

# CROSSING THE LINE: EXAMINING SEX REASSIGNMENT SURGERY FOR TRANSSEXUAL PRISONERS IN THE WAKE OF *KOSILEK V. SPENCER*

LINDSEY V. GILBERT\*

## ABSTRACT

A Massachusetts court recently confronted the issue of whether to provide sex reassignment surgery to a transsexual inmate suffering from Gender Dysphoria (GD). As the first decision of its kind implicating broad transgender civil rights issues and the Eighth Amendment, this Comment argues that the court's mandate to provide Michelle Kosilek with sex reassignment surgery is legally sound. By focusing on the *Kosilek v. Spencer* decision and using Ms. Kosilek's experience as a framework, this Comment highlights the potential severity of GD and analyzes issues unique to transsexual prisoners in light of the Eighth Amendment's prohibition on deliberate indifference to the medical needs of inmates. This Comment also discusses broad transgender civil rights issues in an attempt to shed light on some of the inequities facing inmates suffering from GD, who may not be receiving adequate treatment under the law.

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\* Class of 2014, University of Southern California Gould School of Law; B.S. Journalism 2011, Northwestern University. I would like to thank Professor Elyn Saks and Professor James Pries as well as the *Southern California Review of Law and Social Justice* for its invaluable insight and guidance with this Comment. Special thanks to my wonderful family and friends for always believing in me and for their unwavering support in all of my endeavors. I would like to dedicate this Comment to Allen, Renée, and Melissa Gilbert because without your love and encouragement, none of this would be possible.

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## I. INTRODUCTION

Meet Michelle Kosilek. She<sup>1</sup> will become the first transsexual prisoner to undergo sex reassignment surgery at the expense of taxpayers. As the first decision of its kind, Kosilek's claim implicates important constitutional jurisprudence relating to the application of the Eighth Amendment to inmates with serious medical needs.<sup>2</sup> This Comment highlights the potential severity of Gender Dysphoria (GD),<sup>3</sup> analyzes

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<sup>1</sup> Although court opinions refer to Michelle Kosilek with male pronouns, in an effort to respect Ms. Kosilek's identity, this Comment refers to Ms. Kosilek with female pronouns.

<sup>2</sup> *Kosilek v. Maloney (Kosilek I)*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

<sup>3</sup> The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders reclassified

issues unique to transsexual prisoners under the Eighth Amendment, and argues that the *Kosilek v. Spencer*<sup>4</sup> (*Kosilek II*) decision ordering sex reassignment surgery is legally sound and is unlikely to result in a surge of transsexual inmates receiving sex reassignment surgery in the future.

Kosilek was born biologically male and named Robert at birth.<sup>5</sup> At age three, she began expressing an unrelenting feeling of being a woman trapped inside a man's body.<sup>6</sup> Kosilek also suffered regular abuse and mistreatment by family members.<sup>7</sup> Due to perpetual abuse and feelings of internal self-imprisonment, she frequently "ran away from home[,] . . . dressed as a woman, engaged in prostitution, and abused illegal drugs."<sup>8</sup> Kosilek's gender incongruence "is evidenced, in part, by [her] history of drug abuse and use of female hormones" in exchange for sex.<sup>9</sup> Hormones made Kosilek feel "normal" for the first time in her life.<sup>10</sup> However, after Kosilek was brutally assaulted outside a gay bar, she stopped taking hormones because she felt that it would be easier to avoid abuse and stigma if she surrendered to her biologically assigned sex.<sup>11</sup>

Kosilek eventually entered a drug rehabilitation facility where she met her future wife, Cheryl McCaul, who worked as a volunteer counselor.<sup>12</sup> McCaul told Kosilek that "a good woman" could cure her transsexualism, and they later married.<sup>13</sup> Marriage, however, did not abate Kosilek's suffering.<sup>14</sup> In 1990, Kosilek murdered McCaul after McCaul discovered Kosilek wearing her clothing and reprimanded her for doing so.<sup>15</sup> Kosilek was found guilty of murder and was sentenced to life without

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gender identity disorder as gender dysphoria. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-V]. This change allows for a more descriptive term "and focuses on dysphoria as the clinical problem, not identity per se." *Id.*

<sup>4</sup> *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190 (D. Mass. 2012).

<sup>5</sup> *Kosilek I*, 221 F. Supp. 2d at 163.

<sup>6</sup> *Id.* at 158.

<sup>7</sup> *Id.* at 158, 163. The abuse included being raped by her grandfather and stabbed by her stepfather. *Id.* at 163.

<sup>8</sup> *Id.* at 163.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* at 164.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Kosilek II*, 889 F. Supp. 2d 190, 213 (D. Mass. 2012).

the possibility of parole.<sup>16</sup>

In 1999, Kosilek brought an Eighth Amendment claim against the Massachusetts Department of Corrections (DOC) for deliberate indifference in failing to provide adequate treatment for her medically diagnosed GD.<sup>17</sup> While the court acknowledged that the DOC had a duty to treat Kosilek with adequate care, it held that the prison officials had not acted with deliberate indifference.<sup>18</sup> As a result of this decision, prison officials provided Kosilek with an individual consultation with a specialist and allowed her to begin hormone therapy to treat her GD.<sup>19</sup>

Hormone therapy did not mitigate Kosilek's suffering.<sup>20</sup> She sued again in 2005, and the court ordered the DOC to provide her with sex reassignment surgery to bring her body in line with her identity.<sup>21</sup> This decision marks the first time a court has found that neglecting to provide an inmate with sex reassignment surgery violates the Eighth Amendment's ban on cruel and unusual punishment.<sup>22</sup> While not all transsexual people experience the same degree of suffering as Kosilek, this decision opens the door for transsexual prisoners to receive sex reassignment surgery when medically necessary.

Kosilek is not alone. Over the last few decades, transgender civil rights issues have emerged more frequently in courtrooms. Transphobic laws have been challenged not only for prisons, but also for employment, housing, immigration, health care, insurance coverage, and family law.<sup>23</sup> Medicaid and insurance coverage for transgender people has been hotly contested as needing reformation to provide this group greater access to medical treatments, and especially to mitigate the suffering caused by GD.<sup>24</sup> The *Kosilek II* decision alleviates some of the inequities facing transgender prisoners today by recognizing the potential severity of GD and acknowledging that the criminal justice system cannot ignore the

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<sup>16</sup> *Kosilek I*, 221 F. Supp. 2d at 164.

<sup>17</sup> *Id.* at 159–62.

<sup>18</sup> *Id.* at 195.

<sup>19</sup> *Kosilek II*, 889 F. Supp. 2d at 218.

<sup>20</sup> *Id.* at 221.

<sup>21</sup> *Id.* at 250–51.

<sup>22</sup> Pauline Kim, *Massachusetts Judge Rules for Inmate's Sex-Change Surgery*, CNN (Sept. 6, 2012, 8:58 AM), <http://www.cnn.com/2012/09/04/health/massachusetts-sex-change-surgery-inmate>.

<sup>23</sup> Jaime Johnson, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 LAW & PSYCHOL. REV. 153, 154 (2010).

<sup>24</sup> *Know Your Rights—Transgender People and the Law*, AM. CIV. LIBERTIES UNION, (April 24, 2013), <https://www.aclu.org/translaw>.

mental anguish associated with GD.

This Comment proceeds in five parts. Part II explores the immutability with which society views sex and gender, and lays some definitional groundwork by exploring the differences between transgender and transsexual people. Part II also outlines the complexities of GD, examines its diagnostic criteria and available treatment options, and considers the impact that insurance and Medicaid coverage have on treatment. Part III discusses issues unique to transgender prisoners and how discrimination against this already marginalized group forces many of them into illicit activities.<sup>25</sup> Part III also explores some issues that prison officials must consider when placing transgender prisoners in the proper facilities. Part IV focuses on Eighth Amendment jurisprudence and the appropriate level of health care that prisons must provide for inmates. It also introduces important precedent that has influenced how courts analyze prison officials' treatment of transgender prisoners in light of the Eighth Amendment. Part V specifically addresses the *Kosilek II* decision and discusses its far-reaching policy implications for the transgender, medical, and legal communities. Finally, Part VI provides some concluding thoughts on the topic.

## II. WHAT IS GENDER DYSPHORIA?

### A. THE BINARY PROBLEM: SEX AND GENDER

Society views sex and gender as a binary: people are either male or female.<sup>26</sup> When applying to college, for a job, a passport, or any other form of state identification, applicants must check a box for "sex" to indicate whether they are male or female. No other option exists; no box corresponds to those who do not neatly fit into society's rigid formulation of gender. To better understand the relationship between sex and gender, it is important to first lay some definitional groundwork. Stephen Whittle coined the term "gender identity" to mean a "total perception of an individual about his or her own gender," which includes, "a basic personal identity as a boy or girl, man or woman, as well as personal judgments

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<sup>25</sup> Travis Cox, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 366 (2009) ("Not providing hormone therapy for transgender individuals correlates with an increased risk of self-mutilation, clinical depression, illegal drug consumption, and suicide attempts.").

<sup>26</sup> Liza Khan, Note, *Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform*, 11 YALE J. HEALTH POL'Y L. & ETHICS 375, 384 (2011).

about the individual's level of conformity to the societal norms of masculinity and femininity."<sup>27</sup> Gender is subjective, a set of social behaviors, and something that bodies *do*.<sup>28</sup> Sex is objective and something that bodies *are*.<sup>29</sup> While one's genitals determine sex, gender may be harder to decipher because it is traceable only to one's sense of self.<sup>30</sup>

While the medical community has advanced beyond a strictly physical and binary understanding of gender, the legal system lags behind because it often fails to consider aspects of gender other than anatomy.<sup>31</sup> Despite a significant body of biological evidence suggesting that sex can manifest itself in more than one form, the law tends to ignore that sex can change or be amorphous.<sup>32</sup> One scholar believes that "[d]efining both preoperative and postoperative transsexuals' sex by birth sex alone is not only grossly unfair to transsexuals, but also ignores the basic tenet that 'sex' is not merely a function of anatomy and biology."<sup>33</sup>

Individuals who do not conform to the sole categories of male and female find strict adherence to the gender binary oppressive. To fully appreciate the issues confronting transgender people, the legal system must more readily acknowledge that one's identity is capable of existing distinctly and separately from one's biological sex.<sup>34</sup> Furthermore, many fundamental legal rights attach only after one is forced to choose between the inflexible label of male or female.<sup>35</sup> Requiring this choice causes suffering because it forces people to conform to an identity that clashes with their innate sense of self.

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<sup>27</sup> STEPHEN WHITTLE, *THE TRANSGENDER DEBATE: THE CRISIS SURROUNDING GENDER IDENTITIES* 5 (2000).

<sup>28</sup> Noa Ben-Asher, *The Necessity of a Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 52–53 (2006).

<sup>29</sup> *Id.*

<sup>30</sup> Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 227, 231 (2012).

<sup>31</sup> Khan, *supra* note 26, at 377.

<sup>32</sup> *Id.*

<sup>33</sup> Jody Lyneé Madeira, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 174 (2002).

<sup>34</sup> Cox, *supra* note 25, at 343.

<sup>35</sup> Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1741–42 (2002) (explaining that because some governments and courts are unwilling to extend and recognize legal protections or privileges to transgender people, some decide to live in conflict with their gender identity or undergo sex reassignment surgery in an attempt to gain legal recognition of their status).

B. WHAT'S IN A NAME? TRANSGENDERISM  
AND TRANSEXUALISM

Transgender and transsexual people are not necessarily the same. “Transgender[] individuals can be described as ‘having gender identities, expressions, or behaviors’ that are inconsistent with social norms associated with their natal sex.”<sup>36</sup> Transgender people often find that their “subjective gender does not align with their objective sex.”<sup>37</sup> Thus, the term is an umbrella classification encompassing a diverse group of individuals, including “transsexuals, transgenderists, transvestites, and the intersexed.”<sup>38</sup> Some transgender people identify with a gender different from the one they were assigned at birth, some reject a gendered identity, and some adopt both male and female features.<sup>39</sup>

Transsexualism, more narrowly, describes a specific subset of transgender people whose identity is in sharp contrast with their physical sex.<sup>40</sup> Transsexual people suffer from a deep dissatisfaction with their anatomical sex and are often described as “trapped” in the body of the wrong sex.<sup>41</sup> The Supreme Court has defined a transsexual person as: “one who has [a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex, and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”<sup>42</sup> Because gender incongruity can cause considerable confusion, frustration, and mental anguish, many transsexual people require extensive treatment to resolve their internal conflicts.<sup>43</sup> Others, like cross-dressers, drag queens, and hermaphrodites, may be transgender in that they defy gender norms, but not transsexual because they “do not manifest an extreme dissatisfaction with their bodies’ sexual

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<sup>36</sup> Khan, *supra* note 26, at 379 (quoting Carey V. Johnson, Matthew J. Mimiaga & Judith Bradford, *Health Care Issues Among Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Populations in the United States: Introduction*, 54 J. HOMOSEXUALITY 213, 216 (2008)).

<sup>37</sup> Colopy, *supra* note 30, at 231–32.

<sup>38</sup> Cox, *supra* note 25, at 344.

<sup>39</sup> Khan, *supra* note 26, at 379.

<sup>40</sup> Colopy, *supra* note 30, at 232.

<sup>41</sup> See, e.g., *Kosilek I*, 221 F. Supp. 2d 156, 158, 163 (D. Mass. 2002).

<sup>42</sup> *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (internal quotations omitted).

<sup>43</sup> See Mildred L. Brown and Chloe Ann Rounsley, TRUE SELVES: UNDERSTANDING TRANSEXUALISM—FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS 1 (2003) [hereinafter TRUE SELVES].

characteristics.”<sup>44</sup> Birth rates of transsexual people have been estimated at one in 12,000 for male-to-female and one in 30,000 for female-to-male.<sup>45</sup> Although these statistics should be viewed with skepticism because many transsexual people are self-identified without a psychiatric diagnosis, current statistics confirm that transsexualism “affects ‘much less than 0.01 percent’ of the [U.S.] population.”<sup>46</sup>

Social understanding of stigmatized groups often falls behind scientific and medical discovery.<sup>47</sup> For example, many people misconstrue transsexualism as “just another facet of homosexuality,” when in fact it pertains to one’s “self-identification of gender identity.”<sup>48</sup> While transsexual people remain aware of their biological sex, they fundamentally identify with the opposite gender.<sup>49</sup>

### C. DIAGNOSING GENDER DYSPHORIA

Because the expectations and requirements of the legal system are often at odds with the diagnostic paradigm of mental health professionals, mental pathologies are not susceptible to clear-cut definitions.<sup>50</sup> Moreover, “because impairments, abilities, and disabilities vary widely within each diagnostic category,” a particular clinical diagnosis “does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard.”<sup>51</sup> The fifth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM-V)* defines a mental disorder as a:

[S]yndrom characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other

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<sup>44</sup> Jenifer Marie Albright, Comment, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593, 594 (2002).

<sup>45</sup> Colopy, *supra* note 30, at 232.

<sup>46</sup> Bradley A. Sultan, Note, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195, 1199–1200 (2003) (quoting TRUE SELVES, *supra* note 43, at 12).

<sup>47</sup> Colopy, *supra* note 30, at 232.

<sup>48</sup> *Id.*

<sup>49</sup> See Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 127 (1991).

<sup>50</sup> See CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 5 (5th ed. 2009).

<sup>51</sup> DSM-V, *supra* note 3, at 25.



important activities.<sup>52</sup>

Many transsexual people, if not all, suffer from what the *DSM-V* describes as “gender dysphoria” (GD).<sup>53</sup> The *DSM-V* includes GD as a mental disease, “with separate developmentally appropriate criteria sets for children and for adolescents and adults.”<sup>54</sup> Because there is no diagnostic test or medical examination specifically tailored to diagnose GD, the *DSM-V* provides that an extensive psychological evaluation revealing cross-gender identification and certain behavioral patterns is essential when making the determination.<sup>55</sup> Since this Comment analyzes the court’s decision in *Kosilek II*, dealing with a transsexual adult prisoner, only the criteria for adolescents and adults is outlined. GD in adolescents or adults requires:

A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least [six] months’ duration, as manifested by at least two of the following:

1. A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics . . . .
2. A strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender . . . .
3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one’s assigned gender).
5. A strong desire to be treated as the other gender . . . .
6. A strong conviction that one has the typical feelings and reactions of the other gender . . . .

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>56</sup>

The *DSM-V* explains that GD “should be distinguished from simple nonconformity to stereotypical gender role behavior by the strong desire to be of another gender than the assigned one and by the extent and

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<sup>52</sup> *Id.* at 20.

<sup>53</sup> Sultan, *supra* note 46, at 1200.

<sup>54</sup> *DSM-V*, *supra* note 3, at 451.

<sup>55</sup> *See id.* at 453–54.

<sup>56</sup> *Id.* at 452–53.

pervasiveness of gender-variant activities and interest.”<sup>57</sup> GD is not just a mild discomfort with one’s biological sex; rather, it is a profound disturbance such that the lives of some people revolve only around performing activities to lessen their gender distress.<sup>58</sup> GD often comes with severe mental anguish and the inability to function normally at school, at work, or in a relationship.<sup>59</sup> Moreover, those suffering from GD often become socially ostracized and stigmatized, which further diminishes self-esteem.<sup>60</sup> While GD on its own is not considered a life-threatening illness, it is often seen in conjunction with dangerous related conditions like depression, substance-related disorders, self-mutilation, and suicide.<sup>61</sup> In fact, one study reported that 41 percent of GD patients “attempted suicide at some point in their lives.”<sup>62</sup> This statistic should not be taken lightly.

#### D. ALLEVIATING GENDER DYSPHORIA: TREATMENT OPTIONS

There is considerable controversy when it comes to treating GD. This controversy is due, in large part, to the lack of evidence-based guidelines for recommended treatments.<sup>63</sup> Since the late 1970s, the World Professional Association for Transgender Health (WPATH) has established minimum Standards of Care (SOC) for the treatment of GD,<sup>64</sup> and the American Psychiatric Association (APA) has deferred to the SOC since then.<sup>65</sup> In 2012, however, the APA organized a Task Force to review the literature, including the SOC, on the treatment of GD to determine whether there is a sufficient foundation for the APA to take the next step and develop its own set of treatment recommendations.<sup>66</sup>

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<sup>57</sup> *Id.* at 458.

<sup>58</sup> *See id.* at 453–54.

<sup>59</sup> *Id.* at 457–58.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 458–59; Sultan, *supra* note 46, at 1201.

<sup>62</sup> Khan, *supra* note 26, at 376.

<sup>63</sup> William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 ARCHIVES OF SEXUAL BEHAV. 759, 760 (2012) [hereinafter *APA Report on GD*].

<sup>64</sup> Cox, *supra* note 25, at 363. Since 1979, the SOC have been revised seven times, most recently in September 2011. Eli Coleman et al., *The World Prof’l Ass’n For Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT’L J. TRANSGENDERISM 165, 165 (2011) [hereinafter *Standards of Care*].

<sup>65</sup> *APA Report on GD*, *supra* note 63, at 767–68.

<sup>66</sup> *Id.* at 760.

The Task Force outlined four major recommendations for the APA: (1) “that the current credible literature is sufficient to support treatment recommendations and that such recommendations are needed”; (2) that the APA should issue a Position Statement on the Treatment of GD as quickly as possible, acknowledging that it will take considerable time for the APA to develop an entire treatment scheme; (3) “that the APA create opportunities for educating mental healthcare providers in this area of care”; and (4) that a group be created with the responsibility of following up on the overall recommendations of the Task Force’s report.<sup>67</sup> Until the APA establishes its own set of recommendations or issues a Position Statement on the treatment of GD, the WPATH’s SOC are most instructive.<sup>68</sup>

The SOC “recommend a carefully sequenced three stage course of treatment beginning with hormonal sex treatment, followed by living full-time as a member of the opposite sex, and concluding with sex reassignment surgery.”<sup>69</sup> This three-step approach to GD is commonly referred to as “triadic therapy.”<sup>70</sup> The SOC, however, make it clear that not all persons diagnosed with GD will need or want all aspects of possible therapies, and that the precise order of treatment will vary depending upon the individual’s needs.<sup>71</sup> Emphasizing the diversity of available treatment is important because while transsexual people may not ever need, want, or be able to afford transition-related surgery, becoming a legal member of the opposite sex remains contingent upon documented evidence of this complex medical procedure.<sup>72</sup>

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<sup>67</sup> *Id.* at 768–69. In conjunction with the Position Statement, the Task Force recommended that the APA draft a resolution that “concludes that medical research demonstrates the effectiveness and necessity of mental health care, hormone therapy[,] and [sex reassignment surgery] for many individuals diagnosed with [GD] and resolves that the [American Medical Association] supports . . . health insurance coverage for medically necessary treatments and opposes categorical exclusions of . . . treatment of [GD].” *Id.*

<sup>68</sup> The Task Force criticized the WPATH for not citing “its underlying evidence base” or “indicat[ing] the level of evidence upon which its [SOC] are based.” *Id.* at 768.

<sup>69</sup> Lauren Herman, *A Non-Medicalized Medical Deduction?: O’Donnabhain v. Commissioner & The I.R.S.’s Understanding of Transgender Medical Care*, 35 HARV. J.L. & GENDER 487, 490 (2012).

<sup>70</sup> Nicole M. True, Note, *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 IOWA L. REV. 1329, 1337 (2012).

<sup>71</sup> *Standards of Care*, *supra* note 64, at 170.

<sup>72</sup> Khan, *supra* note 26, at 379. Waiting until after sex reassignment surgery to legally recognize a transsexual person’s identity deprives him or her of fundamental legal rights. Because not all transsexual people undergo sex reassignment surgery, a more holistic analysis of someone’s characteristics and gender self-identification should be required for making a legal determination.

The first element of the SOC may entail psychiatric therapy with the individual fully embracing the new gender role or gender presentation in daily life.<sup>73</sup> While psychotherapy adds to the maturational process and facilitates self-comfort, it is not a complete cure.<sup>74</sup> This insufficiency “is evident from the fact that many transsexuals still pursue the more intensive hormonal and surgical therapies despite successful psychotherapy.”<sup>75</sup> The misconception that psychotherapy on its own is an adequate treatment presents a serious problem for transsexual prisoners like Kosilek. Prison officials routinely provide psychotherapy to the exclusion of other beneficial and more effective treatments because psychotherapy is relatively inexpensive, easy to administer, and unlikely to create significant security concerns.<sup>76</sup>

The second stage of treatment, hormone therapy, “consists of female-to-male transsexuals taking androgens and male-to-female transsexuals taking estrogen, progesterone, and testosterone-blocking agents.”<sup>77</sup> To be eligible for hormone therapy, “the patient must be (1) at least eighteen years old, (2) understand the benefits and the risks of hormone therapy, and (3) either complete a documented three month real-life experience, or a minimum of three months of psychotherapy.”<sup>78</sup> Hormone therapy has both permanent and reversible effects on the individual.<sup>79</sup> For male-to-female transsexuals, estrogen causes breast tissue growth, body fat redistribution, decreased upper body strength, softer skin, reduced body hair, and less frequent erections.<sup>80</sup> For female-to-male transsexuals, hormones cause increased upper body strength, weight gain, voice deepening, increased body and facial hair, male pattern baldness, and clitoral enlargement.<sup>81</sup> Some people with GD may decide that hormone therapy is sufficient for their individual circumstances and forgo the complex, expensive, and irreversible surgeries.<sup>82</sup>

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<sup>73</sup> *Standards of Care*, *supra* note 64, at 171.

<sup>74</sup> Colopy, *supra* note 30, at 262.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 263.

<sup>77</sup> True, *supra* note 70, at 1338.

<sup>78</sup> Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 L. & SEXUALITY 91, 98 (2006).

<sup>79</sup> True, *supra* note 70, at 1338.

<sup>80</sup> TRUE SELVES, *supra* note 43, at 197–98.

<sup>81</sup> *Id.* at 197.

<sup>82</sup> True, *supra* note 70, at 1338–39.

In the final phase of triadic therapy, the individual may elect sex reassignment or other related transitional surgeries.<sup>83</sup> These surgeries can include breast augmentations, tracheal shaves, voice alterations, and in the most extreme cases, sex reassignment surgery.<sup>84</sup> For men, sex reassignment surgery involves “removal of most of the penis and the entire testes, with the remaining penis turned ‘inside-out’ and then grafted to the newly constructed vaginal opening.”<sup>85</sup> Women will typically have a full hysterectomy and then a penis and scrotum is created from their own skin.<sup>86</sup> “Data from small European countries . . . suggest that roughly [one] per 30,000 adult males and [one] per 100,000 adult females seek sex-reassignment surgery.”<sup>87</sup> Another study found that in the United States, approximately 1000 to 2000 people seek sex reassignment surgery annually.<sup>88</sup>

Due to the irreversible nature of these intricate surgeries, the SOC impose strict eligibility requirements.<sup>89</sup> As a result, transsexual people tend to wait an average of two to seven years before undergoing sex reassignment surgery.<sup>90</sup> The eligibility requirements include that the patient:

- (1) be the legal age of majority in the patient’s country of residence;
- (2) participate in at least twelve months of continuous hormonal therapy;
- (3) complete at least twelve months of successful full time real-life experience; (4) participate regularly in psychotherapy throughout the real-life experience, if required by a mental health professional;
- (5) demonstrate knowledge of the surgical costs, likely complications, . . . length of hospitalization, and post-surgery rehabilitation; (6) demonstrate progress in dealing with potential consequences resulting from the transition; and (7) control problems such as sociopathy, substance abuse, suicidal tendencies, and psychosis.<sup>91</sup>

With more medical research dedicated to GD and social acceptance

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<sup>83</sup> *Id.* at 1339–40.

<sup>84</sup> *Id.*

<sup>85</sup> Sultan, *supra* note 46, at 1203.

<sup>86</sup> *Id.*

<sup>87</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 579 (4th ed., Text Revision 2000).

<sup>88</sup> Susan L. Megaard, *Scope of the Medical Expense Deduction Clarified and Broadened by New Tax Court Decision*, 112 J. TAX’N 353, 353 (2010).

<sup>89</sup> *Standards of Care*, *supra* note 64, at 182.

<sup>90</sup> Cox, *supra* note 25, at 349.

<sup>91</sup> Mann, *supra* note 78, at 98.

of GD on the rise, transsexual people have gained greater access to legal rights.<sup>92</sup> Courts are beginning to accept sex reassignment surgery as a genuine treatment option, and for some, medically necessary.<sup>93</sup> For example, in February 2010, the U.S. Tax Court in *O'Donnabhain v. Commissioner* held that gender-transitioning treatments are tax-deductible expenses because they have been proven to effectively treat the distress and suffering caused by GD.<sup>94</sup> Therefore, under the tax code, gender-confirming surgeries are considered legitimate treatment options for GD, not “cosmetic” surgeries.<sup>95</sup> *O'Donnabhain* signals to other courts the seriousness and medical necessity of gender-confirming health care as neither cosmetic nor elective.<sup>96</sup>

#### E. INSURANCE AND MEDICAID COVERAGE FOR GENDER DYSPHORIA

GD manifests itself in differing degrees of severity. In fact, some people with GD find comfortable, effective ways of living without psychotherapy, hormone therapy, or surgery.<sup>97</sup> Sex reassignment surgery is rarely performed because not every person with GD will want or need it. Cost is another reason for the surgery's infrequency. Costing approximately \$75,000,<sup>98</sup> surgery is simply not an option for many. Because of the expense, many seeking treatment for GD rely on assistance from government medical programs. But these programs often provide inadequate support because public ignorance about GD prevents the widespread sympathy—and funding—of more common health conditions.<sup>99</sup> Ignorance and apathy insulate insurers' and state Medicaid programs' treating “transition-related care as ‘medically unnecessary’ without much fear of public or political backlash.”<sup>100</sup> Private insurers may similarly bar GD coverage by labeling it a pre-existing condition, cosmetic, experimental, or medically unnecessary.<sup>101</sup> Courts, however, unanimously agree that transition-related treatments, including sex

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<sup>92</sup> Colopy, *supra* note 30, at 228.

<sup>93</sup> Sultan, *supra* note 46, at 1200–01.

<sup>94</sup> *O'Donnabhain v. Comm'r*, 134 T.C. 34, 76–77 (2010).

<sup>95</sup> *Id.* at 77.

<sup>96</sup> Herman, *supra* note 69, at 504–05.

<sup>97</sup> *Kosilek I*, 221 F. Supp. 2d 156, 184 (D. Mass. 2002).

<sup>98</sup> Khan, *supra* note 26, at 401.

<sup>99</sup> *Id.* at 388.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 390–91.

reassignment surgery, are not cosmetic or experimental. In fact, one court has found that,

[t]he surgery[,] which is lengthy, requires extensive modification and realignment of the human body. It is requested rarely, and done even more infrequently. It is performed to correct a psychological defect, and not to improve muscle tone or physical appearance. While many seem appalled at such surgery, it nevertheless has demonstrated proven benefits for its recipients, although psychological in nature.<sup>102</sup>

Given that the medical community has continued to recommend sex reassignment surgery and hormone therapy to treat GD, it defies common sense to categorize these treatments as experimental. Moreover, sex reassignment surgery results in “a high degree of patient satisfaction, a low prevalence of regrets, significant relief of [GD],” and generally improved psychosocial outcomes.<sup>103</sup> While Medicaid covers only what is deemed to be “medically necessary,” the Medicaid Act does not define this term,<sup>104</sup> leaving each state with significant discretion in deciding which treatments to cover.<sup>105</sup> As long as states follow a formal rulemaking process, they may exclude coverage for treatments they deem medically unnecessary.

Too many states take advantage of this unbridled discretion and exclude Medicaid coverage for those seeking sex reassignment surgery. In fact, one survey “found that forty states do not fund sex reassignment surgery through Medicaid.”<sup>106</sup> To prevent the stigma associated with GD from influencing states to withhold funds for treatment related to GD, Medicaid agencies should recognize gender-confirming treatments as medically necessary and prohibit states from denying treatments that the courts have deemed legitimate, and in some cases, medically necessary.

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<sup>102</sup> Davidson v. Aetna Life & Cas. Ins. Co., 420 N.Y.S.2d. 450, 453 (1979).

<sup>103</sup> True, *supra* note 70, at 1340.

<sup>104</sup> 42 U.S.C. § 1396-1 (2010).

<sup>105</sup> Khan, *supra* note 26, at 399 (“States have significant discretion in determining which services they will produce under the Medicaid Act, which requires only that the standards adopted for determining the extent of medical assistance be ‘reasonable’ and ‘consistent with the objectives’ of the Act.”).

<sup>106</sup> *Id.*

## III. UNIQUE ISSUES CONFRONTING TRANSGENDER PRISONERS

## A. DISCRIMINATION PAVES THE PATH TO PRISON

Historically, gender-defying behavior “has been considered abnormal, anomalous, and even scandalous.”<sup>107</sup> Popular ignorance about transgenderism inflicts extremely high rates of discrimination on the transgender community.<sup>108</sup> In fact, discrimination by employers on the basis of gender identity is legal in thirty-three states.<sup>109</sup> Moreover, while transgender people have a legally recognized psychiatric condition that would otherwise be covered by the Americans with Disabilities Act (ADA), the ADA specifically excludes coverage for GD.<sup>110</sup> Because transgender people are so marginalized, they frequently face the outright denial of education, employment, housing, and health care. Furthermore, transgender people are disproportionately affected by poverty, and thus rely heavily upon public assistance programs to provide for their most basic needs.<sup>111</sup> The welfare system further compounds this structural discrimination by limiting access to programs to those who adhere to strict formulations of gender and sex.<sup>112</sup> This relentless discrimination pushes transgender people to drugs, criminal activity, and other illegal means to survive and quell the effects of their gender incongruence.<sup>113</sup> As a result, transgender people are disproportionately represented in the prison population.<sup>114</sup> “A 2009 survey of several thousand transgender . . . people in the United States reported that 13 percent . . . were unemployed, 26 percent had been fired due to their transgender status, and 97 percent had

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<sup>107</sup> RACHEL ANN HEATH, *THE PRAEGER HANDBOOK OF TRANSSEXUALITY: CHANGING GENDER TO MATCH MINDSET* 11 (2006).

<sup>108</sup> Madeira, *supra* note 33, at 130 (Transgender people “are marginalized through discrimination and prejudice or victimized through violent acts or hate speech simply because their sexual status is perceived as deviant.”).

<sup>109</sup> *Employment Non-Discrimination Act*, Human Rights Campaign (Nov. 7, 2013), <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>.

<sup>110</sup> 42 U.S.C. § 12211 (2008) (Under the ADA, the term “disability” does not include “transvestism, transsexualism . . . [or] gender identity disorders not resulting from physical impairments.”).

<sup>111</sup> Angela Okamura, Note, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 113–14 (2011).

<sup>112</sup> Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 173 (2006).

<sup>113</sup> See Okamura, *supra* note 111, at 113–14.

<sup>114</sup> *Id.* at 114.



been harassed at work.”<sup>115</sup> It further reported that “27 percent earn less than \$20,000 per year and 15 percent earn less than \$10,000,” which is more than double the general population, where “only 7 percent reported [earnings below] \$10,000.”<sup>116</sup> While it is difficult to estimate the total number of transgender prisoners because many remain undiagnosed, one study suggests that there are likely between 500 to 750 transgender inmates in state facilities, and another 50 to 100 in federal facilities.<sup>117</sup> Transgender people, though overrepresented, make up a small number of inmates overall.<sup>118</sup>

Discrimination does not end once a transgender person is incarcerated. Transgender people face an increased risk of sexual assault by fellow inmates and guards because they are commonly perceived as “easy targets.”<sup>119</sup> One scholar noted that “the cumulative effect of the tension within them and the hate and ignorance surrounding them, compounded by the fact that they are often excluded from legislative and judicial protections—or even common understandings of what it means to be human—creates a profoundly negative psychological effect within them.”<sup>120</sup> Thus, “transgender[] inmates are more likely to suffer from depression, anxiety, posttraumatic stress disorder, . . . and substance abuse problems.”<sup>121</sup> Denying transgender prisoners proper treatment can also lead to suicide attempts, autocastration, and other horrific methods of self-mutilation.<sup>122</sup>

#### B. PLACEMENT AND THE DENIAL OF GENDER IDENTITY EXPRESSION IN PRISON

The American prison system currently houses prisoners according to biological sex.<sup>123</sup> Pre-operative transsexual inmates are housed according to their birth sex, “regardless of the extent of their non-genital gender transition.”<sup>124</sup> This genitalia-based classification system exposes

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<sup>115</sup> Colopy, *supra* note 30, at 237.

<sup>116</sup> *Id.* at 237–38.

<sup>117</sup> Silpa Maruri, Note, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL’Y 807, 810 (2011).

<sup>118</sup> *Id.*

<sup>119</sup> Okamura, *supra* note 111, at 134.

<sup>120</sup> Johnson, *supra* note 23, at 153.

<sup>121</sup> Maruri, *supra* note 117, at 812.

<sup>122</sup> *Id.* at 812, 821.

<sup>123</sup> Cox, *supra* note 25, at 358.

<sup>124</sup> *Id.* The hypocrisy of the genitalia-based classification system is evident in *Kosilek II*,

transsexual people to a heightened risk of harassment, injury, rape, and death.<sup>125</sup> Some prisons have responded to this problem by segregating transsexual prisoners in a separate wing.<sup>126</sup> But this forced isolation increases feelings of seclusion because these inmates are cut off from prisons' recreational, educational, occupational, and social activities.<sup>127</sup> Additionally, this segregation only protects transsexual inmates from other inmates; it does not protect inmates from potential abuse by prison guards and officials.<sup>128</sup>

The issue of where to place those prisoners who have undergone sex reassignment surgery is uncharted territory for courts because no judge, until *Kosilek II*, has mandated that the surgery be performed.<sup>129</sup> Courts, however, will likely defer to prison officials' judgment in where to place post-operative prisoners. After Kosilek's surgery, it makes most sense for her to be transferred to a women's prison where she can complete her gender transition and adapt to life as a female. In the future, it is possible that courts will implement specific guidelines and criteria, which if met, would allow for people with GD who do not undergo sex reassignment surgery to be housed with members of their experienced gender. Some might argue that placing those who undergo sex reassignment surgery in a separate facility altogether might prevent both security issues and ridicule. But this seclusion will only serve to further ostracize and isolate the prisoners, and a separate wing would be an unnecessary cost.

Furthermore, many male prisons prohibit male-to-female transgender inmates from wearing female clothing or make-up.<sup>130</sup> While performing one's experienced gender is an essential component of the "real-life experience" for treatment, courts give great deference to prison officials' expertise in dealing with the intricacies of inmate and overall prison safety.<sup>131</sup> Prison officials typically do not allow transgender prisoners to wear make-up or brassieres, claiming that such practices raise considerable safety concerns and would lead to a flood of other inmates

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where the court found Michelle Kosilek to be a transsexual female but nonetheless used male pronouns to describe her.

<sup>125</sup> Mann, *supra* note 78, at 105.

<sup>126</sup> Cox, *supra* note 25, at 358.

<sup>127</sup> Mann, *supra* note 78, at 108.

<sup>128</sup> *Id.*

<sup>129</sup> Kim, *supra* note 22.

<sup>130</sup> Sultan, *supra* note 46, at 1208–09.

<sup>131</sup> *Id.*

requesting special treatment.<sup>132</sup> Nonetheless, because wearing make-up is a very limited privilege and an essential part of one's "real-life experience," it is doubtful that non-transgender prisoners will inundate officials with special requests that meet the same level of necessity.<sup>133</sup> Moreover, the denial of basic undergarments and cosmetics can lead to mental anguish.<sup>134</sup> On balance, prisons should provide transgender inmates with appropriate undergarments and make-up because the potential harm of denying gender-confirming expression is great, while the potential security concerns and resources required are minimal. *Kosilek II* also suggests that these safety concerns do not have any empirical basis and may be a pretense for avoiding the political and social stigma surrounding transgender people's rights.<sup>135</sup>

#### IV. THE EIGHTH AMENDMENT AND HEALTH CARE IN PRISON

##### A. AN INTRODUCTION TO THE EIGHTH AMENDMENT

Legal challenges to the denial of certain medical treatments for transgender prisoners frequently involve an analysis of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>136</sup> Courts have interpreted this Amendment as encompassing "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."<sup>137</sup> It requires that the government protect an inmate's right to humane treatment by preventing the needless suffering as a result of serious illness or injury.<sup>138</sup> When confronting issues that implicate the Eighth Amendment, courts have consistently recognized that the Amendment does not have a precise definition, but rather, procures its meaning from "the evolving standards of decency that mark the progress of a maturing society."<sup>139</sup>

One important change in Eighth Amendment jurisprudence over time

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<sup>132</sup> *Id.*

<sup>133</sup> *But see id.* at 1209 (explaining that other inmates may file suits alleging equal protection violations because transgender inmates are receiving preferential treatment).

<sup>134</sup> See Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 548–51 (2000).

<sup>135</sup> *Kosilek II*, 889 F.Supp.2d 190, 238–47 (D. Mass. 2012).

<sup>136</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>137</sup> *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>138</sup> *Id.* at 103–04.

<sup>139</sup> *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

has been the constitutional requirement that inmates receive an adequate level of health care from the institutions that imprison them.<sup>140</sup> While courts unequivocally accept that inmates have a constitutional right to health care, the right is limited, and the degree of care required is a matter of judicial discretion.<sup>141</sup> Further, prison officials need not grant all prisoner requests or provide ideal medical care.<sup>142</sup> “[M]ere disagreement with the chosen treatment cannot be the basis of a cognizable constitutional claim”; however, policies which severely limit treatment options or fail to provide individualized medical evaluations clash with the Eighth Amendment’s guarantees.<sup>143</sup>

Moreover, whether a medical issue is serious enough to warrant treatment in prison is subject to ambiguity and judgment. This is especially true in the context of mental illness. Additionally, because the patient is a prisoner deserving of retribution, society believes that suffering in prison is part of the punishment. Courts, on the other hand, generally agree that “a condition that a reasonable physician would deem worthy of treatment and which, if left untreated, could result in further significant injury to the inmate or the wanton infliction of pain” constitutes a sufficiently serious medical need.<sup>144</sup>

#### B. PRECEDENT INFORMING THE COURT’S EIGHTH AMENDMENT ANALYSIS OF GENDER DYSPHORIA TREATMENT

The Eighth Amendment requires that the government provide care for prisoners’ most basic medical needs.<sup>145</sup> Courts also recognize that “transsexualism is not a frivolous ‘life style’ choice but a genuine psychiatric disorder for which a prisoner is entitled to receive medical or psychiatric treatment.”<sup>146</sup> In *Estelle v. Gamble*, the Supreme Court held that deliberate indifference by prison doctors or guards to the serious

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<sup>140</sup> *Estelle*, 429 U.S. at 103.

<sup>141</sup> Colopy, *supra* note 30, at 247–48.

<sup>142</sup> *Id.* at 247.

<sup>143</sup> Nikolas Andreopoulos, Note, *Criminal Law—Kosilek v. Maloney: In Prison While Imprisoned in the Body of the Opposite Sex: Examining the Issue of “Cruel and Unusual Punishment” Presented by an Incarcerated Transsexual*, 27 W. NEW ENG. L. REV. 219, 233, 250 (2005).

<sup>144</sup> *Kosilek I*, 221 F. Supp. 2d 156, 180 (D. Mass. 2002) (citing *Boateng v. O’Toole*, No. Civ.A. 96-12015-RGS, 1997 WL 828778, at \*1 (D. Mass. May 30, 1997)).

<sup>145</sup> *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

<sup>146</sup> *Farmer v. Haas*, 990 F. 2d 319, 321 (7th Cir. 1993).

medical needs of a prisoner constitutes cruel and unusual punishment.<sup>147</sup> While treatment need not cure an inmate's condition or illness, the care must at least mitigate the inmate's suffering while under state custody.<sup>148</sup> Under this standard, if a transsexual inmate needs only psychiatric therapy to alleviate GD, then the Eighth Amendment requires no more. If psychiatric therapy is inadequate, however, proper treatment requires that prison officials consider hormone therapy or sex reassignment surgery under *Estelle*'s reasoning.

*Estelle* established a framework to guide courts in determining whether an Eighth Amendment violation has occurred by assessing various objective criteria and the subjective motivations of the responsible prison officials.<sup>149</sup> If prison officials act appropriately by weighing all of the possible treatment options on an individualized basis, *Estelle* will preclude liability. The prisoner must also show more than mere negligence on the part of the prison officials and more than mere dissatisfaction with the type of care given.<sup>150</sup> Under *Estelle*, to state a valid 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."<sup>151</sup>

In *Brooks v. Berg*, the court applied *Estelle*'s deliberate indifference standard and held that a convicted murderer had the right to treatment for her GD because prison officials had acted with deliberate indifference by withholding diagnostic services after repeated requests by the prisoner.<sup>152</sup> The court found that this "blanket denial" of medical treatment ran afoul of the Eighth Amendment and held that prison officials must provide inmates with individualized diagnostic examinations to determine whether a serious medical need exists.<sup>153</sup> Moreover, in *Meriwether v. Faulkner*, the court recognized GD as "a very complex medical and psychological condition."<sup>154</sup> There, the court acknowledged that the prisoner had a

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<sup>147</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

<sup>148</sup> Colopy, *supra* note 30, at 259.

<sup>149</sup> *Estelle*, 429 U.S. at 116.

<sup>150</sup> *See id.* at 110.

<sup>151</sup> *Id.* at 106.

<sup>152</sup> *Brooks v. Berg*, 270 F. Supp. 2d 302, 309–10 (N.D.N.Y. 2003), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

<sup>153</sup> *Id.* at 312.

<sup>154</sup> *Meriwether v. Faulkner*, 821 F. 2d 408, 412 (7th Cir. 1987) (quoting *Pinneke v. Preisser*, 623 F. 2d 546, 549 (8th Cir. 1982)).

constitutional right to treatment for her serious GD, but gave great deference to prison officials by not mandating any particular type of treatment.<sup>155</sup>

In *Maggert v. Hanks*, the court held that prison officials did not have to provide treatments like hormone therapy or surgery to “cure” those with GD.<sup>156</sup> While the court acknowledged that a prisoner suffering from GD was entitled to some medical care, the court reasoned that the total cost of “[w]ithholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment.”<sup>157</sup> The court found the expense of sex reassignment surgery significant, arguing, “[w]e cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. We do not want transsexuals committing crimes because it is the only route to obtaining a cure.”<sup>158</sup> This opinion demonstrated the Seventh Circuit’s concern at the time with the potential inequity that would arise if convicts were provided with expensive medical treatments inaccessible to most law-abiding citizens.

Some courts have recognized the necessity of providing a specific type of treatment for transsexual prisoners suffering from GD. In *Phillips v. Michigan Department of Corrections*, a prisoner with GD had taken estrogen for seventeen years prior to incarceration.<sup>159</sup> Due to a prison policy that did not allow for the provision of hormones for transsexual prisoners, the prisoner experienced an abrupt reversal of many female characteristics, bruising and discomfort caused by a reduction of tissue around her breasts, vomiting, depression, and severe emotional distress.<sup>160</sup> The court ordered prison officials to reinstate hormone therapy for the prisoner to prevent further suffering.<sup>161</sup> In doing so, the court recognized GD as a serious medical disorder and held that failure to provide the proper treatment was cruel and unusual punishment.<sup>162</sup>

Finally, in *Fields v. Smith*, the court invalidated a 2006 Wisconsin statute banning the use of state funds or resources and federal funds

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<sup>155</sup> *Id.* at 413 (explaining that the prisoner “does not have a right to any particular type of treatment”).

<sup>156</sup> *Maggert v. Hanks*, 131 F. 3d 670, 671 (7th Cir. 1997).

<sup>157</sup> *Id.* at 672.

<sup>158</sup> *Id.*

<sup>159</sup> *Phillips v. Mich. Dep’t Corrs.*, 731 F. Supp. 792, 794 (W.D. Mich. 1990).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 801.

<sup>162</sup> *Id.* at 799.

passing through the state from being used to provide or facilitate hormone therapy or sex reassignment surgery to transsexual inmates.<sup>163</sup> The statute's proponents argued that gender-confirming treatments are cosmetic and a waste of taxpayer dollars.<sup>164</sup> The statute's opponents asserted that this blanket denial of treatment deprived transsexual prisoners of the fundamental legal right to access individualized treatment and adequate health care.<sup>165</sup> In overturning the statute, the court emphasized cases where GD may be so intense and severe that it can lead to "anxiety, irritability, suicidal ideation, suicide attempts, and self-mutilation or autocastration."<sup>166</sup> Thus, by denying treatment without considering each individual's needs, the statute inflicted needless pain upon inmates in violation of the Eighth Amendment.<sup>167</sup>

## V. *KOSILEK V. SPENCER*: CASE ANALYSIS

### A. BACKGROUND

While *Kosilek II* involves unusual facts, the outcome is neither unprecedented nor unfounded. *Kosilek II* held that the Massachusetts DOC violated Kosilek's Eighth Amendment rights by refusing to provide her with sex reassignment surgery for her severe GD.<sup>168</sup> The Massachusetts District Court became the first court to grant an injunction requiring a state prison to provide an inmate with sex reassignment surgery.<sup>169</sup> Here, Kosilek sought treatment that was prescribed to her "by the DOC's doctors as the *only* form of adequate medical care for [her] condition."<sup>170</sup> Kosilek's gender incongruence caused her to attempt to castrate herself and attempt to kill herself twice while incarcerated, once while taking the antidepressant Prozac.<sup>171</sup> Citing the WPATH's SOC to support its decision, the court held that "[s]ex reassignment is not 'experimental,' 'investigational,' 'elective,' 'cosmetic,' or optional in any meaningful sense. It constitutes very effective and appropriate treatment for

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<sup>163</sup> *Fields v. Smith*, 712 F. Supp. 2d 830, 869–70 (E.D. Wis. 2010).

<sup>164</sup> Cox, *supra* note 25, at 342.

<sup>165</sup> *Id.*

<sup>166</sup> *Fields*, 712 F. Supp. 2d at 864.

<sup>167</sup> *Id.* at 864–65.

<sup>168</sup> *Kosilek II*, 889 F. Supp 2d. 190, 198 (D. Mass. 2012).

<sup>169</sup> Kim, *supra* note 22.

<sup>170</sup> *Kosilek II*, 889 F. Supp 2d. at 196 (emphasis added).

<sup>171</sup> *Id.* at 197.

transsexualism or profound [GD].”<sup>172</sup>

*Kosilek II* followed *Kosilek I*, which held that Massachusetts prison officials did not provide Kosilek with adequate medical care for her severe GD.<sup>173</sup> The court struck down the DOC’s “freeze-frame” policy because it prohibited doctors from weighing all of the possible treatment options for transsexual prisoners.<sup>174</sup> This policy limited doctors to treating Kosilek’s GD at the same level as prior to her incarceration and did not account for any change in symptoms over time.<sup>175</sup> By keeping Kosilek’s treatment stagnant, the policy barred her from receiving any individualized medical evaluation and foreclosed the possibility of providing her with hormone therapy or sex reassignment surgery.<sup>176</sup> The court did not order that the DOC provide Kosilek with any specific treatment because it did not find that the DOC acted with deliberate indifference.<sup>177</sup> The court, however, did expect the DOC to make future decisions in a manner consistent with the Eighth Amendment’s protections.<sup>178</sup> The court analogized Kosilek’s situation to an inmate with cancer, finding that if an inmate were depressed because of the cancer, the DOC would not limit its efforts to addressing the depression.<sup>179</sup> It explained that the DOC would attempt to treat the cancer by providing necessary treatments like chemotherapy, regardless of cost.<sup>180</sup> As a result of the court’s holding in *Kosilek I*, the DOC abolished its “freeze-frame” policy in favor of a more flexible one, and began providing Kosilek with female hormones while she was living in the general population of a male prison.<sup>181</sup>

#### B. APPLICATION AND ANALYSIS OF *KOSILEK V. SPENCER*

In *Kosilek II*, the DOC’s doctors unequivocally found that the only adequate treatment for Kosilek’s severe GD was sex reassignment surgery.<sup>182</sup> To obtain the injunction for her sex reassignment surgery,

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<sup>172</sup> *Id.* at 232.

<sup>173</sup> *Kosilek I*, 221 F. Supp. 2d 156, 185 (D. Mass 2002).

<sup>174</sup> *Id.* at 192.

<sup>175</sup> *Id.* at 188.

<sup>176</sup> *Id.* at 171.

<sup>177</sup> *Id.* at 193.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 188.

<sup>180</sup> *See id.*

<sup>181</sup> *Kosilek II*, 889 F. Supp. 2d. 190, 218 (D. Mass. 2012).

<sup>182</sup> *Id.* at 200.



Kosilek had to prove that

(1) [she] has a serious medical need; (2) sex reassignment surgery is the only adequate treatment for it; (3) the defendant knows that Kosilek is at high risk of serious harm if [she] does not receive sex reassignment surgery; (4) the defendant has not denied that treatment because of good faith, reasonable security concerns, or for any other legitimate penological purpose; and (5) the defendant's unconstitutional conduct will continue in the future.<sup>183</sup>

The court found that Kosilek met her burden and proved every element of her claim, such that she had a constitutional right to sex reassignment surgery to mitigate the suffering caused by her severe GD.<sup>184</sup>

Kosilek not only demonstrated her medical care to be sub-par, but proved deliberate indifference by prison officials because they treated only her symptoms without addressing the cause of her suffering.<sup>185</sup> While acknowledging that an inmate is not entitled to ideal care or the care of his or her choice, the court found that the refusal to provide effective treatment for Kosilek's GD served no penological purpose.<sup>186</sup> Although the Massachusetts DOC Commissioner Kathleen Dennehy claimed that she denied Kosilek's sex reassignment surgery for "insurmountable security concerns," the court disregarded the claim as not credible, stating that it would be illogical to believe that Kosilek "would attempt to flee while being transported to get the treatment that [she] had dedicated twenty years of [her] life to receiving."<sup>187</sup> Additionally, the court found security concerns regarding other prisoners or the prison's atmosphere unjustified because the Superintendent had conducted a three-year security inspection to see if Kosilek's increasing feminization raised any security problems and the inspection did not report any significant issues.<sup>188</sup>

The court found that Dennehy's purported security concerns were a pretext to mask the real reasons for the decision to deny Kosilek's sex reassignment surgery: "fear of controversy, criticism, ridicule, and scorn."<sup>189</sup> While "[s]ecurity is a legitimate consideration for Eighth

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 238.

<sup>186</sup> *Id.* at 240.

<sup>187</sup> *Id.* at 202–03. Additionally, Dennehy later testified that she understood and accepted the DOC doctor's views that Kosilek posed a substantial risk of serious harm to herself and that sex reassignment surgery was the only adequate treatment for her condition. *Id.* at 202.

<sup>188</sup> *Id.* at 219.

<sup>189</sup> *Id.* at 198.

Amendment purposes[, a] concern about political or public criticism for discharging a constitutional duty is not.”<sup>190</sup> Dennehy was determined to avoid the criticism and societal backlash that would accompany being the first prison official to provide an inmate with sex reassignment surgery. In fact, Dennehy testified that she would rather retire than comply with a Supreme Court order to provide the surgery.<sup>191</sup> Dennehy also fired a specialist who recommended that Kosilek receive sex reassignment surgery, halted prescribed treatments for Kosilek, and excessively delayed decisions of whether any treatment would be allowed.<sup>192</sup> Additionally, Dennehy had the DOC hire a social worker who worked for a doctor known for his opposition to sex reassignment surgery.<sup>193</sup> This resistance to treating Kosilek based solely upon the stigma related to her condition constituted what the court considered a “pattern of pretense, pretext, and prevarication.”<sup>194</sup>

While the provision of female hormones quelled some of Kosilek’s suffering, her intense mental anguish continued, and she remained a suicide risk.<sup>195</sup> The court held that the negative psychological effects of not providing the proper treatment subjected Kosilek to cruel and unusual punishment.<sup>196</sup> The court also found that providing antidepressants, without more, would not reduce Kosilek’s suffering enough to eliminate the risk of continued suicide attempts.<sup>197</sup> As a result, the court ordered the DOC “to take all of the steps reasonably necessary to provide Kosilek [with sex reassignment surgery] as promptly as possible.”<sup>198</sup> The court deferred to the DOC to make good-faith decisions about the surgery’s logistics and Kosilek’s post-operative placement.<sup>199</sup>

### C. RESULTS AND POLICY IMPLICATIONS

Kosilek is no different from any other inmate with heart disease, a broken leg, or asthma. A diagnosis of GD does not make Kosilek any less

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<sup>190</sup> *Id.* at 201 (quoting *Kosilek I*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002)).

<sup>191</sup> *Id.* at 201.

<sup>192</sup> *Id.* at 201–02.

<sup>193</sup> *Id.* at 202.

<sup>194</sup> *Id.* at 201.

<sup>195</sup> *Id.* at 202.

<sup>196</sup> *Id.* at 204–05.

<sup>197</sup> *Id.* at 236.

<sup>198</sup> *Id.* at 204–05.

<sup>199</sup> *Id.* at 205.

deserving of fundamental constitutional rights. Moreover, just because a treatment is controversial or rare does not mean that a prisoner should not receive it, especially if that care can prevent suicide. Understandably, prisoners who have committed heinous acts of violence are unsympathetic candidates for the humane treatment of which they deprived their victims. The entire purpose of the Eighth Amendment, however, is to remove the biases and judgments against prisoners and ensure that they are not subjected to cruel and unusual punishment by the state.<sup>200</sup>

While the *Kosilek II* opinion elicited a surge of news headlines, the decision is not unprecedented.<sup>201</sup> Applying the facts of *Kosilek*'s specific case to the law, the court reached the correct result. Moreover, this case will not open the floodgates to extensive litigation regarding transsexual prisoners seeking sex reassignment surgery because not every case of GD is as severe as *Kosilek*'s. The *Kosilek II* decision does not mandate a constitutional right to receive sex reassignment surgery for every transsexual prisoner or make it easier for transsexual prisoners to receive the surgery. Instead, the decision makes sex reassignment surgery available for those without any alternative treatment options. While the Eighth Amendment does not require sex reassignment surgery for all transsexual prisoners with GD, prison officials may not completely exclude it either.

Opponents of the *Kosilek II* decision argue that because the surgery is not affordable or accessible to the majority of law-abiding citizens under most insurance and Medicaid plans, the surgery should not be available to convicted criminals in prison.<sup>202</sup> Likewise, some believe that withholding controversial medical treatment from prisoners who could not have obtained the treatment had they not committed a crime does not rise to a level of cruel and unusual punishment.<sup>203</sup> Others argue that providing sex

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<sup>200</sup> U.S. CONST. amend. VIII.

<sup>201</sup> See, e.g., Ben Berkowitz, *Federal Judge Orders Massachusetts to Pay for Killer's Sex Change*, REUTERS (Sept. 5, 2012, 10:21 AM), <http://www.reuters.com/article/2012/09/05/us-usa-crime-sexchange-idUSBRE8840V820120905>; Jim Fisher, *Robert Kosilek: Rewarding the Man Who Murdered His Wife with a Free Sex Change Operation*, JIM FISHER TRUE CRIME (Sept. 7, 2012), <http://jimfishertruecrime.blogspot.com/2012/09/robert-kosilek-rewarding-man-who.html>; Ryan Morrison, *Murderer in Prison Gets a Sex Change*, LEGAL AS SHE IS SPOKE (Sept. 5, 2012), <http://www.lasisblog.com/2012/09/05/murderer-in-prison-gets-a-sex-change/>; Lila Shapiro, *Michelle Kosilek Ruling Sparks Debate Over Rights of Transgender Prisoners*, HUFFINGTON POST (Oct. 1, 2012, 2:24 PM), [http://www.huffingtonpost.com/2012/09/29/michelle-kosilek-ruling-transgender\\_n\\_1924424.html](http://www.huffingtonpost.com/2012/09/29/michelle-kosilek-ruling-transgender_n_1924424.html).

<sup>202</sup> Linda Chin, Note, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks v. Berg*, 11 CARDOZO WOMEN'S L.J. 151, 176 (2004).

<sup>203</sup> *Id.*

reassignment surgery improves and benefits the prisoner at the unfair expense of taxpayers, while others simply believe that sex reassignment surgery is never medically necessary.<sup>204</sup> “Judge Posner viewed [GD] care as nonessential, saying that ‘[GD] is not [. . .] generally considered a severe enough condition to warrant expensive treatment at the expense of others.’”<sup>205</sup> Not submitting to Judge Posner’s view of GD care, many appellate courts and the Supreme Court now recognize GD as a serious medical condition requiring careful and individualized medical care.<sup>206</sup> Courts also recognize that the cost of adequate medical care is never a legitimate reason for withholding necessary treatment from a prisoner.<sup>207</sup>

The argument that it is inequitable to provide treatment to prisoners who would not have had access to the treatment had they not violated the law is unconvincing because in contrast to law-abiding citizens, prisoners have a constitutional right to medical care.<sup>208</sup> Moreover, the treatment for GD should not be viewed any differently than the treatment for other serious medical conditions. For example, if a prisoner had diabetes or a liver problem prior to or during incarceration, prison officials would not deny the prisoner the appropriate treatment.<sup>209</sup> Thus, it follows that if a prisoner suffers from GD, prison officials should not deny access to the appropriate treatment by claiming it is too expensive. Additionally, because transsexual prisoners constitute such a small proportion of the overall prison population, the cost to treat GD is relatively minor.<sup>210</sup>

Four important policy considerations also mitigate the cost concerns of providing treatment for prisoners with GD. First, to receive sex reassignment surgery, a prisoner must be diagnosed with GD and meet extensive eligibility requirements.<sup>211</sup> Second, few inmates are diagnosed with GD.<sup>212</sup> Third, not all transsexual inmates require the same treatment.<sup>213</sup> Fourth, there is not a great risk for abuse because prisoners

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<sup>204</sup> *Id.*

<sup>205</sup> *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997).

<sup>206</sup> *Colopy*, *supra* note 30, at 250 (citing cases).

<sup>207</sup> *Kosilek II*, 889 F. Supp. 2d 190, 210 (D. Mass. 2012).

<sup>208</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>209</sup> In fact, in 2002, a two-time felon convicted of robbery, serving a sentence of fourteen years in California, received a heart transplant costing \$1 million. Sultan, *supra* note 46, at 1225. California officials cited *Estelle* to justify the transplant even though the cost of the transplant was far beyond what many un-incarcerated Americans could afford. *Id.*

<sup>210</sup> Cox, *supra* note 25, at 362.

<sup>211</sup> *Colopy*, *supra* note 30, at 257–58.

<sup>212</sup> *Id.* at 258.

<sup>213</sup> *Id.*

who are not transsexual will not want the surgery and will not manipulate prison officials to receive similar treatment.<sup>214</sup> Therefore, “[w]ith enforceable diagnosis guidelines, low numbers, variable need, and no incentive to abuse the system,” sex reassignment surgeries would not be an unreasonable treatment option for prisoners with severe GD.<sup>215</sup>

In recent years, courts have rejected prison officials’ attempts to deny transsexual prisoners appropriate treatment because the prescribed treatment would be unpopular or politically controversial.<sup>216</sup> The *Kosilek II* court reprimanded the DOC Commissioner’s cowardly failure to properly treat Kosilek because of potential political repercussions.<sup>217</sup> A concern for controversy is not a constitutionally permissible basis to deny an inmate necessary medical care.<sup>218</sup> Society must not tolerate actions relegating transsexual people to a sub-human category exempt from constitutional protections. Given that discrimination drives some transsexual people to crime, adequate treatment and protection from victimization may help these inmates successfully re-integrate into society as their experienced gender and thereby reduce recidivism rates.<sup>219</sup> Furthermore, withholding necessary treatment for prisoners with GD can result in disruptive and dangerous side effects like depression and suicide, which prisons must ultimately manage and control.

Finally, it is important to limit this case to its facts. Analyzing Kosilek’s specific circumstances and characteristics demonstrates that this decision will not result in an outpouring of transsexual prisoners newly eligible for sex reassignment surgery. Kosilek’s GD was so severe that hormones, psychotherapy, and antidepressants combined would not address her risk of suicide, and so sex reassignment surgery was medically necessary. Moreover, for prisoners serving life without parole, prison becomes their so-called “real-life experience,” and they therefore need access to resources sufficient to quell the symptoms of their GD. Given the rarity of transsexual people sentenced to life without parole, there will be minimal harm in extending the degree of care in this particular case. The life without parole prisoner would otherwise never get a chance to align his or her body and gender identity, so it is cruel and unusual

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<sup>214</sup> *Kosilek II*, 889 F. Supp. 2d 190, 241 (D. Mass. 2012).

<sup>215</sup> Colopy, *supra* note 30, at 258.

<sup>216</sup> *Kosilek II*, 889 F. Supp. 2d at 211.

<sup>217</sup> *Id.* at 201.

<sup>218</sup> *Kosilek II*, 889 F. Supp. 2d at 201 (quoting *Kosilek I*, 221 F. Supp. 2d 156, 192 (D. Mass. 2002)).

<sup>219</sup> Colopy, *supra* note 30, at 270.

punishment to categorically deprive someone of this treatment with no hope of release.

## VI. CONCLUSION

This case will likely have a significant impact on the way society views transgender people and will result in legislatures and courts granting broader civil rights and protections under the law for this group. Although the positive implications of the *Kosilek II* decision may not be readily apparent to some, it sets the tone for a better future for the transgender community. This decision will force legislatures, medical communities, and citizens to re-evaluate the severe impact that GD can have on one's identity and other peripheral issues like family life, housing, employment, and medical care. Additionally, the decision may diminish some of the stigma and provoke sympathy rather than repugnance for those who legitimately need sex reassignment surgery.

While some vehemently criticized the court's ordering of sex reassignment surgery for Kosilek, regardless of the label that one attaches to Kosilek's collective symptoms, it is clear from the suicide and autocastration attempts that she suffered tremendously from not receiving the proper treatment. Just because doctors labeled Kosilek as having GD does not mean that she should be subjected to inhumane treatment. Moreover, Kosilek's constitutional right to adequate health care under the Eighth Amendment should not be disregarded simply because GD is rare and often misunderstood. As society progresses, it is imperative for educational and outreach efforts to spread awareness of the severe symptoms that can accompany GD, and communal changes must be made to reduce the stigma and hostility associated with transgender people.

It is also important to recognize that the Eighth Amendment serves to protect the rights of prisoners to avoid creating an inhumane and anachronistic criminal justice system. It is cruel for prison officials to permit an inmate to suffer unnecessarily from a serious medical need. It is unusual to treat a prisoner suffering from GD differently from the many inmates suffering from other mental illnesses. It is not permissible for prison officials to deny proper treatment just because GD is misunderstood, and one of the possible treatments for it is unpopular. Therefore, Kosilek deserves sex reassignment surgery not only from a moral standpoint, but also from a legal and constitutional perspective.