robbery, kidnapping, and the rape of a child in 1983.[85] After serving her sentence related to that trial, she was involuntarily civilly committed in 2003 to the Massachusetts Treatment Center for Sexually Dangerous Persons, an all-male facility run by the Massachusetts Department of Correction, where such persons are held indefinitely until they are determined to be safe for release.[86] Born anatomically male, Battista changed her name to Sandy in 1996 and began to seek treatment at that time.[87] Although diagnosed with GID in 1997, she was provided no treatment by the Department of Corrections until 2004.[88] Three months after filing suit against Commissioner of the Massachusetts Department of Correction, Harold W. Clarke, and other department officials, Battista attempted self-castration with a razor blade.[89] In filing suit, she specifically sought an injunction to receive hormone therapy as well as women's clothing and accessories.[90]

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[84] Battista v. Clarke, 645 F.3d 449, 455–56 (1st Cir. 2011). The case was heard by two First Circuit judges, as well as the Honorable David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation. *Id.* at 450.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Battista*, 645 F.3d at 450.

[90] *Id.*

The Department of Correction's healthcare provider stated that "harm could easily occur without adequate treatment, and recommended hormone therapy as medically necessary."[91] Rather than providing therapy, the Department instead sought a second opinion from another gender specialist, who also agreed that hormone therapy, along with other therapy, might be appropriate.[92] Battista's March 2006 request for injunctive relief from the district court was denied because the court found that the defendants had not been shown to be deliberately indifferent to her medical needs.[93] The court "recognize[d] that Plaintiff has spent years waiting for the hormone therapy that she believes will relieve her suffering. She has endured mental breakdowns, bouts of depression, contemplated suicide and even attempted to mutilate herself."[94] However, the court found that she failed to demonstrate that the health care she had previously received fell short of constitutional standards."[95]

The Department of Corrections decided, however, to further evaluate the security concerns of Battista living as a woman in an all-male facility. In 2008, it decided that her appearance would put her at risk of sexual assault by other detainees if she wore women's clothing and accessories, and if her breasts were enhanced as a result of the hormone therapy.[96] On appeal, the First Circuit noted the fact that Battista had originally requested hormone therapy fifteen years prior to the appeal, and health care professionals had recommended hormone therapy as a "necessary part" of her treatment for ten of those years.[97] While weighing the government's interest against Battista's, the court

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[91] *Id.* at 450–51.

[92] *Id.* at 451.

[93] *Id.*

[94] Battista v. Dennehy, Civil Action No. 05-11456-DPW, 2006 WL 1581528, at *10 (D. Mass. Mar. 22, 2006).

[95] *Id.* at *10.

[96] *Battista*, 645 F.3d at 451.

[97] *Id.* at 454.

found that the "Department refused to take the GID diagnosis and request for hormone therapy seriously."[98]

Furthermore, the court found that "defendants went back and forth apparently looking for an out. It may take some education to comprehend that GD is a disorder that can be extremely dangerous. But the education seems to have taken an unduly long time in this instance, especially in light of the self-mutilation attempt."[99] Secondly, the Department waited several years before it produced a "substantial security justification," which apparently depended on inaccurate data.[100] The court found these reasons, along with a mischaracterization by the Department of the choice "between keeping Battista in a severely constraining protective custody unit and denying her hormone therapy," to be sufficient to show deliberate indifference to Battista's serious medical need.[101]

Likewise, the District Court for the District of New Jersey denied summary judgment in favor of the defendant correctional facility officials who denied hormone therapy to a transgender inmate, Alexis Houston, who had been receiving hormone therapy for five years prior to incarceration.[102] There, the inmate was a detainee of the Immigration and Naturalization Service (INS) being held in the Bergen County Jail and, as such, the "INS/ Federal Public Health Service must approve medical treatment for inmates."[103] Summary Judgment was granted for all defendants but the two on the prison's medical staff. The court noted that, while the plaintiff had provided no specific evidence indicating the defendant doctors created the policies under which her therapy was denied, it could not determine as a matter of law that they had played no part in creating the policies.[104] The court quoted a Second

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[98] *Id.* at 455.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Houston v. Trella, Civil Action No.: 04-1393, 2006 WL 2772748, at *5, *26 (D.N.J. Sept. 25, 2006).

[103] *Id.* at *7.

[104] *Id.* at *10.

Circuit opinion that explained, "[a] supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue,' or 'if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event."[105]

Hormone therapy cases are decided on a case-by-case basis, and when it is evident that inmates have Gender Dysphoria, courts are typically willing to grant them access to the hormones. The Eighth Circuit, however, ruled in 1996 in favor of prison officials in *Long v. Nix*.[106] In *Long*, the inmate arrived at the Iowa State Penitentiary in "full drag" in 1964.[107] She was allowed to wear makeup and women's clothing from 1964 until 1981, when these privileges were revoked upon the complaint of a member of the Iowa Parole Board.[108] She repeatedly requested that the privileges be reinstated, and she also requested hormone therapy and gender reassignment surgery.[109] Long's psychiatric evaluations proved to be unproductive, however, and she was found to be "hostile and belligerent" and "verbally abusive and abrasive."[110] Long, in contrast to Battista and Houston, had not shown "a continued interest in psychiatric evaluation or treatment either for depression or his [GID]."[111]

Moreover, the two psychiatrists that testified at Long's trial disagreed as to whether GID was Long's predominate

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[105] *Id.* (quoting Cuoco v. Moritsugu, 222 F.3d 99, 109 (2d Cir. 2000)).

[106] Long v. Nix, 86 F.3d 761, 766 (8th Cir. 1996). Long pled guilty to the brutal murder of a woman in Sioux Rapids, Iowa. *Id.* at 762; *see* Long v. Brewer, 253 N.W.2d 549, 550–51 (Iowa 1977). He gagged her with a brassiere and tied her hands behind her back. *Id.* at 551. "After having tied the woman he pulled her blouse and sweater back over her arms, cut her breasts, stomach and hips and lastly cut her throat with his fishing knife. He then attempted to have intercourse with her and thereafter dumped the body into the river." *Id.*

[107] *Long*, 86 F.3d at 763.

[108] *Id.*

[109] *Id.*

[110] *Id.* (quoting Long v. Nix, 877 F. Supp. 1358, 1362 (S.D. Iowa 1995)).

[111] *Id.*

condition.[112] One of the psychiatrists stated that he believed that Long wore women's clothing

> both to express his feminine identity and for sexual stimulation. [He] concluded that, because Long experience[d] some arousal, he suffer[ed] in part from "paraphilia" (a sexual attraction to an unusual subject or object) and "transvestic fetishism" (sexual arousal from cross-dressing). As a result, [he] stated that Long "[did] not meet the minimal requirements that would make him eligible" for hormone therapy or sex-change surgery.[113]

The court stated that the district court had correctly decided that "[i]n essence, Long demand[ed] the privilege of cross dressing so that he [could] exist in the prison on his own terms, rather than in conformity with prison regulations."[114]

Although courts routinely hold that hormone therapy is a medical necessity, litigation continues on the matter. As recently as March 2013, two inmates in an Oklahoma state prison sued to receive hormone therapy.[115] One of the inmates is receiving the therapy for other reasons, and the other has Gender Dysphoria.[116] Ronny Darnell, a male-to-female transgender, "had some procedures done prior to incarceration, so it's medically appropriate to prescribe the hormones."[117] In a

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[112] *Id.* at 764.

[113] *Id.* (quoting *Long*, 877 F. Supp. at 1362).

[114] *Id.* at 766 (quoting *Long*, 877 F. Supp. at 1366).

[115] *Oklahoma Providing 2 Inmates with Cross-Gender Hormones*, ASSOC'D. PRESS (Mar. 18, 2013), *available at* http://www.foxnews.com/us/2013/03/18/oklahoma-providing-inmates-with-cross-gender-hormones/. Of the two inmates involved in the suit, only one is receiving treatment specifically for GD. *Id.* That inmate, Darnell, is a convicted rapist serving a "lengthy" sentence at the James Crabtree Correctional Center in Oklahoma. *Id.*

[116] *Id.*

[117] *Id.*

court filing, Darnell expressed that he was "deeply depressed and has tried to castrate himself" several times while in prison, claiming to be denied "any kind of medical treatment at all for my serious medical need . . . I am a female not a male. I was just born in the wrong body."[118]

VI. IN A LANDMARK DECISION, A MASSACHUSETTS DISTRICT COURT JUDGE RULED, FOR THE FIRST TIME IN SEPTEMBER 2012, THAT GENDER REASSIGNMENT SURGERY FOR GENDER DYSPHORIC INDIVIDUALS IS A MEDICAL NECESSITY.

Robert Kosilek, now Michelle Kosilek, was "convicted of murder in the first degree under theories of premeditated and deliberate murder and extreme atrocity or cruelty for the death of his wife, Cheryl Kosilek."[119] Kosilek strangled her with a rope and a wire and then left her body in the backseat of her car in a mall parking lot in Attleborough, Massachusetts in 1990.[120] Later that evening, Kosilek called the police and stated that his wife had not come home from work and inquired into whether there had been any reports of car accidents in which she may have been involved.[121] Immediately following the discovery of his wife's body that night, Kosilek cooperated with the police investigation; however, the next day when informed that he was a suspect, he stated to police he would be obtaining counsel and exited the police station.[122] Shortly after midnight that evening, he crashed his car into a stop sign and some shrubs.[123] When police arrived on the scene, they found Kosilek wearing women's

[118] *Id.* *See also* Darnell v. Jones, 2013 WL 3864252 (W.D. Okla. July 24, 2013).

[119] Commonwealth v. Kosilek, 668 N.E.2d 808, 810 (Mass. 1996).

[120] *Id.* at 811.

[121] *Id.*

[122] *Id.*

[123] *Id.*

clothing. Two days later, police stopped Kosilek for speeding and driving while intoxicated.[124] When taken to the police station, he stated, "I can't call my wife. I murdered my wife. Now, I need to call a psychiatrist now."[125]

Kosilek is now serving a life sentence without the possibility of parole, living as Michelle Kosilek. Kosilek has been diagnosed with a severe form of Gender Dysphoria (GD), also known as gender identity disorder.[126] The court documented his desire for transformation:

> Since at least age three, Kosilek has believed that she is actually a female who has been cruelly trapped in a male's body. This belief has caused Kosilek to suffer constant mental anguish and, at times, abuse. While incarcerated, the gender dysphoria has also caused Kosilek to attempt twice to kill himself, and to try to castrate himself as well.[127]

When Kosilek told his stepfather he wanted to live as a girl, his stepfather stabbed him.[128] Kosilek met wife (then Cheryl McCall), and told Cheryl that he was a transgender. However, Cheryl told Kosilek "his transsexualism would be cured by 'a good woman' and married him."[129] In 1990, Cheryl became angry upon discovering Kosilek wearing her clothing; Kosilek murdered her.[130] Thereafter, Kosilek began taking hormone treatment, "had his name legally changed from 'Robert' to

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[124] *Id.*

[125] *Kosilek*, 668 N.E.2d at 811.

[126] Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002).

[127] *Id.*

[128] Kosilek v. Spencer, 889 F. Supp. 2d 190, 213 (D. Mass. 2012), *aff'd*, 29 F. App'x 621(1st Cir. Jan. 17, 2014).

[129] *Spencer*, 889 F. Supp. 2d at 213.

[130] *Id.*

'Michelle' and did everything he could to present himself as a female" while awaiting trial.[131]

Following her[132] conviction and prison sentence, Kosilek sued then-Commissioner of the Massachusetts Department of Correction (DOC) in an attempt to receive a gender reassignment operation to treat her GD.[133] In 2002, Kosilek sought an injunction that would require the state to pay for her gender-reassignment surgery and hormone treatments,[134] claiming that under the Harry Benjamin Standards of Care,[135] these were the medically necessary treatments for her condition. In the United States District Court, District of Massachusetts, Judge Wolf denied the injunction, reasoning that those are "forms of treatment that are provided to some, but not all, transsexuals pursuant to the Standards of Care."[136] The court noted that Maloney's refusal to allow Kosilek to obtain the female hormones doctors had prescribed and possibly a sex reassignment surgery was "rooted in sincere security concerns, and in a fear of public and political criticism as well."[137] The 2002 trial was widely criticized, with the Brian McGrory of the Boston Globe saying that:

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[131] *Id.* at 213–14.

[132] Because it is preferable to call Gender Dysphoric individuals by the pronoun with which they identify, Michelle Kosilek will henceforth be referred to by the feminine pronouns.

[133] *Maloney*, 221 F. Supp. 2d at 156. Prior to the filing of this suit, Kosilek filed a *pro se* suit against the Sheriff of Bristol County, David Nelson. *Id.* at 159. Kosilek amended her complaint to seek the same relief from the DOC.

[134] *Id.* at 156.

[135] The Harry Benjamin Standards of Care are protocols from the Harry Benjamin International Gender Dysphoria Association (now known as the World Professional Association for Transgender Health), a professional organization devoted to the understanding and treatment of Gender Dysphoria used by qualified professionals in the United States to treat individuals suffering from Gender Dysphorias. *See* WORLD PROF'L ASSOC. FOR TRANSGENDER HEALTH, http://www.wpath.org (last visited Mar. 17, 2014).

[136] *Maloney*, 221 F. Supp. 2d at 159.

[137] *Id.* at 162.

> What's truly remarkable is [Kosilek's] ability to make a complete and utter fool out of an otherwise thoughtful and respected federal jurist, US District Judge Mark L. Wolf. Indeed, (s)he's actually made a mockery of our entire penal system, and in the process is costing us thousands of dollars and dozens of hours of valuable court time.[138]

Then, in a 2012 landmark decision, Judge Wolf, the very judge who presided over *Kosilek v. Maloney*,[139] decided for the first time in history that it is a violation of an inmate's Eighth Amendment right to deny the surgery, ruling in Kosilek's favor in *Kosilek II*.[140] In his ruling, Wolf decided that GD is now a medically recognizable disorder, and that the only real treatment for this disorder is gender reassignment surgery.[141] The court noted the seemingly conflicting idea that prisoners have a constitutional right to adequate medical care, while United States citizens do not, and it cited a 2011 United States Supreme Court decision, which justified it by stating:

> To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death. Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is

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[138] Brian McGrory, *A Test Case For A Change*, BOS. GLOBE, June 13, 2000, at B1, *available at* http://www.bostonglobe.com/metro/2000/06/13/test-case-for-change/s9jYsy33HXfJ3ajRNZYpMO/story.html.

[139] *Maloney*, 221 F. Supp. 2d at 156.

[140] *Spencer*, 889 F. Supp. 2d at 213.

[141] *Id.* *See also* Denise Lavoie, *Judge: Mass. Must Pay For Killer's Sex Change*, BIG STORY (AP) (Sept. 4, 2012, 6:23 PM), http://bigstory.ap.org/article/judge-orders-sex-change-mass-murder-convict.

> incompatible with the concept of human dignity and has no place in civilized society.[142]

Even still, under the deliberate indifference test, it is insufficient for an inmate to show only that he has received inadequate care; he must also satisfy a subjective showing that the official responsible for his care has intentionally ignored a serious risk of harm.[143] A serious risk of harm, an objective standard, "is a need that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." [144] The court cited the Seventh Circuit's renouncement of Act 105,[145] stating:

> Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and painkillers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture.[146]

Kosilek was unsuccessful in the *Maloney* case because the court found that she had not satisfied the subjective component of the deliberate indifference test. Rather, it found that "'Maloney knew many facts from which it could have been inferred that Kosilek was at substantial risk of serious harm if [s]he did not receive adequate treatment. Maloney did not, however, actually draw that [required] inference.'"[147]

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[142] *Spencer*, 889 F. Supp. 2d at 198 (quoting Brown v. Plata, 131 S. Ct. 1910, 1928 (2011)).

[143] *Spencer*, 889 F. Supp. 2d at 198–99.

[144] *Id.* at 199.

[145] *Supra* note 63.

[146] *Spencer*, 889 F. Supp. 2d at 199 (quoting Fields v. Smith, 653 F.3d 550, 556 (7th Cir. 2011)).

[147] *Spencer*, 889 F. Supp. 2d at 216–17 (quoting *Maloney*, 221 F. Supp. 2d at 161).

Now, Kosilek, a convicted murderer who has been promised surgery not given to private, law-abiding citizens, law-abiding citizens, filed yet another motion: this time to receive electrolysis on her chest.[148] She was given several electrolysis sessions in 2008 to reduce her facial and chest hair before the Massachusetts Department of Corrections stopped them, stating that the remainder of her hair could be removed by shaving or using depilatories.[149]

The Massachusetts Department of Corrections responded to the decision in a statement:

> Following a thorough review of the decision, we believe the court failed to give due deference to the fact that the Department has and continues to provide adequate medical treatment to address inmate Kosilek's Gender Dysphoria. We also found the opinion improperly discredits the legitimate safety concerns trained correctional professionals testified will arise if sex reassignment surgery is performed. The Department's argument will not center on whether this surgery is a necessary and appropriate treatment for an individual with this particular disorder. Our responsibilities lie with providing certain levels of medical treatment and keeping the inmates in our care and the public at large safe. We believe appealing this decision will allow us to meet those critical responsibilities.[150]

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[148] *See also* Kosilek v. Spencer, 889 F. Supp. 2d 251 (D. Mass. 2012).

[149] Alyssa Newcomb, *Transgender Inmate Michelle Kosilek Fighting for Electrolysis*, ABC NEWS (Nov. 19, 2012), http://abcnews.go.com/US/transgender-inmate-michelle-kosilek-fighting-electrolysis/story?id=17760411; *see* Gabriel Stoffa, Opinion, *Why Does A Murderer Receive State-Funded Surgery When Law-Abiding Citizens Do Not?*, IOWA STATE DAILY (Sept. 11, 2012, 12:00 AM), http://www.iowastatedaily.com/opinion/article_0695f6f2-f83a-11e1-9936-0019bb2963f4.html.

[150] *State Will Appeal Decision To Grant Sex-Change Operation To Convicted Killer*, CBS BOS. (Sept. 26, 2012, 5:20 PM), http://boston.cbslocal.com/2012/09/26/state-will-appeal-decision-to-grant-sex-change-operation-to-convicted-killer/.

Judge Wolf also awarded Kosilek's legal team more than $700,000 for their fight for their client; however, Kosilek has said that she would refuse the money if the state allows her procedure.[151]

On January 17, 2014, the United States Court of Appeals for the First Circuit affirmed Judge Wolf's ruling.[152] This opinion was subsequently withdrawn, however, on February 12, 2014, and an en banc rehearing was granted.[153]

VII. THE STANDARD FOR WHAT CONSTITUTES A MEDICAL NECESSITY IS GREATER FOR INMATES THAN IT IS FOR NON-INCARCERATED CITIZENS.

The Supreme Court in *Estelle v. Gamble* defined what constitutes a medical necessity under the Eighth Amendment when it stated that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."[154] Specifically:

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[151] James Nye, *Massachusetts Taxpayers Will Pay $700,000 To Sex-Change Inmate's Lawyer In Legal Fees . . . Unless The State Allows Her Final Operation*, DAILY MAIL (Dec. 20, 2012, 1:52 PM), http://www.dailymail.co.uk/news/article-2251251/Massachusetts-taxpayers-pay-700k-sex-change-inmate-Michelle-Kosileks-lawyer-legal-fees.html.

[152] Kosilek v. Spencer, 12-2194, 2014 WL 185512 (1st Cir. Jan. 17, 2014)

[153] *Id.* According to Gay and Lesbian Advocates and Defenders (GLAD), who submitted a supplemental brief to the First Circuit on behalf of Kosilek, oral arguments are scheduled for May 8, 2014. *Kosilek v. Spencer*, GLAD, http://www.glad.org/work/cases/kosilek-v.-spencer (last visited March 29, 2014).

[154] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (internal citation omitted). In *Estelle*, the Court found no violation of the Eighth Amendment because the inmate had seen a doctor seventeen times for his back pain and other issues. *Id.* at 107. He complained that more should have been done to help him, and the Fifth Circuit agreed, stating that an X-ray for his lower back pain should have been given. *Id.* However, the Court said that

> [T]he question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is

> [I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend evolving standards of decency in violation of the Eighth Amendment.[155]

The District Court of Massachusetts decided that Ms. Kosilek, who had previously been given hormone treatment and even electrolysis to reduce her facial and chest hair and soften her appearance, would be subjected to "cruel and unusual punishment" if denied gender reassignment surgery. The First Circuit, in affirming the District Court's opinion, seems to have softened from it's earlier reasoning that "[i]mprisonment is, under any circumstances, a rigorous ordeal. It may well be especially difficult for one whose health is impaired, whose activities are restricted, and whose pain is unremitting. Yet, poor health, in and of itself, should not automatically shield a convicted felon from his just deserts."[156] It remains to be seen what the en banc panel will hold. If it again affirms, then a convicted murderer serving a life sentence for the brutal murder of her wife will now have greater rights than a transgender

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> medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act.

Id.

[155] *Id.* at 105–06.

[156] United States. v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987).

individual who has never so much as jaywalked. One should not, however, lose sight of the fact that Ms. Kosilek is not a victim. She is a convicted murderer serving a life sentence for the brutal murder of her wife, who now apparently has greater rights than a transgender individual who has never so much as jaywalked, and is not incarcerated.

VIII. AFTER *KOSILEK*, THE FOURTH CIRCUIT FOLLOWED SUIT, RULING THAT DENIAL OF GENDER REASSIGNMENT SURGERY VIOLATED A VIRGINIA INMATE'S EIGHTH AMENDMENT RIGHTS.

In January 2013, the Fourth Circuit faced the same issue, when an inmate who was genetically male, but had been living as a female, sued the Commonwealth of Virginia because she claimed it violated her constitutional rights by denying her gender reassignment surgery.[157] Ophelia Azriel De'Lonta was born Michael A. Stokes and was serving a seventy-three year sentence for bank robbery.[158] She brought several lawsuits against the Department of Corrections and its officers.[159] De'Lonta was diagnosed with GID since the beginning of her incarceration in 1983 and received estrogen therapy in 1993; however, when transferred from the Greensville Correctional Center to Mecklenburg Correctional Center in 1995, her

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[157] Joe Palazzolo, *Fourth Circuit Revives Prisoner Sex-Change Lawsuit*, WALL ST. J. L. BLOG (Jan. 28, 2013, 10:07 PM), http://blogs.wsj.com/law/2013/01/28/fourth-circuit-revives-prisoner-sex-change-lawsuit/.

[158] *Id.*

[159] *See* De'Lonta v. Johnson, 490 F. App'x 579 (4th Cir. 2012) (suing under the Religious Land Use and Institutionalized Persons Act (RLUIPA) claiming she was denied access to Kosher foods, which interfered with her hormone therapy); *see also* De'Lonta v. Pearson, 1:09 cv 1167, 2011 WL 795934 (E.D. Va. Feb. 24, 2011) (summary judgment affirmed for defendants whom De'Lonta sued for sexual assault and extortion); *see also* De'Lonta v. Fulmore, 745 F. Supp. 2d 687 (E.D. Va. 2010) (complaint of assault and battery in violation of Ms. De'Lonta's Eighth Amendment rights dismissed by the court).

treatment ceased pursuant to a policy that had recently been created.[160] The policy provided that:

> [N]either medical nor surgical interventions related to gender or sex change will be provided to inmates in the management of [GID] cases.
>
> If an inmate has come into prison and/or is currently receiving hormone treatment, he is to be informed of the department's policy and the medication should be tapered immediately and thence discontinued.
>
> Inmates presenting with [GID] should be referred to the institution's mental health staff for further evaluation.[161]

However, instead of her treatment being tapered off, as mandated by the policy, De'Lonta's treatments were cut off abruptly, "causing [her] to suffer nausea, uncontrollable itching, and depression."[162] De'Lonta had a history of self-mutilation.[163] Prior to being cut off from her hormones, she engaged in some self-mutilation; however, after the abrupt termination of her hormone therapy, she developed and uncontrollable urge to mutilate her genitals, "stab[ing] or cut[ting] her genitals on more than 20 occasions."[164] The court reversed the district court's dismissal of her case, stating that "[her] need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent."[165]

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[160] De'Lonta v. Angelone, 330 F.3d 630, 632 (4th Cir. 2003).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.* at 634 (citing Lee v. Downs, 641 F.2d 1117, 1121 (4th Cir. 1981) (explaining that "prison officials have a duty to protect prisoners from self-destruction or self-injury")).

Her real victory came in January 2013, however, when the Fourth Circuit reversed the lower court's decision and stated that denying the gender reassignment surgery violated her Eighth Amendment right to medically necessary treatment.[166] The court cited the Benjamin Harry Standards of Care, explaining that in severe cases like De'Lonta's, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment for GD.[167]

Retrospectively, robbing a bank was the best thing De'Lonta could have done. Had she never gone to prison, she very likely would not have received insurance coverage for the surgery.[168] As it stands, the hurdles for gender reassignment in prison are still relatively high, so it is not as if the ruling in *Kosilek v. Spencer* actually incentivizes crime. In a sense, however, it does function to reward bad behavior for a very select few.

IX. AS LONG AS INSURANCE AND MEDICARE ARE NOT REQUIRED TO COVER GENDER REASSIGNMENT SURGERY, IT DOES NOT MAKE SENSE TO REQUIRE TAXPAYERS TO PAY FOR CRIMINALS TO HAVE THE SURGERY.

After the *Kosilek* decision, there has been much backlash in the media about an entitlement to gender reassignment surgery paid by tax dollars. Because the Supreme Court ruled that Medicare and insurance companies are not mandated to cover the surgery, this is understandable. Courts are reviewing the issue on a case-by-case basis, and, in all cases where inmates show persistent symptoms of Gender Dysphoria, courts seem to

[166] De'Lonta v. Johnson, 708 F.3d 520, 523 (4th Cir. 2013).

[167] *Id.*

[168] Cigna, for example, only covers the surgery in rare circumstances; in preparation, one must live as the desired gender for twelve months and attend continuous, intensive therapy sessions. *Cigna Medical Coverage Policy*, CIGNA, http://www.cigna.com/assets/docs/health-care-professionals/coverage_positions/mm_0266_coveragepositioncriteria_gender_reassignment_surgery.pdf (last visited Mar. 17, 2014). While De'Lonta would certainly meet the twelve-month requirement, this still may not be enough to qualify under the Cigna policy. *See id.*

be consistently ruling in favor of requiring correctional facility officials to provide hormone therapy at a minimum, as a medical necessity.

Post-*Kosilek*, it remains to be seen whether courts will also follow the rationale that GD is now a medically recognizable disorder and that the only real treatment for this disorder is gender reassignment surgery. It also remains to be seen whether Medicare and insurance companies will now be required to cover the surgery. Although "[t]o incarcerate, society takes from prisoners the means to provide for their own needs," and "inmates are dependent on the State for . . . necessary medical care,"[169] it is inconsistent with common sense to deny the same rights to private citizens on Medicare or to those who pay for insurance plans.

Gender Dysphoria is widely recognized in the medical community as a genuine mental disorder, from which transgender individuals genuinely suffer. As phrases like "the modern family" and "the new normal" become cliché and commonplace, it is evident that Americans are recognizing that people do not fit neatly into two boxes of heterosexual male and heterosexual female. Part of the evolution into a more accepting society is the recognition that transgender individuals should have access to whatever treatment is available for the disorder. Furthermore, part of understanding Gender Dysphoria is to understand the anguish often felt by transgendered individuals about their own bodies. Private insurance should become more willing to cover gender reassignment surgery for extreme cases in which hormone therapy is not sufficient. However, this revolution should not begin in our prison system, where inmates are freeloading off of law-abiding citizens. Whether insurance companies should amend their policies to make reassignment surgery more accessible is a question for a different article. However, so long as insurance companies do not cover the surgery, and are not required to cover the surgery, it should not be given to murderers and bank robbers who are in prison for the remainder of their lives.

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[169] *Spencer*, 889 F. Supp. 2d at 198.