

# THE CAGED BIRD SINGS OF FREEDOM: WHY ALLOWING SEX-REASSIGNMENT SURGERY FOR TRANSGENDER LIFE PRISONERS FACILITATES REHABILITATION AND RECONCILIATION

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## ABSTRACT

In October 2015, California became the first state in U.S. history to implement guidelines for transgender state prisoners to petition for gender-affirming and sex-reassignment surgeries. These guidelines raise the question why California would authorize gender-affirming surgeries for prisoners serving life-sentences, yet struggle to implement laws to make the same surgeries more accessible to law-abiding citizens. While the California Department of Corrections and Rehabilitation (“CDCR”) likely implemented the radical SRS policy to abide by Eighth Amendment protections for transgender inmates suffering from severe gender dysphoria—inmates to whom SRS coverage is medically necessary and constitutionally required—this Note outlines four alternative justifications

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\* Class of 2017, University of Southern California Gould School of Law, B.A. Political Science, University of Colorado at Boulder. This Note is dedicated to my client, Amelia, who shared her vulnerable and inspiring story of incarceration, transition, and hope. Amelia is fighting for freedom every day in a California male institution. Thank you to my mentor and Note supervisor, Heidi Rummel, whom champions juvenile justice at the Post-Conviction Justice Project. She has exemplified the values of a lawyer I hope to become. Dear thanks to my partner, Mifa, who continues to challenge me to approach the world with empathy and fight for social justice. Thank you to my parents, brother, and aunt who have supported me every step of the way and showed me the value of storytelling.

for why the policy is essential. First, I argue that SRS policies prevent prison violence against transgender inmates by facilitating transition to state prisons that align more authentically with transgender inmate’s identity. Second, CDCR has a duty to protect transgender inmates from suicide and self-harm caused by gender dysphoria that may be mitigated by SRS coverage. Third, SRS policies improve opportunities to become suitable for parole by affording transgender inmates more equitable ability to remain safe, free from disciplinary action, and involved in prison programming. Fourth, gender-affirming medical coverage enables rehabilitation and restorative justice. By using narratives from my transgender client serving life in prison in California, this Note focuses primarily on the last justification to argue that gender-affirming coverage most fundamentally enables rehabilitation and reconciliation for transgender life prisoners to address a parole board on their journey of transition.

*“But a caged bird stands on the grave of dreams/ his shadow shouts on a nightmare scream/ his wings are clipped and his feet are tied/ so he opens his throat to sing./*

*The caged bird sings/ with a fearful trill/ of things unknown/ but longed for still/ and his tune is heard/ on the distant hill/ for the caged bird/ sings of freedom.” -Maya Angelou<sup>1</sup>*

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<sup>1</sup> Maya Angelou, *Shaker, Why Don't You Sing?*, CAGED BIRD (1983), available at <http://www.poetryfoundation.org/poem/178948>.

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I. INTRODUCTION

In October 2015, California became the first state in the United States to implement policies for transgender prisoners to receive gender-affirming and sex-reassignment surgeries (“SRS”) in state prisons.<sup>2</sup> However, costly sex-reassignment surgeries are rarely covered by state-sponsored and private insurance companies for law-abiding residents.<sup>3</sup>

<sup>2</sup> Sam Levin, *California Prisons Implement Policy Allowing Transgender Inmates to Access Surgeries*, East Bay Express, (Oct. 21, 2015), <http://www.eastbayexpress.com/SevenDays/archives/2015/10/21/california-prisons-implement-policy-allowing-transgender-inmates-to-access-surgeries>.

<sup>3</sup> Transgender Law Center, *Medi-Cal and Gender Reassignment Procedures*, THE TRANSGENDER LAW CENTER AND THE COMMUNITY HEALTH ADVOCACY PROJECT (2012), <http://transgenderlawcenter.org/wp-content/uploads/2012/07/Medical-Fact-Sheet.pdf>.

The stark divide raises the question, why does California authorize gender-affirming surgeries for inmates serving life sentences for serious crimes,<sup>4</sup> but struggles to implement wide-spread gender-affirming medical coverage for law-abiding transgender residents?<sup>5</sup>

In this Note, I will outline four central justifications for why gender-affirming medical coverage is necessary for transgender inmates in California State Prisons: (1) SRS policies prevent prison violence against transgender inmates by facilitating transition to state prisons that align more authentically with transgender inmate's identity, (2) California Department of Corrections and Rehabilitation ("CDCR") has a duty to protect transgender inmates from suicide and self-harm caused by gender-dysphoria that may be mitigated by SRS coverage, (3) SRS policies improve opportunities to become suitable for parole by affording transgender inmates more equitable ability to remain safe, free from disciplinary action, and involved in prison programming, and (4) SRS coverage enables rehabilitation of transgender prisoners serving life sentences ("lifers") by facilitating transition to a more coherent self.

While the CDCR likely implemented the radical SRS policy to abide by Eighth Amendment protections for transgender inmates suffering from severe gender dysphoria<sup>6</sup>—inmates to whom SRS coverage is medically necessary<sup>7</sup>—this Note focuses primarily on the fourth justification. I argue that SRS coverage is not relevant simply because it is medically necessary but most fundamentally it affords transgender inmates serving life sentences a greater opportunity of rehabilitation and parole suitability by enabling them to express to a parole board through a coherent identity insight into why the parolee committed the offense and how they have rehabilitated.

In part II, I provide a brief background about the recent legal framework and constitutional claims that initiated CDCR's radical SRS

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<sup>4</sup> See CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, GUIDELINES FOR REVIEW OF REQUEST FOR SEX REASSIGNMENT SURGERY (SRS) (2015), [http://www.cphcs.ca.gov/docs/careguides/Guidelines%20for%20Review%20of%20Requests%20for%20Sex%20Reassignment%20Surgery%20\(SRS\).pdf](http://www.cphcs.ca.gov/docs/careguides/Guidelines%20for%20Review%20of%20Requests%20for%20Sex%20Reassignment%20Surgery%20(SRS).pdf) [hereinafter CDCR SRS Policy].

<sup>5</sup> Transgender Law Center, *supra* note 3.

<sup>6</sup> Lindsey V. Gilbert, Note, *Crossing the Line: Examining Sex Reassignment Surgery for Transsexual Prisoners in the Wake of Kosilek v. Spencer*, 23 S. CAL. REV. L. & SOCIAL JUSTICE 29, 47 (2013); see Transgender Law Center, *TLC Celebrates Groundbreaking CA Prison Policy Ensuring Access to Gender-Affirming Medical Care*, TRANSGENDER LAW CENTER BLOG (Oct. 21, 2015), <http://transgenderlawcenter.org/archives/12109>.

<sup>7</sup> *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 198 (D. Mass. 2012).

policy. This part offers an education on trans-identity and gender dysphoria and a short analysis of the SRS policy itself. In part III, I lay out the four justifications for why the SRS policy is necessary for transgender inmates. Here, I will argue that the least obvious or intended, but perhaps most fundamental, justification for the SRS policy is that it enables transgender life inmates a coherent self-identity necessary for parole suitability and rehabilitation. This part will include a brief overview of California's parole law. In part IV, I will exemplify the importance of gender-affirming medical coverage for the rehabilitation of transgender life inmates by re-telling the narrative of a current male-to-female prisoner with a life sentence in a California male prison, a client of mine named Amelia.<sup>8</sup> Through narrative, I will show that gender dysphoria is often a cause of a transgender inmate's commitment offense, and that the parole process itself is predicated on an inmate's ability to coherently articulate and demonstrate insight into their crime. As a result, I will argue that gender-affirming medical coverage affords transgender inmates the rehabilitation necessary to coherently fight for freedom.

## II. TRANSITIONS IN CONTEXT: A BACKGROUND OF TRANSGENDER INMATES IN CALIFORNIA STATE PRISONS AND THE IMPLEMENTATION OF CDCR'S SEX-REASSIGNMENT POLICY

There are currently 363 transgender women living in California male state prisons, and 22 transgender men living in female prisons.<sup>9</sup> This number only encompasses those transgender inmates that CDCR has authorized or who have self-selected to undergo hormone therapy for their diagnosed gender dysphoria ("GD"),<sup>10</sup> the psychological distress accompanying the incongruence of one's expressed versus experienced gender.<sup>11</sup> Yet, many transgender inmates have not yet been able to achieve CDCR recognition as transgender since they have not chosen to undergo hormone therapy for a litany of personal or safety reasons or have not been

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<sup>8</sup> Amelia's name has been changed to protect her identity and maintain client confidentiality.

<sup>9</sup> Sam Levin, *When Women Are Sentenced to Male Prisons*, EAST BAY EXPRESS (Sep. 30, 2015), <http://www.eastbayexpress.com/oakland/when-women-are-sentenced-to-male-prisons/Content?oid=4517050>.

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

<sup>11</sup> The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders reclassified and categorized "gender identity disorder" as "gender dysphoria." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) [hereinafter DSM-V].

authorized for hormone therapy.<sup>12</sup> CDCR houses inmates in prisons corresponding to the gender assigned at birth.<sup>13</sup> Unless a transgender woman or -man has completed sex-reassignment surgery, CDCR denies the prisoner access to housing that matches their gender.<sup>14</sup> CDCR also does not consider sexual or gender identity when initially housing prisoners and has not created separate housing units for LGBT inmates to prevent prison violence.<sup>15</sup>

As a result, transgender inmates experience violence and abuse far more frequently than any other population in California state prisons.<sup>16</sup> A staggering 59 percent of transgender inmates report having experienced sexual assault, compared to 4.4 percent of the general prison population.<sup>17</sup> Inmates that have multiple marginalized identities, such as a transgender person of color living in poverty, experience an increased risk of violence and abuse.<sup>18</sup> On top of the violence perpetrated against transgender prisoners, transgender inmates without gender-affirming medical coverage are vulnerable to the self-harm and suicidality caused by gender dysphoria.<sup>19</sup> Many transgender inmates in California without medical care have attempted auto-castration in order to alleviate their distress.<sup>20</sup> Sex-reassignment surgery is one treatment for GD, which involves for transgender females the removal of male genitals and the construction of female genitals resulting in the elimination of the primary source of

<sup>12</sup> Levin, *supra* note 9 (transgender inmates have been categorized by California as those with medical diagnoses and/or are engaged in hormonal therapy).

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

<sup>14</sup> Eric T. Fleischaker, Note, *The Constitutionality of Prolonged Administrative Segregation for Inmates Who Have Received Sex Reassignment Surgery*, 41 HASTINGS CONST. L.Q. 903, 907 (2014).

<sup>15</sup> *Final List of LGBT-Related Bills - 2009 Legislation*, CALIFORNIA LEGISLATIVE LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAUCUS (Eric Astacaan ed., Oct. 19, 2009), available at <http://lgbtcaucus.legislature.ca.gov/2009-legislation> (legislation passed by the California Legislature that would classify inmates in order to prevent sexual violence was vetoed by the Governor in 2009).

<sup>16</sup> Tasha Hill, *Sexual Abuse in California Prisons: How the California Rape Shield Fails the Most Vulnerable Populations*, 21 UCLA WOMEN'S L.J. 89, 114–115 (2014).

<sup>17</sup> Center for Evidence-Based Corrections Department of Criminology, Law and Society University of California, Irvine, *Transgender Inmates in California's Prisons: An Empirical Study of a Vulnerable Population*, (April 8, 2009), <http://ucicorrections.seweb.uci.edu/files/2013/06/Transgender-Inmates-in-CAs-Prisons-An-Empirical-Study-of-a-Vulnerable-Population.pdf> [hereinafter Irvine, Transgender Prisoner Empirical Study].

<sup>18</sup> Hill, *supra* note 16.

<sup>19</sup> Gilbert, *supra* note 6, at 38.

<sup>20</sup> *Id.* at 45.

testosterone and, more importantly, the alignment of her gender identity and her sex characteristics.<sup>21</sup>

#### A. A BRIEF EDUCATION OF TRANS IDENTITY AND GENDER-DYSPHORIA

While sex is typically understood as a prescribed objective binary—female *or* male—that is determined by one’s sexual characteristics (including genitalia), gender is understood as demonstrative of one’s identity and sense of self.<sup>22</sup> While gender is a subjective means of self-identity, sex has legally been prescribed as a static and objective binary.<sup>23</sup> Namely, “while gender is often considered to be something that bodies *do*, sex is often considered to be something that bodies *are*.”<sup>24</sup>

Transgender individuals describe having a gender identity or expression that is inconsistent with the social norms of their prescribed sex.<sup>25</sup> The term “transgender” and more generally “*trans*” encompasses a broad group of individuals who may identify with a gender that is different from the one they were born with, may identify as gender nonconforming, or may identify as being both male and female or neither.<sup>26</sup>

Many transgender individuals experience persistent suffering and mental stress from their gender incongruity.<sup>27</sup> The fifth edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorder (“DSM”) diagnoses gender dysphoria as the distress resulting from an incongruent gender,<sup>28</sup> which many transgender individuals experience. GD can range in severity, but often manifests as a serious disturbance in a person’s daily functioning.<sup>29</sup> Individuals struggling with GD often times become socially stigmatized and experience high rates of depression, self-harm, suicidality, and substance-related

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<sup>21</sup> World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, (Version 7, 2012), [https://amo\\_hub\\_content.s3.amazonaws.com/Association140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf](https://amo_hub_content.s3.amazonaws.com/Association140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf), 9–10 [hereinafter WPATH].

<sup>22</sup> Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 52–53 (2006).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> WPATH, *supra* note 21.

<sup>28</sup> DSM-V, *supra* note 11.

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

disorders.<sup>30</sup>

Treatment for GD varies dramatically and is directed by the individual's personal needs and desires.<sup>31</sup> Generally, the American Psychiatric Association ("APA") through the guidance of the World Professional Association for Transgender Health's ("WPATH") *Standards of Care*, recommend a three-stage approach that includes: (1) living as a member of the desired gender or sex, (2) hormonal therapy, and (3) self-elected sex-reassignment surgery or other transitional surgeries.<sup>32</sup>

Treatment for GD does not necessarily include all three of these steps but rather is tailored to an individual's holistic therapeutic and transitional process.<sup>33</sup> The first stage involves a person fully adopting their gender role or identity outwardly and in their everyday life.<sup>34</sup> Many times this process is combined with hormonal therapy, the second stage of treatment.<sup>35</sup> Male-to-female ("MTF") individuals may take estrogen and testosterone-blocking agents to encourage breast growth, reduce body hair, and redistribute body fat.<sup>36</sup> Female-to-male ("FTM") individuals may take testosterone to increase body strength, deepen their voice, grow facial and body hair, and enlarge the clitoris.<sup>37</sup>

In many experiences of GD, transitional surgeries and sex-reassignment surgery may be an effective treatment. WPATH explains,

"Surgery – particularly genital surgery – is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria. For the latter group, relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their

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<sup>30</sup> Bradley A. Sultan, Note, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195, 1199-1200 (2003).

<sup>31</sup> WPATH, *supra* note 21.

<sup>32</sup> *Id.* See 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>33</sup> WPATH, *supra* note 21.

<sup>34</sup> Gilbert, *supra* note 6, at 40.

<sup>35</sup> *Id.*

<sup>36</sup> WPATH, *supra* note 21.

<sup>37</sup> *Id.*



gender identity.”<sup>38</sup>

Non-genital transitional surgeries can include breast augmentations, tracheal shaves, voice alterations, and various aesthetic procedures.<sup>39</sup> In more extreme cases of GD, sex-reassignment or genital surgery is necessary.<sup>40</sup> For MTF patients, the surgery involves removing most parts of the penis and the testes, and turning the remaining parts of the penis into a vaginal opening.<sup>41</sup> Likewise, FTM patients usually construct a penis and scrotum and undergo a full hysterectomy.<sup>42</sup>

Most people with GD live a happy life without sex-reassignment surgery.<sup>43</sup> Many people with GD simply do not want or need the surgery. Moreover, SRS treatment is extremely costly,<sup>44</sup> and is rarely covered by private health insurance because GD is seen as a pre-existing condition or the surgery is considered to be cosmetic.<sup>45</sup> Some state-sponsored health insurance policies, including MediCal, cover sex-reassignment surgery if it is medically necessary, but coverage is difficult to petition for and rarely administered.<sup>46</sup> As research grows that highlights the viability and necessity of sex-reassignment surgery for GD, medical coverage and public acceptance has slowly begun to catch up.<sup>47</sup>

#### B. IMPLEMENTING GENDER-AFFIRMING MEDICAL COVERAGE FOR TRANSGENDER INMATES AND THE EIGHTH AMENDMENT’S MEDICAL NECESSITY STANDARD

The Eighth Amendment requires states to provide necessary medical coverage for all prisoners in custody.<sup>48</sup> The Supreme Court in *Estelle v. Gamble* held that the deliberate indifference to the serious medical needs of inmates constitutes the “unnecessary and wanton infliction of pain”

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<sup>38</sup> *Id.* at 54.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 54-55.

<sup>44</sup> Rachael Rezabek, Note, *(D)evolving Standards of Decency: The Unworkability of Current Eighth Amendment Jurisprudence as Illustrated by Kosilek v. Spencer*, 87 S. CAL. L. REV. 420, 427 (2014).

<sup>45</sup> Noa Ben-Asher, *supra* note 22. See also Transgender Law Center, *supra* note 3.

<sup>46</sup> Transgender Law Center, *supra* note 3.

<sup>47</sup> Rezabek, *supra* note 44.

<sup>48</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

protected by the Eighth Amendment.<sup>49</sup> *Estelle* first established standards guiding courts about whether prisoners' Eighth Amendment rights were violated.<sup>50</sup> *Estelle* prescribed that prisoners must be provided adequate treatment to mitigate suffering.<sup>51</sup> Here, the Court explained that mere negligence in diagnosing or treating a medical condition does not surmount to an Eighth Amendment violation.<sup>52</sup> Rather, a prisoner must establish "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>53</sup>

In turn, under *Estelle*'s reasoning, transgender inmates with GD are owed medical treatment proportional to the severity of their gender dysphoria.<sup>54</sup> For the most severe cases of GD in which no other treatments are effective to treat GD—such as hormonal therapies—*Estelle* would effectively require that sex-reassignment surgery be available.<sup>55</sup> To argue that sex-reassignment surgery is medically necessary, *Estelle* requires the petitioner to prove that the state is *subjectively aware* of the transgender inmate's severe gender dysphoria and failed to adequately respond.<sup>56</sup>

In light of *Estelle*, courts have continued to rule that prisons cannot implement blanket policies that deny gender-affirming medical coverage for transgender inmates. The court in *Brooks v. Berg* held that *Estelle*'s deliberate indifference standard required prisons to give individualized diagnostic consideration to transgender inmates.<sup>57</sup> Specifically, the court ruled that a transgender woman in a male prison had a right to treatment for her severe GD because the institution had continued to deny requests for treatment.<sup>58</sup>

Courts have also established that transgender inmates have valid claims to specific treatment options, such as hormonal therapy and sex-reassignment surgery, even when the prison offers other types of treatments

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<sup>49</sup> *Id.* at 104.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.* at 106.

<sup>54</sup> *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011).

<sup>55</sup> *Id.*

<sup>56</sup> *Conn v. City of Reno*, 591 F.3d 1081, 1096 (9th Cir. 2010), *vacated*, 131 S. Ct. 1812 (2011), *reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011).

<sup>57</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>58</sup> *Id.*

for GD.<sup>59</sup> The court in *Fields v. Smith* held that a transgender inmate established a valid Eighth Amendment claim when their institution continued to deny access to sex-reassignment surgery even though the prison provided counseling and hormonal therapy treatment options.<sup>60</sup> The court in *Fields* points out that treatment must correspond to the severity of a transgender inmate's GD.<sup>61</sup> Sex-reassignment surgery may still be medically necessary to alleviate the severe effects of GD, even if an inmate is receiving hormonal therapy.<sup>62</sup> "Some people cannot function because the disorder is so intense and severe, while others experience less discomfort. For those with severe GD, symptoms may include depression, anxiety, irritability, suicidal ideation, suicide attempts, and self-mutilation or autocastration."<sup>63</sup> The court exemplifies the reality that treatment for gender dysphoria is individualized and that surgery for some transgender inmates is the only viable or effective treatment to alleviate serious suffering.<sup>64</sup>

Even in the wake of courts acknowledging transgender inmates' Eighth Amendment right to medically necessary sex-reassignment surgery, it was not until last year that CDCR authorized SRS for any prisoner.<sup>65</sup> In April 2015, Michelle-Lael Norsworthy, a transgender woman held in a California men's prison, won a historic preliminary injunction ordering CDCR to provide her sex-reassignment surgery.<sup>66</sup> Ms. Norsworthy had been continually denied gender-affirming medical coverage, including SRS, to treat her ongoing severe GD.<sup>67</sup> Relying on the Eighth Amendment's standard of deliberate indifference, the judge in Ms. Norsworthy case found that CDCR had "chose[n] to ignore the clear recommendations of her mental health provider" that established she suffered excruciating psychological and emotional pain from her GD, and "instead of following his recommendations . . ."<sup>68</sup> CDCR had removed Ms.

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<sup>59</sup> *Fields*, 653 F.3d at 556 (holding that barring access to SRS violates Eighth Amendment, even though patients were receiving treatments for GD).

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 684.

<sup>64</sup> *See id.*

<sup>65</sup> *See* Transgender Law Center, *Victory! Court Orders California Prison to Provide Treatment for Transgender Prisoner* (April 2, 2015), <http://transgenderlawcenter.org/archives/11514>.

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

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Norsworthy from the doctor's care altogether.<sup>69</sup> CDCR appealed the decision, and Ms. Norsworthy was released on parole before the legal fight for gender-affirming coverage was decided on appeal.<sup>70</sup>

In June 2015, Mia Rosati, a transgender woman in a California male prison, had her Eighth Amendment claim reversed and remanded by the Ninth Circuit when a district court dismissed the complaint at a screening for failure to state a claim.<sup>71</sup> Ms. Rosati alleged that CDCR had continually denied her requests for SRS after having reported repeated episodes of attempted self-castration despite having had hormonal therapy.<sup>72</sup> Ms. Rosati alleged that CDCR failed to provide her access to a physician or medical expert competent enough to offer a medical opinion recommending SRS.<sup>73</sup>

In August 2015, Shiloh Quine, a transgender woman in a California male prison, reached a settlement in which CDCR acknowledged that SRS was a medically necessary treatment for her.<sup>74</sup> Shiloh had a pending Eighth Amendment lawsuit alleging that she was denied gender-affirming medical coverage and a First Amendment lawsuit claiming rights to clothing and cosmetics disallowed in male prisons but allowed in female institutions.<sup>75</sup> The settlement agreed to authorized SRS treatment for Shiloh, transfer her to a female institution after the procedure, and allow access to female-specific items while remaining in the men's prison.<sup>76</sup>

Michelle, Mia, and Shiloh only represent a few of the hundreds of transgender women and men in California state institutions being denied gender-affirming medical coverage and sex-reassignment surgery for GD.<sup>77</sup> As a result of the mounting evidence that SRS may be necessary to alleviate the suffering of severe GD,<sup>78</sup> in October 2015, CDCR was the first state corrections agency in the United States to implement guidelines for inmates

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015).

<sup>72</sup> *Id.* at 1039.

<sup>73</sup> *Id.*

<sup>74</sup> Transgender Law Center, *Quine v. Beard* (Aug. 7, 2015), <http://transgenderlawcenter.org/quine-v-beard>.

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

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

<sup>77</sup> Gilbert, *supra* note 6. See also KRISTIN SCHREIER LYSEGGEN, *THE WOMEN OF SAN QUENTIN* (2015).

<sup>78</sup> *Id.*

to request sex-reassignment surgery.<sup>79</sup>

### C. ANALYZING CDCR'S RADICAL SRS POLICY.

Under CDCR's guidelines for requesting sex-reassignment surgery, inmates who have been diagnosed with gender dysphoria can petition for SRS by petitioning a CDCR "Sex Reassignment Surgery Review Committee," made up of two medical physicians, two mental health physicians, and two psychologists.<sup>80</sup> The committee reviews the prisoner's request and decides based on the published guidelines.<sup>81</sup> The guidelines are primarily designed to direct the committee to determine whether surgery is necessary *after* the inmate's continued efforts at other forms of treatment for GD.<sup>82</sup> The guidelines list specific eligibility criteria including whether the prisoner has been officially diagnosed with GD, has received more than twelve months of continued hormonal therapy, and has manifested a desire to "live and be accepted as a member of the preferred sex," including a desire to align his/her body with the preferred sex for at least two years prior to the request and live "full time" as the desired gender for at least twelve months.<sup>83</sup> Inmates that request the surgery must have at least two years remaining before their release from prison or anticipated parole date.<sup>84</sup> Once a request has been authorized and the surgery is completed, the prisoner will be transferred to the institution aligned with the petitioner's gender.<sup>85</sup> Prisoners who have their application denied can re-apply in one year from the initial application date.<sup>86</sup>

Although not a single request for SRS coverage through the newly published guidelines has been reported, the SRS policy marks a major milestone in instituting the right to significant gender-affirming medical coverage for transgender women and men in state prisons.<sup>87</sup> The guidelines simply codify or promulgate the already existing right to medically necessary coverage established by the Eighth Amendment and as

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<sup>79</sup> Transgender Law Center, *supra* note 6.

<sup>80</sup> CDCR SRS Policy, *supra* note 4.

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

<sup>82</sup> *Id.* at 3.

<sup>83</sup> *Id.*

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

<sup>85</sup> *Id.*

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

<sup>87</sup> Richard Perez-Pena, *California Is First State to Adopt Sex Reassignment Surgery Policy for Prisoners*, N.Y. TIMES (Oct. 21, 2015), [http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html?\\_r=0](http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html?_r=0).

exemplified by the string of cases and settlements leading up to its implementation.<sup>88</sup> As the policy stands, it is too early to examine whether it has effectively considered valid requests for SRS or whether CDCR has implemented enough institutional support, including medical examiners, trained social workers, or psychologists to help inmates prepare the tedious petition for initial consideration and to review submitted applications.<sup>89</sup>

However much hope these guidelines offer to transgender inmates, the SRS policy may threaten inmate's legal recourse to an Eighth Amendment claim of deliberate indifference.<sup>90</sup> The guidelines may be a loophole for CDCR to bypass its culpability by at least giving some apparent consideration to inmate's requests while denying the majority of serious and valid petitions.<sup>91</sup> This policy may make it easier for CDCR to claim that petitions were reviewed but denied with negligent diagnoses, thus bypassing the Eighth Amendment's requirement of subjective intent and deliberate indifference.<sup>92</sup> Nevertheless, as more publicity is given to the reality of gender dysphoria for transgender inmates, including its extreme psychological and emotional effects that have in many cases caused inmates to resort to auto-castration and self-mutilation, CDCR may not be able to deny sex-reassignment surgery as a necessary, effective, and viable treatment.

### III. CAGED BIRDS CAN'T FLY: WHY GENDER AFFIRMING MEDICAL COVERAGE IS UNIQUELY NECESSARY FOR TRANSGENDER PRISONERS

In light of the string of Eighth Amendment precedents and recent settlements ensuring transgender inmates in California may receive medically necessary gender-affirming medical coverage,<sup>93</sup> the justifications underlying CDCR's sex-reassignment surgery policy reflect those supporting Eighth Amendment protection. Yet, CDCR's motives for implementing the policy also likely extend beyond the constitutional requirement to provide medically necessary coverage, specifically in recent

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<sup>88</sup> CDCR SRS Policy, *supra* note 4; *see Fields*, 653 F.3d at 556; *see also Rosati*, 791 F.3d. 1037

<sup>89</sup> CDCR SRS Policy, *supra* note 4.

<sup>90</sup> *See Fields*, 653 F.3d at 556. The SRS policy may give minimum consideration to inmates' treatment options and effectively bypasses the deliberate indifference standard through such face consideration. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Fleischaker, *supra* note 14.

<sup>93</sup> *See Estelle*, 429 U.S. 97; *Fields*, 653 F.3d 550; *Rosati*, 791 F.3d. 1037; *see also* text accompanying notes 47-75.

precedents that seek to protect the severe mental and physical effects of GD.<sup>94</sup> Although CDCR's policy may be narrowly designed to provide gender affirming medical coverage to remedy the effects of GD, such as depression, anxiety, suicidal ideation, and auto-castration, the policy has potential to simultaneously remedy a universe of struggles facing transgender prisoners.

In Part III, I will outline four different issues facing transgender inmates in California State Prisons that CDCR's gender-affirming policy works to remedy. These four justifications underlying the policy fall both within and outside the scope of the Eighth Amendment's constitutional protection. Through exploring these four justifications, I will demonstrate the broad significance and impact gender affirming medical coverage has on many aspects of transgender inmate's incarceration experience. Ultimately, I will argue that perhaps the most unintended benefit of CDCR's policy, but one of the most fundamental justifications, is that sex-reassignment surgery coverage enables transgender life inmates the rehabilitation and reconciliation necessary to express insight and remorse to a parole board regarding their commitment offense. For these transgender inmates serving life sentences, I will argue that gender affirming medical coverage does not only protect their daily safety but also facilitates the development of a coherent identity that may determine the prisoner's ultimate freedom.

#### A. GENDER AFFIRMING COVERAGE PREVENTS PRISON VIOLENCE AGAINST TRANSGENDER INMATES

Transgender prisoners are arguably California's most vulnerable population to sexual assault and violence.<sup>95</sup> Although the systemic violence perpetrated on transgender prisoners reflects similar histories of violence many trans individuals experience outside of prison, the intersectional experiences of incarceration, race, poverty, sexual and gender orientation, perpetuate violence to a unique degree.<sup>96</sup>

Almost half of all transgender people of color in the United States have been incarcerated.<sup>97</sup> Incarcerated transgender women of color are

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<sup>94</sup> See Perez-Pena, *supra* note 87.

<sup>95</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, 111 (2011).

<sup>96</sup> *Id.* See also Irvine, *supra* note 17.

<sup>97</sup> LYSEGGEN, *supra* note 77, at xvii.

*thirteen times more likely* to be sexually abused by inmates and prison staff than non-transgender prisoners.<sup>98</sup> Since transgender prisoners are most often not accepted by their racial groups in prison—a common scheme of social organization in California State Prisons—many transgender individuals are forced, for safety reasons, to be socially segregated in prison to the degree that many are forced to eat standing up during communal dining.<sup>99</sup>

Since most prisons in California do not have special housing or treatment programs, transgender individuals who report sexual abuse, rape, or violence are often forced into solitary confinement as the only means of protection.<sup>100</sup> As a result, a significant portion of California's transgender prison population are forced into solitary confinement,<sup>101</sup> windowless six-by-nine-foot small solitary cells for twenty-two to twenty-four hours a day.<sup>102</sup> More commonly known as administrative segregation or secure housing units ("SHU"), solitary confinement works to re-traumatize, re-violate, and re-abuse transgender survivors of trauma.<sup>103</sup> Once in solitary confinement, prisoners are many times functionally denied access to legal representation since they are often only let out of their cells after business hours.<sup>104</sup>

Not only does the isolation itself reinforce the mental health effects of gender dysphoria, the terms of solitary confinement often block transgender individuals from gender affirming medical coverage even when it is prescribed as medically necessary.<sup>105</sup> Although U.S. citizens do not have a constitutional right to medical coverage, prisoners do, however, have a right to adequate and necessary medical coverage given the special circumstances of incarceration and confinement.<sup>106</sup> Incarceration itself takes away a prisoner's ability to provide for herself basic human needs such as food, clothing, and medical care. Just as a prison's failure to provide sustenance may lead an inmate to starvation and lingering death, similarly, a prison's inability to facilitate necessary mental and physical

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<sup>98</sup> *Id.*

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

<sup>100</sup> Fleischaker, *supra* note 14.

<sup>101</sup> *Id.*

<sup>102</sup> LAURA SULLIVAN, *At Pelican Bay Prison, a Life in Solitary*, N.P.R. (July 26, 2006), <http://www.npr.org/templates/story/story.php?storyId=5584254>.

<sup>103</sup> See LYSEGGEN, *supra* note 77.

<sup>104</sup> *Id.* at xvi-xvii.

<sup>105</sup> *Id.* See also Fleischaker, *supra* note 14.

<sup>106</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).



medical coverage causes prolonged and inescapable suffering.<sup>107</sup> While widespread sexual abuse and violence occur on transgender inmates in general population,<sup>108</sup> the terms of solitary confinement initiate a different means of physiological and mental punishment.<sup>109</sup> Solitary confinement's sole purpose is to discipline and deter violent prisoners through isolation.<sup>110</sup>

A transgender person in solitary confinement may be temporarily protected from sexual abuse but is ultimately stripped of their human freedom and agency.<sup>111</sup> The boundaries of sexual and gender identity—and its actual mental health consequences—become reimagined and redefined when someone has little human contact.<sup>112</sup> Even when necessary mental health and medical services are administered to transgender inmates in solitary confinement—coverage that rises above the deliberate indifference standard of the Eighth Amendment—the isolation environment itself may not be favorable for rehabilitation.<sup>113</sup> When prisoners in solitary confinement meet with a therapist or doctor, they are transferred from their solitary cells to a metal “cage” located on the prison floor, shaped as a human sized bird-cage just large enough for a prisoner to be shackled while sitting.<sup>114</sup> Medical or therapy services are administered through the metal slits of the cage.<sup>115</sup> Without humane housing for transgender prisoners, the use of solitary confinement as the only means of protection from sexual abuse will continue to traumatize and violate California's most vulnerable population.<sup>116</sup>

Gender-affirming medical coverage and CDCR's sex-reassignment surgery policy may work to prevent prison violence against transgender inmates by facilitating prison transfer to an institution that accurately represents an applicant's sex and gender.<sup>117</sup> Once an applicant has completed sex-reassignment surgery, the SRS policy requires them to

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<sup>107</sup> Fleischaker, *supra* note 14.

<sup>108</sup> See Irvine, *supra* note 17.

<sup>109</sup> See LYSEGGEN, *supra* note 77.

<sup>110</sup> Fleischaker, *supra* note 14.

<sup>111</sup> Okamura, *supra* note 95.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Sullivan, *supra* note 102; Paige St. John, *California Proposes Isolation Units for Mentally Ill Prison Inmates*, L.A. TIMES (Aug. 29, 2014), <http://www.latimes.com/local/political/la-me-ff-california-prison-system-creates-isolation-cells-for-the-mentally-ill-20140829-story.html>.

<sup>115</sup> *Id.*

<sup>116</sup> See Okamura, *supra* note 95.

<sup>117</sup> See CDCR SRS Policy, *supra* note 4.

transfer institutions.<sup>118</sup> While the policy itself may be narrowly concerned about institutionalizing a process for CDCR to abide by the Eighth Amendment's medical necessity standard, the SRS policy works to protect transgender inmates from prison violence by offering an alternative means of protection outside of solitary confinement.<sup>119</sup>

However, since many of California's transgender prisoners may not want sex-reassignment surgery or qualify for the application process,<sup>120</sup> *the SRS policy itself cannot directly fix the issue of sexual abuse and violence for transgender inmates*. If sex-reassignment surgery becomes the *only alternative means* of escaping the isolation of solitary confinement or the terror of sexual abuse in general population, then the policy may force transgender inmates to apply for the surgery simply because they want to be transferred to safe housing and not because the surgery would be personally, medically, or physiologically appropriate.

While suffering through the threat of sexual abuse in silence in general population or lingering in the isolation of solitary confinement, it may be difficult for a transgender individual to decide whether the irreversible surgery is personally appropriate or merely necessary at the time to escape their current conditions.<sup>121</sup>

The SRS policy specifically requires that an inmate demonstrate significant distress attributable to their gender dysphoria which "cannot be attributed to the conditions of confinement, mental illness, or any other factor..."<sup>122</sup> Yet, without safe alternative housing,<sup>123</sup> how are inmates that may be experiencing sexual violence in general population or are suffering the punishment of isolation in solitary confinement able to attribute their current distress specifically to their gender dysphoria itself and not the conditions of confinement? If inmates are experiencing indistinguishable distress from the violence of their confinement, such as depression, anxiety, and suicidality, are they barred from applying through the SRS policy? Moreover, the SRS policy reads: "Distress due to gender dysphoria can be demonstrated by clinical findings (such as anxiety and sadness), an inability to develop appropriate interpersonal relationships and/or an inability to grow emotionally or learn effectively."<sup>124</sup> Yet, how

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<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Okamura, *supra* note 95.

<sup>122</sup> CDCR SRS Policy, *supra* note 4, at 3.

<sup>123</sup> See Okamura, *supra* note 95.

<sup>124</sup> CDCR SRS Policy, *supra* note 4, at 3.

are prisoners that are thirteen times more likely to experience sexual abuse<sup>125</sup> able to clinically attribute their symptoms of distress to GD when the conditions of confinement themselves and transgender stigma may prohibit interpersonal relationships and emotional growth?<sup>126</sup>

Since sex-reassignment surgery may become an alternative to facing solitary confinement, CDCR must implement feasible and accessible special housing options for transgender inmates in conjunction with the SRS policy. The decision to undergo an irreversible surgery and the determination whether the procedure is necessary under the guidelines of the application, should be considered by the applicant and a mental health and medical counselor in a safe environment removed from the vulnerability of sexual assault in general population or the traumatic punishment of isolation in solitary confinement.

B. CDCR HAS A DUTY TO PROTECT TRANSGENDER INMATES FROM  
SUICIDALITY AND SELF-HARM CAUSED BY UNTREATED GENDER  
DYSPHORIA

The clearest justification for the radical sex-reassignment surgery policy is that CDCR has a constitutional duty to provide medically necessary coverage under the Eighth Amendment, as applied by the string of federal and California cases classifying sex-reassignment surgery as a medically necessary procedure for some cases of severe GD.<sup>127</sup> The assessment of whether or not a prisoner is authorized to have the surgery must rise above the standard of deliberate indifference to the serious medical needs of the prisoner.<sup>128</sup> Many extreme cases of untreated gender dysphoria from prisoners in California state prisons, resulting in suicidal ideation, self-mutilation, auto-castration, and severe depression and anxiety, have been determined by courts as medically necessary enough to warrant coverage of sex-reassignment surgery.<sup>129</sup>

With no institutionalized procedures prior to the SRS policy for CDCR staff to recommend sex-reassignment surgery for inmates already diagnosed with gender dysphoria,<sup>130</sup> CDCR's policy makes clear administrative sense. Since CDCR's constitutional duty to protect

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<sup>125</sup> LYSEGGEN, *supra* note 77, at xvii.

<sup>126</sup> *See id.*

<sup>127</sup> *See Fields*, 653 F.3d at 556.

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

<sup>129</sup> *See supra* text accompanying notes 47-75.

<sup>130</sup> Levin, *supra* note 2

transgender inmates from suicidality and self-harm resulting from untreated gender dysphoria has already been defined by the recent string of Eighth Amendment cases brought by transgender inmates in California, CDCR's policy establishes streamlined administrative directives for how prisoners pursue sex-reassignment surgery without legal action.

However, it is unclear how effective the SRS policy itself will be in carrying out CDCR's duty to treat gender dysphoria. The policy's language reflects the recent Eighth Amendment cases by focusing on applicants with the most severe symptoms of GD.<sup>131</sup> Not only are the stringent requirements of the SRS application seemingly contradicted by the uniquely violent conditions of confinement for transgender inmates,<sup>132</sup> against which I argue that transgender prisoners must be given special housing units separate from general population or solitary confinement, but the application process itself is also so cumbersome, long, and involved that it may make the SRS procedure ultimately inaccessible to many applicants.

If the Eighth Amendment defined CDCR's duty to treat gender dysphoria as a responsibility to provide coverage only when medically necessary as determined by diagnoses above a standard of deliberate indifference,<sup>133</sup> then on its face the SRS policy's detailed clinical application process likely surpasses the constitutional threshold. The policy prescribes CDCR's Health Care Services ("CCHCS") to assist an inmate in preparing the arduous application, including complete psychological, personal, and post-conviction histories relevant to the applicant's gender dysphoria and sexual orientation.<sup>134</sup> Once the application is submitted, it is sent to a subcommittee made up of CDCR executive staff who decide whether the applicant meets the policy's basic requirements, has demonstrated involvement in all possible treatment options other than SRS, and is free of mental health or medical considerations precluding the applicant from applying.<sup>135</sup> After the subcommittee initially approves the application, it is sent to an SRS "review committee" ("SRSRC") consisting of two medical physicians, two mental health practitioners, and two psychologists who vote by majority decision on the application.<sup>136</sup> If approved by the SRSRC, then the application is

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<sup>131</sup> CDCR SRS Policy, *supra* note 4, at 3.

<sup>132</sup> *See id.* (Requires transgender application to prove that their "significant distress due to gender dysphoria...by clinical findings . . .")

<sup>133</sup> *Fields*, 653 F.3d at 556.

<sup>134</sup> CDCR SRS Policy, *supra* note 4, at 1-2.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

finally reviewed by the CDCR executive health care staff to either approve and refer the applicant for the SRS procedure or deny the application altogether.<sup>137</sup>

With almost no current information about whether CDCR has successfully approved SRS applications, it is difficult to see how the policy works to protect transgender inmates. Although CDCR's duty is already defined by Eighth Amendment cases granting SRS procedures for inmates suffering from severe GD, no inmate in California has yet to receive the surgery from a settlement or lawsuit.<sup>138</sup> The policy's cumbersome review process that administers close scrutiny to applicant's treatment options on its face would likely allow CDCR to escape constitutional claims of deliberate indifference. However, if the SRS policy does not ultimately administer treatment to those in need—inmates like Ms. Quinn and Ms. Norsworthy who have suffered so severely as to cause suicidality, self-mutilation, and auto-castration—then the SRS policy may serve little constitutional protection for CDCR<sup>139</sup> or little purpose for transgender inmates in California.

#### C. GENDER AFFIRMING COVERAGE AFFORDS EQUAL APPLICATION OF PAROLE SUITABILITY FACTORS TO TRANSGENDER LIFE INMATES BY FACILITATING EQUITABLE ENVIRONMENTS FOR REHABILITATION

Prisoners in California serving life sentences with the possibility of parole participate in hearings in front of a panel of commissioners appointed by the Governor to determine whether the prisoner is suitable to be released.<sup>140</sup> California Board Parole Hearings (BPH) determine whether the parolee poses an unreasonable risk of recidivism if released in the community.<sup>141</sup> The prisoner is afforded their first parole hearing on a minimum eligible date calculated from the base term of their life sentence.<sup>142</sup> If the panel denies the prisoner parole, they are given a three, five, ten, or fifteen year set-off date before they become eligible to attend

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<sup>137</sup> *Id.*

<sup>138</sup> Transgender Law Center, *supra* note 74.

<sup>139</sup> If the SRS policy does not actually administer treatment to those with a medical necessity, then the policy would likely not protect CDCR from constitutional scrutiny as laid out in *Fields*, 653 F.3d at 556, *Kosilek*, 889 F. Supp. 2d at 198, and similar cases.

<sup>140</sup> California Board of Parole Hearings, *Lifer Parole Process* (2016), available at [http://www.cdcr.ca.gov/BOPH/lifer\\_parole\\_process.html](http://www.cdcr.ca.gov/BOPH/lifer_parole_process.html).

<sup>141</sup> *Id.*

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

another parole hearing.<sup>143</sup> The Governor makes the ultimate decision through an executive review process to release or deny parole to prisoners convicted of murder in any degree, whether or not the parole panel grants the prisoner parole.<sup>144</sup>

California has established criteria that parole boards rely on to decide what factors of a parolee's social history, commitment offense, and post-conviction history may predict their suitability or unsuitability if released in the community.<sup>145</sup> A parole hearing consists of the commissioners reviewing and weighing these suitability and unsuitability factors in light of the parolee's record and testimony.<sup>146</sup> The parole panel and the Governor must support their decision to deny parole with "some evidence . . . that an inmate continues to pose an unreasonable risk to public safety."<sup>147</sup> California Code of Regulations, title 15, section 2281, outlines which factors the parole board considers,

"Factors tending to show an inmate's suitability include: (1) lack of a juvenile record, (2) stable social history, (3) signs of remorse, (4) motivation for the crime, (5) lack of criminal history, (6) age, (7) understanding and plans for the future, and (8) institutional behavior<sup>148</sup> . . . After the panel weighs the evidence, they will consider evidence suggesting unsuitability. The factors of unsuitability include the inmate's (1) commitment offense, (2) previous record of violence, (3) unstable social history, (4) prior sadistic sexual offenses, (5) psychological factors, including the prisoner's history of mental problems related to the crime, and (6) institutional misconduct in prison or jail."<sup>149</sup>

Transgender inmates serving life sentences face a uniquely particular challenge in meeting the threshold of suitability and overcoming their unsuitability factors, given transgender people's particular vulnerability to homelessness, suicide and suicidal ideation, poverty, and sexual assault prior to conviction.<sup>150</sup> While in prison, transgender parolees face a

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<sup>143</sup> There are also administrative applications to advance an inmate's parole hearing date that depend on the parolee's institutional behavior and programming involvement. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> CAL. CODE REGS. tit. 15, § 2281.

<sup>146</sup> *Id.*

<sup>147</sup> *In re Lawrence*, 44 Cal. 4th 1181 (2008).

<sup>148</sup> CAL. CODE REGS. tit. 15 § 2281, subd. (d)(1)-(9).

<sup>149</sup> *Id.* at subd. (c)(1)-(6).

<sup>150</sup> Jaime M. Grant, Lisa A. Mottet, Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force (2011), [http://endtransdiscrimination.org/PDFs/NTDS\\_Exec\\_Summary.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf) [hereinafter Transgender

uniquely high burden in meeting the factors of suitability due to their social stigmatization by prisoners and staff, susceptibility to sexual assault and violence, and their lack of proper medical coverage resulting in the effects of gender dysphoria.<sup>151</sup> Although there has not been an empirical research study conducted that measures the parole suitability and denial rates of transgender inmates in comparison to non-transgender parolees, statistics have highlighted transgender individual's unique susceptibility to the factors that hinder their chances at freedom through parole.

While many inmates serving life sentences have experienced prior trauma, poverty, homelessness, and abuse that may have influenced factors of their life crime, transgender people in particular are considered California's *most* vulnerable population to incarceration.<sup>152</sup> Whereas almost one in six black men in the United States have been to prison, almost half of all transgender people of color have been incarcerated.<sup>153</sup> Forty to fifty percent of America's homeless youth identify as transgender or as one or more of the LGBTQI identities.<sup>154</sup> Likewise, transgender people are twice as likely to be homeless than the general population.<sup>155</sup> Ninety percent of transgender individuals in the United States have reported one or more forms of harassment.<sup>156</sup> Forty-one percent of transgender people in America have attempted suicide compared to 1.6 percent of the general population.<sup>157</sup> More than 78 percent of transgender youth have experienced harassment in school, while 35 percent of transgender youth have been physically assaulted due to their gender identity.<sup>158</sup> Transgender individuals experience double the rate of unemployment than their non-transgender counterparts.<sup>159</sup> Fifty-five percent have lost a job due to their gender identity or related biases, and 16 percent have participated in sex-work or other forms of underground employment as a result of losing their job.<sup>160</sup> Transgender individuals are four-times more likely to have a household income of less than ten-thousand dollars

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Discrimination Survey].

<sup>151</sup> See LYSEGGEN, *supra* note 77.

<sup>152</sup> Okamura, *supra* note 95.

<sup>153</sup> LYSEGGEN, *supra* note 77, at xvii.

<sup>154</sup> Grant et al., *supra* note 150.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

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

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

<sup>159</sup> *Id.*

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

compared to the general population.<sup>161</sup>

The grim statistics of transgender people's susceptibility to homelessness, poverty, and assault contextualize why so many transgender people in California end up incarcerated. In light of transgender individuals' often unstable social history prior to incarceration, the factors of parole suitability and unsuitability are inequitably biased. With the highest rate of incarceration of any population in California,<sup>162</sup> transgender parolees uniquely face burdens meeting suitability criteria including a "lack of a juvenile record, stable social history . . . and lack of criminal history."<sup>163</sup> Moreover, transgender parolees' experiences prior to incarceration uniquely disadvantage them to overcome the factors of unsuitability, including, "previous record of violence . . . unstable social history . . . [and] psychological factors," including the prisoner's history of mental problems related to the crime.<sup>164</sup>

Transgender prisoner's unique vulnerability to violence, sexual assault, solitary confinement, and social stigmatization within prison may also inequitably burden transgender parolees in developing a positive institutional history. While parole boards consider suitability by reviewing parolees' disciplinary history while incarcerated and history of participating in prison rehabilitation programs, transgender inmates' susceptibility within prison may make their experiences particularly difficult to meet the board's standards. Anti-transgender discrimination, sexual assault, and solitary confinement prevent many transgender parolees from becoming involved in institutional programming in the first place.<sup>165</sup> Journalist Kristin Lyseggen recounts the daily experiences of transgender women in California male prisons in a series of published correspondences. Jazzie, a transgender woman serving a life sentence in Tehachapi state prison, wrote in July 2013 about the challenges she continually faces as a transgender woman amongst stints in solitary confinement.

"Being in the SHU is like being underground; everywhere you go you are in handcuffs, most of the time you are in your cell 24 hours a day. Now while you're in that bathroom imagine someone slamming the door all day long, people hollering, someone taking a bowl or a cup and banging on the bed all day. You can't have no bowl in the SHU, so we use a potato chip bag to eat out of, and use milk [cartons] to drink out of. Now to wash your

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

<sup>162</sup> LYSEGGEN, *supra* note 77, at xvii.

<sup>163</sup> CAL. CODE REGS. tit. 15, § 2281, subd. (d)(1)-(9).

<sup>164</sup> *Id.* at subd. (c)(1)-(6).

<sup>165</sup> See LYSEGGEN, *supra* note 77, at xvii.



cloths you use the toilet . . . As a transgender, it's hard to be in a relationship because sometime the dudes just want you for sexual favors . . . some girls sell their body just to survive . . . some girls put up with their boyfriend beating on them because that's who is taking care of them . . . Prison is no good for no one, but you got to stay strong if you want to survive. I refuse to give up."<sup>166</sup>

Jazzie's letter exposes the difficulty she faces in living a positive path of rehabilitation while incarcerated. This difficulty is echoed by many transgender women in male California State prisons serving life sentences.<sup>167</sup> While transgender parolees cannot change their social history prior to conviction, the unique challenges they face while incarcerated inequitably disadvantage them from participating in positive rehabilitation and remaining discipline-free. Jazzie wrote that she was initially sent to solitary confinement because a guard fought with her boyfriend about Jazzie's identity.<sup>168</sup> Both Jazzie and her boyfriend were disciplined in the SHU.<sup>169</sup> Solitary confinement restricts inmates from attending prison programs, education classes, vocational programs, and therapy groups,<sup>170</sup> which in turn negatively influences their chances of gaining parole.<sup>171</sup>

CDCR's SRS policy and gender affirming medical coverage may afford parolees more equitable access to parole suitability factors by facilitating transgender inmates' transfer to institutions that match their gender identity. Free from the violence, sexual assault, and routine stints of solitary confinement transgender women commonly experience in California male prisons,<sup>172</sup> the SRS policy may enable many women an equitable opportunity of rehabilitation in women's prisons. In turn, the SRS policy may directly level the playing field for transgender life inmates as compared to their non-transgender counterparts by allowing transgender women to elect sex-reassignment surgery and transfer to female prisons where violence, sexual assault, and solitary confinement, due to gender identity issues, is shown to be less apparent.

The equal application of parole suitability factors may be an indirect benefit and justification for the SRS policy, but the policy at best is an

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<sup>166</sup> *Id.* at 228-29.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 228-29.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at xvii.

<sup>171</sup> CAL. CODE REGS. tit. 15, § 2281.

<sup>172</sup> Okamura, *supra* note 95.

imperfect solution. Many transgender women and men suffering from gender dysphoria may not elect for sex-reassignment surgery, either because they personally do not want the procedure, it isn't medically beneficial, or they don't find surgery a necessary means of expressing their identity.<sup>173</sup> Many life inmates simply will not meet the eligibility requirements for the policy.<sup>174</sup> Likewise, since the policy went into effect last October CDCR has not publicly announced that it has authorized or performed any SRS procedures. While it is essential that CDCR provide proper housing and treatment for transgender inmates and BPH consider the unique challenges facing transgender inmates within the parole process in order to remedy the inequitable application of parole suitability for transgender life inmates in general, the SRS policy provides an imperfect solution to facilitate the safety and wellbeing for transgender life inmates suffering from the most severe cases of gender dysphoria in which sex-reassignment surgery would be a self-elected, necessary, and positive means of transition and gender expression.

D. SRS COVERAGE ENABLES TRANSGENDER LIFE INMATES  
REHABILITATION AND RECONCILIATION BY EXPRESSING INSIGHT  
THROUGH A COHERENT IDENTITY.

Many transgender individuals describe their experiences of gender identity as a process of simply "moving towards becoming themselves."<sup>175</sup> Through my experience representing my client Amelia,<sup>176</sup> a transgender woman serving a life sentence in a California maximum security male prison, I believe that transgender prisoners are treated, metaphorically speaking, like birds in a cage: not only are they singing for freedom confined behind prison bars (often isolated in solitary confinement), but many also yearn for a safe environment to transition and express their genuine identities.<sup>177</sup> Many may, metaphorically, sing behind bars for the freedom of *becoming themselves* just as they are singing for the freedom of release. Many may be on the journey and in the process of transition, just as they are fighting for the freedom of release on parole.

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<sup>173</sup> WPATH, *supra* note 21.

<sup>174</sup> CDCR SRS Policy, *supra* note 4, at 3.

<sup>175</sup> LYSEGGEN, *supra* note 77, at xviii.

<sup>176</sup> Amelia's name has been changed to protect client confidentiality. I am a second-year certified law student at University of Southern California's Post-Conviction Justice Project.

<sup>177</sup> LYSEGGEN, *supra* note 77. The metaphor of a bird in a cage is not only borrowed from the Maya Angelou's poem, recounted in part in the introduction, but also from cover art featuring a caged bird on KRISTIN SCHREIER LYSEGGEN'S book, *THE WOMEN OF SAN QUENTIN*.

Together with the statutory factors of suitability and unsuitability,<sup>178</sup> California's parole board is obligated to consider "all relevant, reliable information available" relating to whether an inmate poses an unreasonable risk of recidivism if released.<sup>179</sup> Fundamental to the board's decision of suitability is an assessment of the parolee's insight into the causes and motivations of their commitment offense as exemplified by "the inmate's past and present attitudes towards the crime . . . expressly including indications that the inmate understand the nature and magnitude of the offense."<sup>180</sup> Furthermore, insight into the causative factors of a parolee's life crime become probative of their current risk of recidivism if they are still exhibiting their causative factors.<sup>181</sup> In other words, only understanding *why* you committed your crime—insight by itself—is likely not enough if the same factors that motivated the parolee to commit their crime are still present in their life.<sup>182</sup> For example, many parolees may have causative factors related to their gang mentality and gang involvement, substance abuse, co-dependent relationships, triggers from previous trauma, or anger issues. These parolees may demonstrate their suitability to a parole board by articulating insight into how their causative factors contributed to their life crime and showing how they have overcome, or have been rehabilitated from, these burdens.<sup>183</sup>

Even though inmates do not have a constitutional right to rehabilitation in prison, the expectation of the board for inmates to articulate and demonstrate insight is fundamentally the process of *rehabilitation*. Parolees are forced to face the roots of why and how they ended up incarcerated so they are less likely to re-offend once they are released.<sup>184</sup> In turn, confronting one's insight in front of the board is also a means of *reconciliation* because the parolee must face the truth of their commitment offense without minimizing their involvement in the crime and while showing remorse for the impact of their offense.<sup>185</sup> Articulating and demonstrating insight expresses to the board that the parolee has sincerely

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<sup>178</sup> CAL. CODE REGS. tit. 15, § 2281.

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

<sup>180</sup> *In re Shaputis*, 53 Cal. 4th 192, 218 (2011).

<sup>181</sup> *In re Morganti*, 204 Cal. App. 4th 904, 923 (2012).

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

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

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

<sup>185</sup> *Shaputis*, 53 Cal. 4th 192 ("expressly recognized that the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety.").

and truthfully overcome the factors that caused their incarceration.

The commitment offenses of many transgender life inmates were directly or indirectly caused by their gender identity struggles or factors related to their gender dysphoria.<sup>186</sup> For these parolees, articulating insight, demonstrating rehabilitation, and reconciliation involves directly confronting how their gender identity struggles—their inability to be themselves—may have influenced their offenses. Since their gender identity was a causative factor in their crime, demonstrating rehabilitation may involve showing the board that they are no longer influenced by the mental health effects of gender dysphoria or the psychological triggers of social stigmatization that caused their commitment offenses in the first place.<sup>187</sup> Namely, that they have insight into how their gender dysphoria influenced their crimes, and that they demonstrate how these factors will not influence them to reoffend if released.

We cannot expect transgender parolees suffering the effects of gender dysphoria to demonstrate their rehabilitation from the causative factors relating to their gender identity without institutional support facilitating their transition. If the struggles of gender identity are described by transgender individuals as a process of becoming themselves, and the severe effects of gender dysphoria are resolved through proper medical and mental health treatment,<sup>188</sup> then CDCR's SRS policy helps to enable transgender life inmates' rehabilitation and reconciliation by facilitating a transition to a coherent identity. In other words, by facilitating sex-reassignment surgery for transgender life inmates who require the procedure to have a coherent self-identity, we are also enabling these life inmates the opportunity for the rehabilitation and reconciliation that is expected to be found suitable for release.

Alongside the goals of administering punishment and facilitating rehabilitation through criminal sentencing in California, section 1170 of the California Penal Code has been amended in 2016 to include “restorative justice” as a third additional goal of imprisonment.<sup>189</sup> Under section 1170, restorative justice is defined as implementing policies and programming within prisons to administer the successful transition of

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<sup>186</sup> See LYSEGGEN, *supra* note 77.

<sup>187</sup> *Shaputis*, 53 Cal. 4th at 218.

<sup>188</sup> WPATH, *supra* note 21.

<sup>189</sup> CAL. PEN. CODE § 1170 (2016), available at [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2590](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2590) (“[T]he Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice.”).

offenders back into their communities.<sup>190</sup> CDCR's SRS policy reflects California's shift towards restorative justice by facilitating mental health and medical coverage necessary for many transgender inmates to succeed on parole.

While the SRS policy may not yet feasibly facilitate sex-reassignment surgery for every transgender inmate who requires the surgery for a coherent identity, the policy itself encourages insight for transgender parolees. By applying for the surgery, an applicant has expressed to the review committee that sex-reassignment surgery is a medically necessary treatment, that they have tried each and every alternative treatment, and that they have a history of gender dysphoria and gender identity struggles prior to conviction.<sup>191</sup> By filing their SRS application, a transgender parolee demonstrates to the board that they have some insight into how gender dysphoria influenced their personal histories leading up to their conviction and that they have a commitment to developing a coherent identity.<sup>192</sup>

In Part IV of this note, I will use narrative correspondence from my client, Amelia, a transgender life inmate in a male prison, to show how her gender identity struggles as an adolescent were a primary causative factor in her life crime. I will show how sex-reassignment surgery would help Amelia develop a coherent self-identity in order to express insight and demonstrate rehabilitation and reconciliation necessary for her eventual parole suitability. Through Amelia's narrative, I will argue that one of the most fundamental underlying justifications for the SRS policy is its potential to facilitate transgender individuals' transition to a coherent identity, and that transition in turn, enable the process of rehabilitation, reconciliation, and restorative justice by which transgender parolees are able to face the causative factors that led to their incarceration.

#### IV. SINGING FOR FREEDOM: A PORTRAIT OF A TRANSGENDER LIFE INMATE WITHOUT TREATMENT FIGHTING FOR COVERAGE WHILE TRYING TO FIND PEACE IN A COHERENT IDENTITY

I first met Amelia when I was assigned to represent her in preparation for her first parole hearing scheduled in 2017. As a second-year law student working in the law school clinic, the Post-Conviction

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<sup>190</sup> *Id.* (restorative justice seeks to "promote behavior change and to prepare all eligible offenders for successful reentry into the community.").

<sup>191</sup> CDCR SRS Policy, *supra* note 4, at 3.

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

Justice Project, I read her stories through prison correspondence and began to understand for the first time the circumstances of transgender inmates in California maximum security prisons. During my first visit with her in June 2015, she asked how my project could assist her in receiving sex-reassignment surgery so she could live as a woman in a women's prison, before she faced the parole board. My Note grew out of this very question: how could I help Amelia receive the SRS surgery to live with a coherent sense of self? As the prison guards shackled Amelia at the end of our first visit, referring to her as "him" in *his* masculine pronoun, I was given a glimpse of the difficulty she faced being regarded in prison simply as herself.

It was not until October 2015 when CDCR released its SRS policy that I had certain guidance for Amelia's question. With little institutional assistance on how to begin the application process for the SRS surgery, I began to gather Amelia's life history narrative to prepare the application ourselves. As a cisgender straight white male, Amelia's narratives taught me that gender and sexuality is as much an internal journey of self-identity as it is an outward process of transition and recognition.<sup>193</sup> It became clear to me how meaningful it was for Amelia to be regarded for who she identified as during the transition process of becoming herself. Having a coherent identity does not necessarily mean having a socially acceptable identity that strangers recognize.<sup>194</sup> A coherent identity may mean being regarded for how you see yourself.<sup>195</sup> Amelia's ongoing journey of self-discovery has allowed her to see how her gender dysphoria was a causative factor in her life crime.

In Part IV, I will use excerpts from Amelia's letters to show how her gender dysphoria influenced her life crime and argue that gender-affirming medical coverage, including sex-reassignment surgery, would help her facilitate the rehabilitation and reconciliation that is expected before she faces the parole board in 2017.

#### A. COMING TO BE AMELIA: NARRATIVE FROM A TRANSGENDER WOMEN SERVING A LIFE SENTENCE IN A MALE PRISON

Amelia has served twenty years in a California maximum security

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<sup>193</sup> See Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121 (1991) (in the context of transgender individuals, Garet discusses how a sense of self is created and manipulated through self-transformation).

<sup>194</sup> See Gilbert, *supra* note 6.

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

male prison with a life sentence for a gang crime she committed when she was seventeen. She describes her struggle with gender dysphoria as a journey that began in early childhood in which she sought to hide her sexuality from others with a façade of hyper-masculinity. Amelia wrote in her letter,

“I can’t exactly remember the age when I knew I was different from other boys, I’d say around 6 or 7. I just didn’t know what the difference was. When I was seven years old I think I may have been showing signs of my sexuality because I was molested by different men my mother would bring home and later the one she married. That confused me greatly throughout my life. Around 9 and 10 I started learning about what it was to be considered gay and I thought that I was. I was so terrified that I was gay and that my family would learn of it and kill or disown me that I found different and sometimes very bad coping mechanisms to hide my gayness. I knew that if I was found out, that I only had one choice left to me. I would’ve killed myself just to not face all of the fear of discovery that I believed would be aimed at me. I started doing everything I possibly could do to prove to everyone that I was a *Man*. My biggest problem was that the only men I had in my environment as role models were drug dealers and users, women and child abusers, gang members and pimps and prostitutes. So I decided to be the best or worst of pretty much all of them because my belief was if I do this, then no one will every question my sexuality. Around 11 I thought I may have been suspected and started running away. It seemed safer on the streets than at home. I ended up getting into a gang because 1) that’s what I had to do in my head to be a Man and 2) because they fed me when I was hungry and seemed to fill a need I had for acceptance and male uniformity.”<sup>196</sup>

By eleven years old, Amelia was a full member of a gang and living on the streets of Los Angeles. She ran away from home with the belief that her gang persona would hide her sexuality from the world. By thirteen, Amelia was engaged in sex-work to support herself and began to run even closer with her gang. Amelia wrote,

“I didn’t enjoy living or much about life at all. I used to curse God asking him why did he make me just to be a mistake. I started getting into more and more trouble with the gang and every challenge that they presented me with I’d either find an acceptable way out of it, or if I felt I had to do it to prove how Macho I was I’d do it out of fear of discovery and rejection by my Gang peers.”<sup>197</sup>

At fourteen years of age, Amelia was sent to juvenile detention for shooting

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<sup>196</sup> Letter from Amelia, March 7, 2016.

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

her stepfather in self-defense when he had beat her and her brother. She returned from detention with newfound expectations from her gang members. Not only did Amelia feel a necessity to overcompensate for her sexuality, she was continually forced to prove her loyalty because she was African-American in a Latino gang. The gang's demands grew more serious and dangerous as Amelia grew older. When rumors of her sexuality and loyalty surfaced, she was asked to carry out robberies and assaults that reaffirmed her "manhood." When she was seventeen, Amelia committed a gang-related murder in which she pled guilty and was sentenced to over thirty-years-to-life. In county jail, and soon after in state prison, Amelia exacerbated her gang involvement to avoid being hurt, raped, or murdered because of race and prison politics. Amelia was sent to solitary confinement and administrative segregation for purposely avoiding having to carry out violent requests by the Mexican Mafia without raising suspicion of her loyalty to her gang or draw attention to her sexuality. Amelia wrote,

"What I felt from that [gang] acceptance was a relief and safety that my secret was safe and I was well as long as I proved myself. But I was so tired of living a lie around the age of 30 that I made an attempt to hang myself, that injured me but failed. Now I felt stuck in a life that I felt no joy in and no way to get out."<sup>198</sup>

Before her first suicide attempt, Amelia had spent eleven years in the Pelican Bay SHU, a form of solitary confinement in California's highest security institution in which inmates spend up to twenty-two hours a day in a concrete windowless cell.<sup>199</sup> In the SHU, Amelia avoided gang responsibility while protecting herself from imminent violence. After her suicide attempt, she decided to go through an official debriefing process with CDCR to renounce her gang-affiliation in return for being transferred to a "sensitive needs yard" (SNY), a prison housing unit with prisoners facing safety concerns.<sup>200</sup> On SNY, Amelia was not entirely free from violence but the yard was her best chance to leave gang politics and begin to explore her identity. With gangs and drugs still present on SNY, Amelia suffered several more stints in the SHU for "proving" herself to

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

<sup>199</sup> Sullivan, *supra* note 102.

<sup>200</sup> CDCR, Richard J. Donavon Correctional Center, CDCR [http://www.cdcr.ca.gov/Facilities\\_Locator/RJD.html](http://www.cdcr.ca.gov/Facilities_Locator/RJD.html) (last visited November 14, 2016) ("SNY inmates are those inmates that are remanded to the custody of the [CDCR] but due to safety concerns they are separated from General Population inmates to serve their term of incarceration.").



other inmates,

"I sat alone in the cell and cried that I hated hiding and doing the things I needed to do to hide. I finally said to myself that I am going to come out. Once I was out of the SHU, I called my mother, my aunt and sister and told them that I had to see them at a visit because I had something important to say to them . . . I committed myself into coming out to my closest living family because I just couldn't live through this lie anymore, I wanted them to finally know that I wasn't just some senseless thug . . . I also know in my very fearful mind that my aunt and mother would disown me on the spot . . . I so convinced myself that my family will abandon me because of this, I sought out a large amount of heroin because I was told it's a painless way to overdose and die. I got the drugs before my visit and put them away until after my visit so once I have been disowned by my loved ones, I'd come back to my cell and kill myself. This is the fear I have lived with my whole existence."<sup>201</sup>

Amelia came out to her family as gay with love and acceptance. By speaking with her family, other transgender inmates on SNY, and mental health staff for the last three years she has since come to understand her identity as a transgender woman:

"I always felt female and wanted to not only be a woman but to be treated as a woman . . . I'm a transgender woman and have been all of my life. I was derailed long ago, but now I am finally learning how to be who I am supposed to be."<sup>202</sup>

Amelia has taken hormones for the last two years and has since identified openly as a woman to other inmates on her male yard. She has petitioned her prison before the SRS policy for sex-reassignment surgery to no avail but is currently in the process of preparing her application. In her journey of becoming herself, Amelia believes sex-reassignment surgery is necessary in expressing her coherent identity and for being regarded as a woman. The dysphoria, fear, anxiety, substance abuse, depression, and suicidality that began in childhood and adolescence and which were exacerbated by experiences of rape, sexual assault, poverty, homelessness, and her gang involvement, has begun to subside for the last two years since she has begun hormonal therapy. Yet, reconciling the causative factors that led Amelia to commit her life offense has required institutional support and gender-affirming medical coverage for her to safely express her gender and sexual identities. Housed in a male institution without the means of fully

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<sup>201</sup> *Letter from Amelia*, March 7, 2016.

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

expressing herself or being regard as a woman, Amelia is still suffering.<sup>203</sup>

B. HOW EXPRESSING IDENTITY FACILITATES REHABILITATION: LINKING GENDER DYSPHORIA AS A PRIMARY CAUSATIVE FACTOR OF AMELIA'S COMMITMENT OFFENSE

Amelia's life-crime was not caused merely because she was a victim of her circumstances, but rather that her perception of the world and the choices that she made were directly shaped by her gender dysphoria. Amelia ran away from home not only to escape her mother's alcoholism and neglect and the sexual abuse and rape perpetrated by her stepfather and other men, but also because this violence taught her that it would not be safe to express her sexuality and gender identity. She believed that she would be killed and further sexually assaulted if her family found out, so she ran away.

As a homeless adolescent, her gang was the first family to take her in and give her sustenance, attention, and affection. In return, Amelia had to prove her loyalty doubly: as a black eleven-year-old homeless boy masking his sexual and gender identity, Amelia believed that being hyper-masculine was the only means of proving herself to a Latino gang that she considered family. Around the same age, Amelia engaged in sex-work as a man and woman to support herself. While running with her gang Amelia committed robberies and assaults that demonstrated loyalty and masculinity. She has described developing a gang mentality linked to a primal fear that her sexual and gender identity would be found out. By seventeen years of age, rumors about her loyalty and sexuality surfaced when she avoided participating in gang murders and violent sex-related assaults. On the night of her commitment offense, Amelia chose to stab an innocent person when her gang members challenged her loyalty. In her eyes, when she was seventeen, she mistakenly believed that she had to do "whatever it took" to survive.

Amelia's gender dysphoria manifested itself as a fear that if her true sexuality were exposed she would be killed. As an adolescent this distress caused her depression, anxiety, and suicidality that ultimately influenced her choice to commit murder. Her dysphoria continued in prison and was a driving motivation to remain in a gang. After eleven years in solitary confinement at Pelican Bay and after her first suicide attempt, Amelia began

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<sup>203</sup> Since this article was initially written, Ameila was sent into Solitary Confinement when she reported being sexually assaulted in her cell. Subsequently, Amelia was transferred to a different institution and has since submitted her SRS application, which is still pending.

to contemplate how the distress from her sexuality drove her behavior. Eventually, her continued journey of transition in coming to be herself, has allowed her to develop insight into how her dysphoria was a primary causative factor in her crime and gang involvement.

Amelia has come to see how both presenting herself and being regarded coherently as a woman facilitates her rehabilitation. Likewise, as Amelia directly faces the truth of her identity she is forced to reconcile the harm she has caused to all of her victims. This process of reconciliation requires Amelia to take ownership of her crime by recognizing that she has control over her fear by coherently expressing her identity. This reconciliation and rehabilitation is difficult because it forces Amelia to see her actions as choices and understand that she continues to have freedom and agency to express herself even when faced with her current circumstances.

While prisoners do not have a constitutional right to rehabilitation despite the parole board's expectations, CDCR's SRS policy reflects how gender-affirming medical coverage enables transgender life inmates' rehabilitation, reconciliation, and restorative justice by facilitating a coherent identity. This process requires many transgender parolees to face the causative factors that drove them to commit their crimes in the first place.<sup>204</sup> While sex-reassignment surgery may not be a desired or medically appropriate treatment for many individuals with gender dysphoria, the surgery allows transgender prisoners suffering from severe dysphoria, such as Amelia, to present a coherent identity to the parole board.<sup>205</sup> For Amelia, SRS surgery is necessary for being herself. Demonstrating Amelia's rehabilitation to the board may involve showing how she is no longer driven by the fear of being rejected for who she is and the depression, anxiety, propensity to substance abuse, and suicidality that that accompanies this fear. The availability of sex-reassignment surgery created by CDCR's new policy reflects how gender-affirming medical and mental health treatment works to encourage rehabilitation and challenges parolees to reconcile themselves with their crimes, whether or not the policy had such an intention.

## V. CONCLUSION

Maya Angelou's poem, *Caged Bird*, gives special significance to the

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<sup>204</sup> See LYSEGGEN, *supra* note 77 (collection of correspondences documenting transgender women's experiences in California male prisons).

<sup>205</sup> WPATH, *supra* note 21.

current predicament of transgender prisoners in California. Angelou writes, “But a bird that stalks/ down his narrow cage/ can seldom see/ through his bars of rage/ his wings are clipped and/ his feet are tied so he opens his throat to sing.”<sup>206</sup> As a caged bird locked behind prisons bars and trapped within an environment trying to transition towards a more coherent self, we can hear Amelia sing songs of freedom. Her songs echo those of many transgender prisoners in California suffering from dysphoria without treatment and prison violence without safe alternative housing. While California’s SRS policy was likely implemented to abide by Eighth Amendment protections guaranteeing medically necessary coverage,<sup>207</sup> this Note highlights four specific issues facing transgender prisoners and paroles that justify the new policy.

First, SRS policies work to prevent prison violence and sexual assault for transgender inmates by enabling those who undergo the surgery to transfer to an institution that matches their gender. The eligibility criteria within the SRS policy that require applicants to demonstrate that their suffering is not caused by the “conditions of confinement”<sup>208</sup> is contradictory when transgender prisoners experience a significant likelihood of violence, sexual assault, and solitary confinement.<sup>209</sup> It is necessary that transgender prisoners need alternative forms of safe housing for those in which sex-reassignment surgery is not necessary and for the applicant to truly differentiate the source of their distress.

Second, while CDCR has a duty to protect transgender inmates from suicidality and self-harm by providing medically necessary coverage, the SRS policy’s cumbersome and lengthy application process requires institutional support enough to actually administer treatment.<sup>210</sup> Currently, there have been no public reports of an applicant being approved or receiving sex-reassignment surgery under the policy.

Third, the sex-reassignment surgery policy contributes to an equal application of parole suitability standards by affording transgender parolees more equitable conditions to remain safe, discipline-free, and involved in prison programming. As well, transgender individuals’ unique susceptibility to poverty, homelessness, and assault prior to conviction<sup>211</sup>

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<sup>206</sup> Angelou, *supra* note 1.

<sup>207</sup> CDCR SRS Policy, *supra* note 4. See *Fields*, 653 F.3d 550; *Rosati*, 791 F.3d. 1037.

<sup>208</sup> CDCR SRS Policy, *supra* note 4.

<sup>209</sup> LYSEGGEN, *supra* note 77 at xvii; Okamura, *supra* note 95.

<sup>210</sup> See WPATH, *supra* note 21.

<sup>211</sup> Irvine, *supra* note 17.

contextualizes why transgender individuals have California's highest susceptibility of incarceration.<sup>212</sup> The factors of parole suitability and unsuitability are inequitably skewed for transgender parolees, including a measure of a parolee's prior unstable social history, criminal convictions, and juvenile record.

Last, the SRS policy enables the development of a coherent identity and, in turn, facilitates the rehabilitation and reconciliation necessary for many transgender life inmates facing parole. As Amelia is undergoing a journey of becoming herself, gender-affirming medical coverage has allowed her to develop a more coherent identity and gain insight into how her gender dysphoria was a causative factor in her commitment offense and gang participation while incarcerated. Sex-reassignment surgery would allow Amelia, alongside countless other transgender parolees suffering from severe gender dysphoria, to transition fully into themselves and live free from the underlying causative factors that influenced their incarceration.

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<sup>212</sup> LYSEGGEN, *supra* note 77 at xvii.