Washington and Lee University School of Law
Washington and Lee University School of Law Scholarly Commons

Scholarly Articles | Faculty Scholarship

2014

Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates

Tammi S. Etheridge

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlufac

 Part of the Law and Gender Commons, and the Law Enforcement and Corrections Commons

SAFETY V. SURGERY: SEX REASSIGNMENT SURGERY AND THE HOUSING OF TRANSGENDER INMATES

TAMMI S. ETHERIDGE*

INTRODUCTION

"With fully developed breasts, long hair, and feminine features, Kelly McAllister is not the sort of person you'd expect to find sharing a cell with a male prisoner."[1] Despite her slight 5-foot 7-inch, 135-pound frame, the fact that she had lived as a woman for several years before her incarceration, and the sheriff's department's knowledge of her transgender status, the Sacramento Sheriff's Department classified Kelly McAllister as a 'him' and placed her in a cell with a straight male inmate.[2] McAllister's misclassification as a man, and the resulting housing discrepancy, resulted in a violent sexual assault.[3] At the time, California prison officials claimed that there was no dilemma.[4] Russ Heinmerich, a spokesman for the California Department of Corrections, said, "If they've had the operation, they go to the appropriate [suitable for their new gender] facility. In the meantime [male-to-female transgender inmates] are housed with the male population."[5] Twelve years have passed since Kelly McAllister's 2002 rape. Since then, major legal battles, rule changes, and disputes have occurred,[6] each seeking to address one critical concern: How should prisons treat and house their transgender inmates?[7]

Responding to incidents like Kelly McAllister's rape, California prison officials revised their official rules and manuals specifically to address the "processing, housing, custody, and protection of transgender inmates."[8] The

---

* The author graduated from the University of Minnesota Humphrey School of Public Affairs in May 2013 and the University of Minnesota Law School in December 2013. She currently works as an Associate at Barnes & Thornburg LLP in Minneapolis, Minnesota. The author extends her gratitude to Professor Michele Bratcher Goodwin of the University Of California, Irvine, School of Law, Professor Joe Soss of the University of Minnesota Humphrey School of Public Affairs, and Professor Regina Kunzel of Princeton University for their comments, feedback, encouragement, and support. She would also like to express thanks to the editors at the *Georgetown Journal of Gender and the Law* for their hard work, patience, and dedication. © 2014, Tammi S. Etheridge.

1. Oliver Libaw, *Prisons Face Dilemma with Transgender Inmates*, ABC NEWS (Jan. 22, 2003), http://abcnews.go.com/US/story?id=90919&page=1#.UWsi77WyBic.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Examples are outlined in the following paragraphs.

7. The National Center for Transgender Equality defines transgender as "[a] term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth." NAT'L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER TERMINOLOGY 1, *available at* http://transequality.org/Resources/TransTerminology_2014.pdf (2014).

8. *See* News Release, L.A. Police Dep't, LAPD Develops Guidelines to Improve Interactions with Transgender Individuals New Procedures to Be Discussed at Special Community Forum NR12169rf

modifications came about as a result of the Department's collaboration with the Transgender Working Group.[9] Founded in 2007, the Working Group was comprised of transgender community advocates and was hosted by the Los Angeles City Human Relations Commission.[10] The group conducted citywide surveys and held a public forum to investigate Los Angeles Police Department (LAPD) interactions with transgender individuals in the city.[11] The data collected was then transformed into a set of policy recommendations for the LAPD.[12] Policy recommendations adopted from the Working Group included the creation of a separate detention section for transgender inmates,[13] which opened at the Metropolitan Detention Center in downtown Los Angeles in April 2012.[14] The LAPD is "the first department in the country to provide" a space specifically for transgender inmates.[15] Moreover, the facility provides both male and female clothing and medical treatment, including hormone therapy.[16] To improve relations between officers and transgender inmates, the facility educates its officers and instructs them to address the inmates by their preferred gender pronouns and names.[17] Additionally, requests to remove "appearance-related items" including "prosthetics, clothing that conveys gender identity, wigs, and cosmetics," can only be made if they are being asked of non-transgender inmates as well.[18]

Although these efforts are laudable, the progressive facility only houses inmates who are being held for arraignment.[19] Once the inmates are transferred to county jails, which are run by the Los Angeles County Sheriff's Department,

---

(Apr. 11, 2012), *available at* http://www.lapdonline.org/newsroom/news_view/50748; Notice 1.12 from Charlie Beck, Chief of Police, L.A. Police Dep't, to All Dep't Pers. (Apr. 10, 2012), *available at* http://assets.lapdonline.org/assets/pdf/OCOP_04-10-12.pdf; L.A. Police Dep't, Inmate Classification Questionnaire (on file with author).

9. The Group was formed in 2007 to address the "need for more dialogue to promote mutual understanding" between members of the transgender community and the LAPD. Talia Bettcher et al., CITY OF L.A. HUMAN RELATIONS COMM'N TRANSGENDER WORKING GRP., RECOMMENDED MODEL POLICIES AND STANDARDS FOR THE LOS ANGELES POLICE DEPARTMENT'S INTERACTIONS WITH TRANSGENDER INDIVIDUALS 4 (2010), *available at* http://hrc.lacity.org/pdf/July2010_lapd-interact-transgender.pdf.

10. *Id.*

11. *Id.* at 5, 33.

12. *Id.* at 9-10.

13. *Id.* at 6.

14. Kathleen Miles, *Transgender Prison: LA Police Open Separate Detention Facility for Transgender Inmates*, HUFFINGTON POST (Apr. 13, 2012), http://www.huffingtonpost.com/2012/04/13/transgender-prison-la-police_n_1423879.html.

15. *Rules Regarding Transgender Inmates Continue to Change*, CORR. NEWS (Dec. 5, 2012), http://www.correctionalnews.com/articles/2012/12/5/rules-regarding-transgender-inmates-continue-change.

16. *Id.*

17. *Id.*

18. Beck, *supra* note 8, at 3.

19. Sam Quinones, *LAPD To House Transgender Arrestees in Separate Section*, L.A. TIMES (Apr. 12, 2012), http://latimesblogs.latimes.com/lanow/2012/04/lapd-jail-transgender.html.

transgender inmates find themselves back in the general population.[20] Furthermore, the rest of the California system has been slower to adapt. The California system generally is just now updating its manuals to replace the term "effeminate homosexual" with "transgender."[21] Soon, transgender inmates will be able to request both bras and boxer shorts as part of their sanctioned prison clothing statewide,[22] but currently, the state's most progressive policy includes paying for hormone treatment for inmates who were already taking the drugs when they became incarcerated.[23] While many states draw the line at providing hormones,[24] this measure has begun to seem increasingly less generous, especially when compared to the changes in Los Angeles and the adoption of more permissive federal laws.

Transgender inmates also won a series of important legal battles from 2010-2012. In 2010, the United States Tax Court held that the costs of feminizing hormones and sex reassignment surgeries are tax deductible for certain individuals as forms of necessary medical care.[25] In 2011, the Seventh Circuit held that a state statute prohibiting hormone therapy and sex reassignment surgery for prisoners violates the Eighth Amendment because such forms of treatment could be medically necessary to treat some inmates adequately.[26] Similarly, in 2012, U.S. District Court of Massachusetts Judge Mark L. Wolf ruled that under the Eighth Amendment prisoners have a right to humane treatment, including a right to adequate care for serious medical needs like Gender Identity Disorder (GID).[27] The ruling meant that Michelle Kosilek, a transgender inmate whose hormone therapy was not providing adequate relief from her mental duress, was "entitled to a surgical sex change procedure" funded by the Massachusetts Department of Correction.[28]

The new wave of laws and policies favoring transgender inmate rights has brought this important issue to the forefront, providing the movement with both a

---

20. *Id.*

21. *Rules Regarding Transgender Inmates, supra* note 15.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See* O'Donnabhain v. Comm'r of Internal Revenue, 134 T.C. 34, 70 (2010) (holding "that petitioner's hormone therapy and sex reassignment surgery treated disease within the meaning of section 213(d)(9)(B)" of the Internal Revenue Code "and accordingly are not 'cosmetic surgery' as defined in that section") (citing 26 U.S.C.A. § 213 (2014)).

26. *See* Fields v. Smith, 653 F.3d 550, 556 (7th Cir. 2011) ("Surely, had the Wisconsin legislature passed a law that DoC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture.") (citing Estelle v. Gamble, 429 U.S. 97, 103-4 (1976)).

27. Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014). *See* Denise Lavoie, *Michelle Kosilek, Transgender Murder Convict Granted Gender Reassignment Surgery*, HUFFINGTON POST (Sept. 4, 2012), http://www.huffingtonpost.com/2012/09/04/michelle-kosilek-transgender-murder-convict-surgery-approved_n_1855192.html.

28. *Rules Regarding Transgender Inmates, supra* note 15.

national stage and a sympathetic audience. Yet courts have failed to fully address the far-reaching practical implications of permitting sex reassignment surgery while leaving both pre-operative and post-operative transgender persons imprisoned with members of the opposite sex. This failure is especially concerning given that the penal system has thus far been unable to uniformly identify safe and constitutional housing for its non-operative transgender inmates. In fact, courts have outright refused to address this problem, choosing instead to leave the issue to the discretion of prison officials and thus shirking their responsibility to a vulnerable population.[29] Instead of addressing where transgender inmates should be housed or offering some sort of guidelines for prison officials making such decisions, courts have allowed prison administrators to refrain from providing constitutionally prescribed, medically necessary, gender-appropriate treatments by claiming that the abuses that will likely result from such treatments will largely outweigh their benefits.[30]

Violations of transgender inmates' rights occur in part because U.S. prison administrators have failed to take into account, in any meaningful way, the vulnerability of the prison populace and the government's obligations and duties to protect this population's constitutional interests. This Article studies the conflict that arises when the imprisoner is tasked with protecting the transgender prisoner by providing for either his or her health or his or her safety. It details how courts have traditionally applied the Eighth Amendment to constitutional violations of inmate housing and provides a descriptive account of what transgender inmates currently face in prisons. Part I considers an Eighth Amendment application to prisoners' rights to medically necessary treatment. It also outlines the prisoner's difficulty in successfully proving that a constitutional violation has occurred, especially as it relates to the prison's safety defense. Part II analyzes the prison's right to choose to provide for either safety or surgery via the affirmative safety defense. Part III addresses the housing options currently available to transgender inmates and the shortcomings inherent in this system. Part IV shows that courts have purposely avoided stipulating any minimum standards for the housing of transgender prisoners and, instead, have chosen to leave the decision to the biased discretion of prison officials. Part V briefly outlines some of the key reasons for reform. Lastly, the Article concludes with closing remarks in Part VI.

Applying the Eighth Amendment application to the needs for both medical treatment and safety, this Note seeks to address the implications of balancing the interests of transgender inmates with the prison's safety. This project is especially important because where the lives of inmates are directly endangered as a result

29. *See infra* Part IV.

30. *See* Denise Lavoie, *Appeals Court Hears Mass. Inmates Sex Change Case*, ASSOCIATED PRESS, Apr. 2, 2013, *available at* http://bigstory.ap.org/article/appeals-court-hears-mass-inmates-sex-change-case (citing Massachusetts Department of Correction lawyer Richard McFarland as disputing Judge Wolf's finding that security concerns were "either pretextual or can be dealt with").

of surgery, despite the best of intentions, the endangerment amounts to another violation of the Eighth Amendment. The issue is far too important to be left to the discretion of prison officials who are generally known to be biased against transgender inmates and disinclined to protect the rights of these marginalized prisoners. Ultimately, courts should prioritize enforcement of medically necessary treatment prescribed by doctors while still mandating safe housing as required by the Constitution, thus protecting the safety of the transgender prison population.

I. THE EIGHTH AMENDMENT AND INMATE PROTECTION

Situating the constitutional problem at issue, this Section analyzes the Eighth Amendment's application to the transgender prisoner's right to medically necessary care and safety. Subsection A takes an elemental approach as it describes the relationship between the Eighth Amendment and inmates. Subsection B describes those actions that an inmate must take to prove a violation of the Eighth Amendment, followed by court interpretations of the term "serious medical need," and an analysis of the difficulty transgender prisoners face in proving deliberate indifference—a necessary element to prove an Eighth Amendment violation. The immediate use of the elemental approach is necessary to expound upon how basic these rights are and how they are intrinsically violated. Moreover, the steps discussed here show that the system has been constructed in a way that makes it near impossible for victims of these violations to address their grievances.

A. THE CONSTITUTIONAL RIGHT TO MEDICAL TREATMENT

The Supreme Court regularly employs the Cruel and Unusual Punishment Clause of the Eighth Amendment to restrict the severity of punishments that state and federal governments may impose upon persons convicted of a criminal offense.[31] In fact, issues regarding the treatment of prisoners and the conditions of their confinement are always subject to scrutiny under the Cruel and Unusual Punishment Clause.[32] The Court defines "cruel and unusual punishments" as those punishments which are "incompatible with the evolving standards of decency that mark the progress of a maturing society" or that involve the "unnecessary and wanton infliction of pain" on an inmate.[33] As such, the Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must take reasonable

31. *See* U.S. CONST. amend. VIII.

32. Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.") (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993)).

33. Estelle v. Gamble, 429 U.S. 97, 102-04 (1976) (internal quotations omitted); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

measures to guarantee the safety of inmates."[34] Quality medical care is a critical component of the prison experience. Without it, prisoners are likely to suffer greater harm than the imposed segregation from society and loss of liberty, thus making their sentences unnecessarily punitive.

B. PROVING AN EIGHTH AMENDMENT VIOLATION

Despite the duty of prison officials to provide inmates with adequate medical care, a prisoner's claim that they have not received such care is not an automatic violation of the Eighth Amendment.[35] To state a cognizable claim, the prisoner must also assert several elements.[36] First, there must be a serious medical need.[37] Second, the desired treatment must be the only adequate treatment for the serious medical need.[38] Third, the prison must know that the prisoner is at risk of serious harm if he does not receive the treatment.[39] Fourth, the denial of care cannot be justified by good faith, reasonable security concerns, or any other legitimate penological purpose.[40] Fifth, there must be evidence that the defendant's unconstitutional conduct will continue in the future.[41] These last three elements, taken as a whole, mean that prison officials must act with continued deliberate indifference. If the plaintiff-prisoner can prove that they are entitled to relief, the injunction issued must be narrowly tailored to remedy the violation of his Eighth Amendment rights and not unnecessarily restrict the discretion of prison officials.[42] Of greatest concern for purposes of this Note are the serious medical

---

34. *Farmer*, 511 U.S. at 832 (internal quotations omitted).

35. *Estelle*, 429 U.S. at 105 ("not every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment").

36. *Farmer*, 511 U.S. at 834 (the deprivation must be "sufficiently serious" and the prison official must have a "sufficiently culpable state of mind").

37. *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (holding that in cases involving a denial of medical care, an inmate must show that he has a serious medical need for which he has not received adequate medical care).

38. *See* Kosilek v. Spencer, 889 F. Supp. 2d 190, 208 (D. Mass. 2012) ("The fact that an inmate is entitled to adequate medical care does not mean that he is entitled to ideal care or to the care of his choice."), *rev'd*,—F.3d—(1st Cir. 2014). *See generally* Barron v. Keohane, 216 F.3d 692, 693 (8th Cir. 2000); Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation."); Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997); DesRosiers v. Moran, 949 F.2d 15, 18 (1st Cir. 1991); Fernandez v. U.S., 941 F.2d 1488, 1493-94 (11th Cir. 1991); U.S. v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987).

39. *See* Leavitt v. Corr. Med. Servs., Inc., 645 F.3d 484, 497 (1st Cir. 2011) (stating that a prison official must know of the substantial risk of serious harm faced by the inmate in order to violate the Eighth Amendment); *see also Farmer,* 511 U.S. at 837.

40. *See* Battista v. Clarke, 645 F.3d 449, 454 (1st Cir. 2011) (stating that a prison official who knows of a substantial risk of harm faced by an inmate does not violate the Eighth Amendment if the denial of particular medical care is based on reasonable, good faith judgments balancing the inmate's medical needs with other legitimate, penological considerations).

41. *See Farmer,* 511 U.S. at 845-47 ("[T]o establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.").

42. *See* 18 U.S.C.A. § 3626(a)(1)(A) (West, Westlaw through 2014) (according to the Prison Litigation Reform Act, the injunction issued must be "narrowly drawn, extend[] no farther than necessary

need and deliberate indifference elements. These elements are most likely to present a challenge for transgender inmates seeking civil redress.

1. Serious Medical Need

The first obstacle a prisoner must overcome is the qualification of his or her condition as a serious medical need. There are several prominent definitions of serious medical need, all of which include both physical and mental medical needs.[43] A serious medical need has been defined as, inter alia, one "that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[44] Other courts have held that a serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain.[45] Less common are those courts which have mandated guidelines for considering whether a serious medical need exists, asking questions like: (1) whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," (2) whether the medical condition significantly affects daily activities, and (3) whether there is "chronic and substantial pain."[46]

Relying on the various definitions of serious medical need and recommendations from the medical community, many courts have recognized Gender Identity Disorder[47] (GID) as a serious medical need.[48] GID is the mental disorder associated with transgender individuals. Both the medical community and the courts recognize that a gender identity disorder can cause intense mental

---

to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right").

43. *See* Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1990) (arguing that there is "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart" and finding that deliberate indifference to an inmate's serious mental health needs violates the Eighth Amendment). *See also* Clark-Murphy v. Foreback, 439 F.3d 280, 292 (6th Cir. 2006); Steele v. Shah, 87 F.3d 1266, 1269 (11th Cir. 1996).

44. Mahan v. Plymouth Cnty. House of Corr., 64 F.3d 14, 18 (1st Cir. 1995) (quoting Gaudreault v. Mun. of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990)).

45. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

46. Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003) (quoting Chance v. Armstrong, 143 F.3d 698, 702 (2d. Cir. 1998)).

47. Under the DSM-IV, Gender Identity Disorder is marked by "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex" (not merely a desire for any perceived cultural advantages of being the other sex) and a "persistent discomfort" with his or her assigned sex or a "sense of inappropriateness in the gender role of that sex," but the condition cannot be concurrent with a physical intersex condition. AM. PSYCH. ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.85 (4th ed. 2000) [hereinafter DSM-IV].

48. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 829 (1994); Battista v. Clarke, 645 F.3d 449, 450 (1st Cir. 2011). Additionally, the Tax Court has recently described Gender Identity Disorder as "a serious psychologically debilitating condition." O'Donnabhain v. Comm'r of Internal Revenue, 134 T.C. 34, 61 (2010).

anguish.[49] Seven circuits of the U.S. Courts of Appeals have concluded that severe GID or transsexualism constitutes a "serious medical need" for purposes of the Eighth Amendment.[50] No circuit court has held otherwise.[51] Additionally, the First Circuit considers GID to be a serious medical need for the purposes of a civil commitment.[52] Other courts have reached comparable decisions.[53]

Along with recognizing the serious medical implications of GID, courts have begun to support the most commonly prescribed treatment methods for individuals suffering from this condition, including psychotherapy, hormone therapy, and sex reassignment surgery.[54] Courts' acknowledgement of common treatment methods helps prisoners to prove the second element of their case–that the desired treatment is the only adequate treatment for their serious medical need. The United States Tax Court, for example, has held that the costs of feminizing hormones and sex reassignment surgeries are tax deductible for certain individuals as forms of necessary medical care.[55] The Seventh Circuit has held that a state statute prohibiting hormone therapy and sex reassignment surgery for a prisoner violates the Eighth Amendment because such forms of treatment could be medically necessary to treat some inmates adequately.[56] Similarly, the U.S. District Court of Massachusetts found that under the Eighth Amendment prisoners may have the right to gender reassignment surgery as adequate care for

49. *See* DSM-IV *supra* note 47; Kosilek v. Spencer, 889 F. Supp. 2d 190, 208 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).

50. *O'Donnabhain*, 134 T.C. at 62. *See generally* De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003); Allard v. Gomez, 9 Fed. Appx. 793, 794 (9th Cir. 2001); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000); Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995); Phillips v. Mich. Dept. of Corr., 932 F.2d 969 (6th Cir. 1991); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 411-413 (7th Cir. 1987); *see also* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (calling Gender Identity Disorder a "profound psychiatric disorder").

51. *O'Donnabhain*, 134 T.C. at 62.

52. *Battista*, 645 F.3d at 452.

53. *See generally* Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011); Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012); Adams v. Federal Bureau of Prisons, 716 F. Supp. 2d 107, 112 (D. Mass. 2010); Sundstrom v. Frank, 630 F. Supp. 2d 974, 983 (E.D. Wis. 2007); Brooks v. Berg, 289 F. Supp. 2d 286, 287 (N.D.N.Y. 2003); Barrett v. Coplan, 292 F. Supp. 2d 281, 286 (D.N.H. 2003).

54. *See* GLEN O. GABBARD, TREATMENTS OF PSYCHIATRIC DISORDERS 683-701 (4th ed. 2007) (showing that the American Psychiatric Association (APA) may recommend psychotherapy, hormone therapy, and surgery (also known as triadic therapy) as the appropriate standard care for individuals suffering from Gender Identity Disorder); *see also* Kosilek v. Maloney, 221 F. Supp. 2d 156, 158-59 (D. Mass. 2012) ("The Harry Benjamin Standards of Care (the 'Standards of Care') are protocols used by qualified professionals in the United States to treat individuals suffering from gender identity disorders. According to the Standards of Care, psychotherapy with a qualified therapist is sufficient treatment for some individuals. In other cases psychotherapy and the administration of female hormones provide adequate relief. There are, however, some cases in which sex reassignment surgery is medically necessary and appropriate.")

55. *O'Donnabhain*, 134 T.C. at 70, 76-77.

56. *Fields*, 653 F.3d at 556.

their serious medical need.[57] While the requirement of "serious medical need" remains a hurdle for transgender inmates, trends in judicial decisions have rendered it easier to prove.

2. Deliberate Indifference

While contemporary court decisions may advance access to certain treatments for transgender inmates, they fail to extend beyond the first two elements necessary to establish a cognizable claim under the Eighth Amendment, leaving the remaining, most subjective elements, to the inmate to establish. The final elements are especially difficult for prisoners to prove. For starters, to establish deliberate indifference the prisoner must show that a particular prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[58] As a threshold matter, the prisoner must first identify the prison official who is the decision maker and whose state of mind is to be analyzed.[59] After identifying the ultimate decision maker, the prisoner must then catalog, with specificity, all incidents in which they were endangered, prove the official knew of the encounters, and show that the prison official concluded that there was a substantial risk of harm to the inmate's health or safety based on knowledge of these incidents.[60] The difficulty of proving these elements is exacerbated for transgender prisoners, who must also demonstrate that their difference (transgender status) was the catalyst for the increased risk of harm and that the prison officials deliberately disregarded both the increased risk of harm and the specific reason for that increased risk.

II. THE INSTITUTION'S SAFETY DEFENSE

Although substantiating a claim for an Eighth Amendment violation by proving the existence of a serious medical need, choosing a treatment deemed adequate for the serious medical need, and showing that the prison knew that the prisoner would remain at an increased risk of harm without receiving the treatment is sufficiently burdensome (and near impossible for most prisoners), transgender prisoners are further encumbered by the prison system's ability to deny medical treatment based on alleged concerns for safety. A prison official who is aware of a substantial risk of serious harm is not in violation of the Eighth Amendment if "the denial of particular medical care is based on reasonable, good

57. Kosilek v. Spencer, 889 F. Supp. 2d 190, 204-205 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).

58. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

59. *Maloney*, 221 F. Supp. 2d at 190.

60. *See Farmer*, 511 U.S. at 837 ("[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."); *see also* Flanory v. Bonn, 604 F.3d 249, 254 (6th Cir. 2010); De'Lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003); Chance v. Armstrong, 143 F.3d 698, 702 (2d. Cir. 1998).

faith judgments balancing the inmate's medical needs with other legitimate, penological considerations."[61] "The duty to reasonably assure inmate security," for example, "is one of the realities of prison administration and, therefore, is relevant to the deliberate indifference analysis."[62] As such, the institution must balance these seemingly perverse obligations.[63] A prisoner who is allowed to have sex reassignment surgery by one institution could easily be denied that same right by another institution "so long as the balancing judgments are within the realm of reason and made in good faith."[64] The good faith requirement in this context does little more than further burden the inmate, who must also show that there was no good faith, reasonable security concern, or other legitimate penological purpose that would inhibit his or her requested relief,[65] and that but for this claim, the prison would continue its unconstitutional conduct.

A. JUSTIFICATIONS FOR THE SAFETY DEFENSE

The institution's ability to evade its responsibility to inmates comes from the U.S. legal principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."[66] The logic is that if the pain is neither unnecessary nor wanton, then its infliction is permissible. According to the Federal District Court of Massachusetts:

> The duty of prison officials to protect the safety of inmates and prison personnel is a factor that may properly be considered in prescribing medical care for a serious medical need. It is conceivable that a prison official, acting reasonably and in good faith, might perceive an irreconcilable conflict between his duty to protect the safety of inmates and his duty to provide a particular inmate adequate medical care. If so, his decision not to provide that care might not violate the Eighth Amendment because the resulting infliction of pain on the inmate would not be unnecessary or wanton. Rather, it might be reasonable and reasonable conduct does not violate the Eighth Amendment.[67]

The potential for a prison official to perceive an irreconcilable difference between an inmate's serious medical need and his safety is inherently problematic. The Supreme Court has held that "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[68] Yet the bar for

---

61. *Kosilek*, 889 F. Supp. 2d at 206.
62. *Id.*; *see also Farmer*, 511 U.S. at 833; Battista v. Clarke, 645 F.3d 449, 454-55 (1st Cir. 2011).
63. *See Battista*, 645 F.3d at 454.
64. *Id.* (quoting *Farmer*, 511 U.S. at 844-45).
65. *See* White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988) (saying that, in a case involving a transgender prisoner, "[a]ctions without penological justification may constitute an unnecessary infliction of pain").
66. Wilson v. Seiter, 501 U.S. 294, 297 (1991).
67. Kosilek v. Maloney, 221 F. Supp. 2d 156, 161 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).
68. *Farmer*, 511 U.S. at 837.

reasonableness is low while the risk of discrimination by prison officials is high. To help alleviate such concerns, the Court established an alternative test of reasonability: the deliberate indifference test.

Under the deliberate indifference test,[69] if an inmate can show that the prison official both knew of an excessive risk to the inmate's health and disregarded it, there is sufficient evidence that he did not act reasonably. The deliberate indifference test, therefore, "leaves ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources."[70] Judges seriously consider the constraints facing prison officials,[71] affording deference to the judgments of prison administrators concerning what is necessary to discharge their duty to maintain institutional security.[72] Prison officials do, however, forfeit the right to deference when their actions were clearly taken in bad faith and for no legitimate purpose ("not rooted in the responsibility to preserve internal order and discipline, and maintain institutional security"),[73] or when the grounds for refusing treatment are shown to be pretextual and the plaintiff can establish that the "balancing judgments" were not "within the realm of reason."[74] Forfeiture of the right to deference holds true even absent a "sinister motive or 'purpose' to do harm" to the inmate.[75]

B. IMPLICATIONS OF THE BALANCING TEST

The balancing test as prescribed by the courts fails to adequately address the needs of transgender prisoners. It allows prison administrators to successfully argue that their facilities lack safe housing options for post-operative transgender inmates. Prison officials can claim that an inmate presenting with sexual characteristics contrary to those of the general population will be at such a heightened risk of assault as to make protecting him or her from all threats near impossible.[76] In practice, institutions rely on these arguments to avoid providing for all forms of transgender prescribed treatment, including psychotherapy, hormone therapy treatments, sex reassignment surgery, and the like. So long as courts continue to defer to prison administrators, the balancing test will serve as

---

69. Previously discussed at I.(B)(2).

70. Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011).

71. *See Wilson*, 501 U.S. at 303 ("[A]ssuming the conduct is harmful enough to satisfy the objective component of the Eighth Amendment claim . . . . whether it can be characterized as 'wanton' depends upon the constraints facing the *official*.").

72. Whitley v. Albers, 475 U.S. 312, 321-22 (1986).

73. Kosilek v. Spencer, 889 F. Supp. 2d 190, 210 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).

74. *Battista*, 645 F.3d at 454-55.

75. *Id.* at 455.

76. *See Kosilek*, 889 F. Supp. 2d at 197-98 (noting that the Massachusetts Department of Correction Commissioner, Kathleen Dennehy, claimed that providing sexual reassignment surgery for transgender prisoner Michelle Kosilek would create "insurmountable security problems," resulting in the unconstitutional denial of Kosilek's surgery).

justification for the denial of equal protection under the Cruel and Unusual Punishments Clause.

The level of discretion afforded to prison officials allows them to distort the balancing test in a way that is antithetical to the Eighth Amendment. On one hand, transgender individuals left in the general population have complained of grave offenses, validating the officials' alleged concerns for safety. Unfortunately, prison officials are emboldened by these incidents and use them as evidence that the existing security measures are incapable of protecting the transgender individual as is, and that altering their physical form to align with their mental state will make safety completely unmanageable. In this way, a victim's assault or report of assault can become the institution's strongest argument against providing him or her the necessary medical attention required under constitutional law, prompting a dangerous cycle wherein victims are loath to report abuse. On the other hand, some prisons do allow for the special protection of transgender prisoners, especially those with gender-variant physical features. To accommodate the prisoners' safety, officials place the individuals in special wards meant to provide some level of additional protection.[77] These special wards (including administrative segregation, medical wards, and transgender only wards), however, are generally segregated from the rest of the inmate population.[78] When housed in segregated facilities, transgender prisoners find themselves isolated in conditions that are harsher and more restrictive than those of the general prison population.[79]

Alleged concerns for safety have resulted in the creation of a prison-housing dichotomy where both of the options presented to transgender inmates are unnecessarily punitive. The issue is only exacerbated by the courts' continued reliance on a balancing test whereby the prison is justified in claiming either that its facilities cannot accommodate the housing of a post-operative transgender inmate (thereby denying the medical treatment the individual requires) or that the individual must choose to serve the remainder of his sentence in some form of segregation. By permitting these claims, courts allow prisons to employ their own balancing tests at the administrative level—so long as they can justify their decisions in the unlikely event of a lawsuit. In effect, courts have provided the correctional institution with a way to shirk its Eighth Amendment responsibilities to transgender prisoners. Despite all of the recent holdings supporting the advancement of transgender medical rights, the balancing test serves to completely nullify these advancements within the prison system.

---

77. *See* Alexander L. Lee, *Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America's Prisons*, 3 GIC TIP J. 1, 11-12 (2004).

78. *Id.*

79. *Id.*

III. CURRENT HOUSING OPTIONS

United States prisons are sex-segregated.[80] To maintain this system, prison administrators classify prisoners according to their birth-assigned sex or to the sex corresponding with the current presentation of their genitalia.[81] Transgender women, individuals who live and identify as women but were identified as male at birth, and transgender men, individuals who live and identify as men but were identified as female at birth,[82] are often placed in facilities that conflict with their self-identification.[83] Self-identification is paramount for transgender prisoners because "[p]eople with intersex conditions who have not been surgically 'normalized' are seen as 'freaks' in the prison system because their bodies defy easy categorization as 'male' or 'female,'"[84] and they are thus more vulnerable than others. The permissible otherization[85] of the transgender body within the prison system gives license to injustice and violence at the hands of both officers and other prisoners.[86] Transgender men and women are more prone to victimization in prisons than any other group. According to the Sylvia Rivera Law Project (SRLP), an advocacy group for transgender inmates, "in men's facilities, transgender women, gender non-conforming people, and intersex people are frequent and visible targets for discrimination and violence, and are subject to daily refusals by correctional officers and other prisoners to recognize their gender identity."[87] The victimization of transgender men in women's prisons is equally problematic.[88]

---

80. Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons* (Spring 2003) (unpublished comment, Boalt Hall School of Law) (on file with the author).

81. Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522-26 (1999).

82. MERRIAM-WEBSTER DICTIONARY 1328 (11th ed. 2008) (defining transgender as "having personal characteristics (as transsexuality or transvestism) that transcend traditional gender boundaries and corresponding sexual norms").

83. *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 142 (2011) ("The consequences of misclassification or the inability to be fit into the existing classification system are extremely high, particularly in the kinds of institutions and systems that have emerged and grown to target and control poor people and people of color, such as criminal punishment systems, public benefit systems, and immigration systems.").

84. THE SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 22 (2007), *available at* http://srlp.org/files/warinhere.pdf.

85. *See* ADRIAN HOLLIDAY, JOHN KULLMAN & MARTIN HYDE, INTERCULTURAL COMMUNICATION: AN ADVANCED RESOURCE BOOK 3 (1st ed. 2004) ("By otherizing we mean imagining someone as alien and different to 'us' in such a way that they are excluded from 'our' 'normal,' 'superior' and 'civilized' group.").

86. *See* JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 166 (2011) (validating the frequency of harassment and assault at the hands of both corrections officers and other inmates for transgender and gender non-conforming respondents).

87. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 18.

88. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 32 ("As is the case in men's prisons, authorities in women's prisons target transgender, gender non-conforming, and intersex people in those facilities

A. PROTECTIVE CUSTODY

Within prison facilities, transgender prisoners are generally placed in one of two types of housing, either general population or protective custody.[89] Protective custody (or punitive isolation) is thought to minimize the likelihood of victimization and is thus reserved for prisoners who are at an exceptionally high risk of violence or harassment by other prisoners.[90] Public officials, including politicians, judges, and police officers, and people convicted of sex-related offenses are regularly put into protective custody.[91] Transgender people, too, often find themselves railroaded into punitive isolation for no other reason than that administrators did not know whether to place them in men's or women's prisons.[92] The most commonly stated reason for placing transgender persons in protective custody, however, is that due to their gender expression (which is often mistaken for sexual orientation) they are especially targeted for violence.[93]

While it is true that transgender prisoners are regularly victimized, there are several major flaws with the promotion of protective custody as a safety mechanism. First, it rarely meets the publicized level of safety. Despite the isolationist components of protective custody, prisoners in protective custody still experience violence within their segregated units.[94] Second, protective custody's primary purpose is solitary confinement. It should be reserved for use as a means of additional punishment for prisoners who are more likely to commit violent acts towards others.[95] In light of its disciplinary purpose, the use of protective custody to house a transgender inmate for lack of other options is unnecessarily antagonistic.[96] Third, the level of safety provided in protective custody varies among facilities, often based on the quality of prison employees.

---

with verbal harassment, humiliation, excessive strip searches, and isolation, and refuse to recognize their gender identities.").

89. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 18.

90. JAMES D. HENDERSON & RICHARD L. PHILLIPS, PROTECTIVE CUSTODY MANAGEMENT IN ADULT CORRECTIONAL FACILITIES: A DISCUSSION OF CAUSES, CONDITIONS, ATTITUDES, AND ALTERNATIVES 2 (1991).

91. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 18.

92. *Id.* at 22.

93. *Id.* at 18.

94. Paul Gendreau, Marie-Claude Tellier & Stephen J. Wormith, *Protective Custody: The Emerging Crisis within Our Prisons*, 49 FED. PROB. 55, 60 (1985) (indicating that protective custody is not safe enough according to a self-report scale, which showed that protective custody inmates still express a high level of fear).

95. David Lovell, Kristin Cloyes, David Allen & Lorna Rhodes, *Who Lives in Super-Maximum Custody? A Washington State Study*, 64 FED. PROB. 33, 34 (2000) (sharing the results of a Washington state study, which concluded that thirty-three percent of protective custody prisoners had been convicted of homicide and thirty-eight percent had been convicted of other violent offenses (sex offenses were classified separately). Of the protective custody residents, twelve percent were sentenced to Life Without Parole or Death, and parole custody residents had committed an average of 7.7 major infractions per year vs. 0.9 per year in general population inmates).

96. Unfortunately, protective custody is being used more often to house a disproportionate number of "prisoners who have problems coping with prison due to mental illness, brain damage, or other factors" requiring treatment despite the fact that treatment is not provided in this setting and despite the fact that

Protective custody therefore acts either as a safe refuge from the violence of other prisoners or acts as a dangerous form of isolation for transgender prisoners, placing them at a greater risk of violence from correctional officers.[97] With this level of variation and inconsistency, the policy of placing transgender inmates in protective custody has a high risk-to-reward ratio.

A study of transgender and intersex people in New York state men's prisons, conducted by the SRLP, enumerates the personal reasons a transgender inmate would sooner risk the violence associated with the general population than be housed in protective custody.[98] Interviewees claimed that protective custody "makes them more vulnerable to harassment and assault by correctional officers."[99] It also severely restricts the prisoner's relative mobility, thereby limiting access to some of the diversions associated with incarceration (e.g., vocational and recreational programs). One of the participants in the SRLP study reported that they had "spent 95% of [their] time in PC [protective custody] where there are no programs."[100] Access to prison programs is a critical part of incarceration. Many of the programs that act as diversions for prisoners serve a more utilitarian purpose for society at large.[101] Education,[102] rehabilitation,[103] and vocational programming, which are all denied to those housed within protective custody units, are intended to assist in deterring future crime and reforming incarcerated offenders.[104] In limiting access to these programs,

---

vulnerable inmates are likely to be further damaged in protective custody by means of sensory deprivation and other disorienting features of the environment. *Id.* at 33.

97. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 18.

98. *See* THE SYLVIA RIVERA LAW PROJECT, *supra* note 84 (providing varying perspectives on the experience of transgender inmates in United States prisons).

99. *Id.* at 18. ("Bianca, an SRLP client who is currently imprisoned in general population and pursuing litigation in connection with incidents in which she was raped by correctional officers, observes, 'PC [protective custody] is even worse cause there are no cameras.' For Bianca, placement in protective custody would mean less opportunity to document an ongoing pattern of abuse she experiences.").

100. *Id.*

101. Consider, e.g., the U.S. Department of Education's 1992 Functional Literacy for State and Local Prisoners Program, designed to rehabilitate prisoners and reduce recidivism. U.S. DEP'T OF EDUC., ADULT EDUCATION–FUNCTIONAL LITERACY AND LIFE SKILLS PROGRAMS FOR STATE AND LOCAL PRISONERS 417-1 (1997), *available at* http://www.ed.gov/pubs/Biennial/95-96/eval/417-97.pdf.

102. *See* Emily A. Whitney, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 777, 788 (2009).

103. Many states have established rehabilitation programs by statute based on guidance from the Code of Federal Regulations (C.F.R.). The C.F.R. explains the purpose and scope of postsecondary education programs for inmates, naming the ideal program as one that offers "courses for college credit other than those courses which pertain to occupational education programs . . . which have been determined to be appropriate in light of the institution's need for discipline, security, and good order." 28 C.F.R. § 544.20 (2013).

104. In *Pugh v. Locke*, a federal district court found that the Alabama prison system "[created] an environment in which it is impossible [for prisoners] to rehabilitate themselves." Pugh v. Locke, 406 F. Supp. 318, 326 (M.D. Ala. 1976). The court also noted that "[t]he content of the Eighth and Fourteenth Amendments is not static but must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 328. From this we might conclude that although the absence of

protective custody impedes a healthier prison experience for the incarcerated and a more goal-oriented incarceration period for the benefit of society. Furthermore, the isolation in and of itself is problematic for the mental health and wellbeing of the inmate.[105] Even courts have begun to recognize that long-term placement in administrative segregation can be psychologically damaging.[106] Vicki, an SLRP interviewee, said, "I need to be in general population. I need the freedom to move, if you can call it freedom."[107]

B. GENERAL POPULATION

Despite the fact that protective custody is an ill-formed safety mechanism, some transgender prisoners prefer it to the risk of violence associated with being in the general population.[108] Within the general population, transgender inmates face verbal humiliation, rape, battery, assault, sexual harassment, and blackmail, among other abuses.[109] Although much of this violence occurs at the hands of inmates, it is important to note that transgender prisoners are also frequently targeted by prison officials.[110] According to Sydney Tarzwell, in her study of transgender inmates, "[f]emale prisoners often experience verbal harassment,

---

education, rehabilitation, or training programs is not sufficient to compel judicial action, courts may consider this absence in finding a constitutional violation.

105. *See* Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, NAT'L PRISON PROJECT J. (Spring 1993) (revealing that inmates in isolation, even those who start out healthy, can become withdrawn, incapable of initiating or governing behavior, suicidal, or paranoid); *see generally* Stuart Grassian & Nancy Friedman, *Effects of sensory deprivation in psychiatric seclusion and solitary confinement*, 8 INT'L J.L. & PSYCHIATRY 49 (1986).

106. *See* Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988).

107. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 18.

108. *See id.* (sharing the thoughts of transgender prisoners):

> [Prison] is a horror show. It's madness in here. Totally bizarre and crazy, and you think 'this can't be real.' But it's everyday life. The best thing about it is being locked up 23 hours a day, 7 days a week. Otherwise I would have to survive in open population . . .' [and] . . . Sunday, a former prisoner, . . . describ[es] a specific instance in which she was experiencing so much violence and abuse in general population that protective custody seemed like the only alternative to death: 'Can you imagine what it must have been like for me to have requested that? But they wouldn't even do that for me.'

109. *See id.* at 25:

> I have faced violence where I have been beaten and raped because of my being a transgender with female breasts and feminine. I have been burned out of a cell block & dorm because I wouldn't give an inmate sex. I have been slapped, punched, and even threatened because of my being a transgender that told another inmate 'No' when they told me they wanted sex from me or my commissary buy. I have been harassed verbally and have had others grab my female breasts and ass because they knew I was transgender and figured they can get away with such actions–which they do most of the time due to the fact no one cares what happens to us transgenders inside. I've been subjected to all kinds of verbal harassment from 'look at that inmate scumbag transgender' all the way to threats and sexual harassment physically as well as verbally.

110. *See* Lee, *supra* note 77, at 10 (sharing anecdotal evidence suggesting that most of the abuse suffered by transgender prisoners in women's prisons is at the hands of white male correctional officers). *But see* Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the*

unnecessary pat-downs, and rape at the hands of staff."[111] Furthermore, corrections officers have been known to leverage their control over the goods and services available to prisoners into sexual bartering.[112] In men's prisons, those prisoners displaying "feminine" traits are more likely to be victimized.[113] Tarzwell also found that "[f]eminine-appearing transgender prisoners are disproportionately subjected to transphobic and homophobic slurs, beatings, and sexual assault, including rape."[114] Active participation in the victimization of transgender prisoners by male prison staff results in demeaning "gender-check" strip searches; mocking of genitals; verbal, physical, and sexual assault; and rape at the hands of guards.[115]

Housing in the general population is extremely difficult for transgender prisoners. As one of the SRLP interviewees explained, ". . . you're the lowest rung on the totem pole of prison life. You have to pay somebody to protect you, but most people won't be seen talking to you, or let you sit at their table, or touch their food."[116] This low position within the prison hierarchy places transgender prisoners at increased risk of verbal harassment, physical abuse, sexual assault, and coercion, creating an exceptionally dangerous environment. In the alternative, transgender inmates can hope for protective custody where, at best, they are removed from the companionship of other prisoners, denied access to many programs, confined to smaller cells and limited time in exercise yards, and further stigmatized. At worst, they are isolated with predatory prison staff and have fewer witnesses to potential harassment or violence against them. As Lori, another interviewee of the SRLP, explained, these factors compound one another

---

Eighth Amendment, 44 SANTA CLARA L. REV. 1211, 1242 (2004) (suggesting that half of the sexual attacks in women's prisons occur at the hands of other prisoners).

111. Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 178 (2006).

112. *See* THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 25-26: "In his testimony during a U.S. Department of Justice hearing on rape in prison, one legal advocate for transgender people in prison remarked on the widespread practice of correctional officers forcing transgender people in prison into prostitution:

> A common form of sexual abuse of transgender, intersex, and gender non-conforming people in prison is forced prostitution. In these systems, correction officers bring transgender women to the cell of male inmates and lock them in for the male inmate to have sex with. The male inmate will then pay the correction officer in some way, for example with cigarettes or money. The correction officer sometimes gives a small cut to the woman and brings her back to her cell.
>
> The rape and sexual exploitation of transgender, intersex, and gender non-conforming people in some facilities is very open. Sometimes all or almost all the staff and officials in a particular facility know about the abuse, but even those who do not participate in it maintain a rigid conspiracy of silence."

113. Lee, *supra* note 77, at 6.

114. Tarzwell, *supra* note 111, at 179.

115. Lee, *supra* note 77, at 9. *See also* Meriwether v. Faulkner, 821 F.2d 408, 410-11, 418 (7th Cir. 1987) (finding harassment of a transgender inmate by prison officials who forced the prisoner to strip in front of officers and other inmates), *cert. denied*, 484 U.S. 935 (1987).

116. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 26.

to produce a climate in which abuse and discrimination is inevitable: " . . . for transsexual prisoners like me, it is very hard to stay out of the limelight, in a problem free existence."[117] As long as placements in prisons are sex-segregated and based on genitalia and birth-assigned sex, and as long as isolation is the only alternative to living in general population, placement for transgender people will continue to engender discrimination.

IV. COURT INACTION

Predating their recent progress, the courts have a long history of finding against transgender prisoners seeking special consideration for their unique circumstances. When deciding whether a transgender person is entitled to hormone therapy, for example, courts have ruled in favor of prison officials almost every time.[118] In recent cases, however, prisoners have begun to make some gains.[119] All of these successes are in jeopardy if the courts continue to

---

117. *Id.*

118. *See* Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of the fact that neither public nor private health insurance programs will pay for sex reassignment); Long v. Nix, 86 F.3d 761 (8th Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); Jones v. Flannigan, 1991 U.S. App. LEXIS 29605 (7th Cir. Nov. 12, 1991) (holding prisoner had a right to some type of medical treatment but did not have a right to any particular type of treatment); White v. Farrier, 849 F.2d 322 (8th Cir. 1988) (holding that male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); Meriwether v. Faulkner, 21 F.2d 408, 413 (7th Cir. 1987) (holding that transsexual prisoner is constitutionally entitled to some type of medical treatment for diagnosed condition of transsexualism, but she "does not have a right to any particular type of treatment, such as estrogen therapy"), *cert. denied*, 484 U.S. 935 (1987); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) (same); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) (holding that transsexual prisoner had no right to hormone therapy). *See also* Cuoco v. Mortisugo, 222 F.3d 99 (2d Cir. 2000) (granting officials immunity against claim by transsexual pre-trial detainee who was denied hormones).

119. *See* De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003) (holding that a transsexual prisoner whose hormone treatment was terminated had stated a valid claim that the lack of adequate treatment for her compulsion to mutilate herself after her hormone treatment was cut off could constitute deliberate indifference); Allard v. Gomez, 2001 WL 638413 at *1 (9th Cir. June 8, 2001) (finding a colorable question of fact as to whether a transsexual prisoner was denied hormone therapy based on "an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs"); South v. Gomez, 211 F.2d 1275 (9th Cir. 2000) (finding Eighth Amendment violation where a prisoner's course of hormone treatment was abruptly cut off after being transferred to a new prison); Barrett v. Coplan, 292 F. Supp. 2d 281 (D.N.H. 2003) (holding that a transsexual prisoner had stated a valid Eighth Amendment claim when prison officials refused any treatment for her gender identity disorder); Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003) (denying qualified immunity to defendant prison officials who refused a transsexual prisoner all medical treatment for her gender identity disorder based on a blanket policy), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002) (finding that plaintiff's transsexualism constituted a serious medical need and directing prison officials to provide adequate treatment as recommended by a physician experienced with treating gender identity disorders

refuse to address the housing realities of transgender inmates. Up to this point, the judicial branch has been unwilling to explore the possibility that placement in either general population or protective custody is cruel and unusual punishment for transgender prisoners akin to the outright denial of medical treatment. Instead, the system functions under the misinformed belief that if one option is unconstitutional, the other must be appropriate. This either/or mentality adversely affects transgender prisoners' rights to a variety of therapies (most notably surgical and hormonal) to which they have recently become entitled. By allowing prison officials to weigh the cost of housing safety against the benefits of surgery or hormonal treatment, the courts have supplied prison officials with a court-sanctioned excuse to deny transgender prisoners what is rightfully theirs.

When given the opportunity to address the unique place of transgender people in prisons, courts have chosen time and again to leave serious decisions regarding placement in the hands of prison officials. In *Lamb v. Maschner*, for example, a transgender plaintiff requested transfer to a women's prison, or alternatively that she be protected from sexual harassment and molestation by means other than administrative segregation.[120] The *Lamb* court rejected her demand for transfer and concluded that she had no right to any placement option other than administrative segregation or general population, stating, "Plaintiff does not have a constitutional right to choose his [sic] place of confinement and prison officials may move a prisoner for any reason or no reason at all."[121] Untethered authority given in this way is tantamount to the institutionalization of the officials' biases against transgender inmates.

Given the courts' regular deference to prison officials, it logically follows that the officials will continue to promote administrative segregation as a reasonable alternative to general population housing for transgender prisoners. Consider a Pennsylvania court's rejection of Dee Farmer's arguments that her extended placement in administrative segregation constituted cruel and unusual punishment because she was denied access to recreation and exercise, assistance from jailhouse lawyers, psychological counseling, and equal access to rehabilitative programs offered to the inmates in the general population.[122] The *Farmer* court

---

and without excluding the possibility that necessary treatment might include initiating hormones or providing sex reassignment surgery); Wolfe v. Horn, 130 F. Supp. 2d 648 (D. Pa. 2001) (noting that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute deliberate indifference); Phillips v. Mich. Dep't of Corrections, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction directing prison officials to provide estrogen therapy to transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *cf.* Praylor v. Tex. Dep't of Criminal Justice, 430 F.3d 1208 (5th Cir. 2005) (assuming without deciding that transsexualism is a serious medical need, but finding insufficient evidence of deliberate indifference); Kosilek v. Nelson, 2000 WL 1346898 (D. Mass. Sept. 12, 2000) (same).

120. *Lamb*, 633 F. Supp. at 352-53.

121. *Id.*

122. Farmer v. Carlson, 685 F. Supp. 1335, 1338 (M.D. Pa. 1988).

concluded that placing a twenty-one-year-old transgender woman into the general population at a high security institution would pose a significant threat to security in general, and to Farmer specifically. The court also found that a four and one-half month stay in administrative segregation was an appropriate use of segregation and neither cruel nor unusual.[123] The court's decision in *Farmer* flies in the face of all the studies showing that the use of solitary confinement actually creates anger, hostility, aggression, and mental illness.[124] Even staff psychologists of state prisons have argued that placing a prisoner in solitary confinement creates management problems far exceeding any problem that existed when the prisoner was part of the general prison population.[125]

That courts have repeatedly shirked their responsibility to transgender prisoners is even more disturbing when one observes the courts' willingness to address the housing concerns of other special needs groups. In *Youngberg v. Romeo*, Nicholas Romeo was involuntarily committed to a Pennsylvania state hospital, where he was restrained for many hours each day and repeatedly injured.[126] In this case, the Supreme Court held that involuntarily-committed residents (Romeo was labeled "severely retarded")[127] had the right to reasonably safe confinement conditions, no unreasonable body restraints, and the habilitation that they reasonably require.[128] Of consequence here is the Court's recognition of both a right to reasonably safe confinement conditions *and* the habilitation that a person reasonably requires. Habilitation for Romeo is akin to medical treatment for transgender inmates.

By constructing its argument around the Eighth Amendment vernacular regarding unnecessary and wanton infliction of pain, the Supreme Court left ample room for the Cruel and Unusual Punishment Clause to be applied to other special classes of prisoners seeking reasonably safe confinement conditions. Moreover, according to the Court:

> Respondent [Romeo] has constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment to

123. *Id.* at 1344.

124. *See* Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 266 (1977).

125. A paper written by staff psychologists at the Maine State Prison explains that when prisoners lack access to normal reinforcements, after a while they begin to "act crazy," reinforce each other's "acting out" behavior, and become extremely destructive. The staff psychologists argue that solitary confinement cannot be justified even as a punishment device, since it only serves to repress unwanted behavior. Once the aversive stimulus is removed, the unwanted behavior is likely to reappear. They conclude that prisoners confined to solitary for long periods of time revert to irrational and bizarre behavior, eventually exhibiting one of the following behavior patterns: (1) angry and destructive acts; (2) depressive reactions, sometimes culminating in suicidal attempts; or (3) withdrawn and psychotic behavior. D. Hasson & J. Quinsey, *Function of the Segregation Unit at the Maine State Prison* (Apr. 10, 1975) (unpublished paper on file with Pine Tree Legal Assistance, Inc., Lewiston, Maine).

126. Youngberg v. Romeo, 457 U.S. 307, 310 (1982).

127. *Id.*

128. *Id.* at 324.

> reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests. Whether [his] constitutional rights have been violated must be determined by balancing these liberty interests against the relevant state interests. The proper standard for determining whether the State has adequately protected such rights is whether professional judgment, in fact, was exercised. And in determining what is "reasonable," courts must show deference to the judgment exercised by a qualified professional, whose decision is presumptively valid.[129]

Despite the call for judgment to be exercised by a qualified professional in the case of individuals with mental disabilities, courts continuously allow untrained prison officials to make important decisions regarding transgender prisoners. Prison officials are not qualified professionals and their decisions should not be presumptively valid. Actions that are prohibited under the Fourteenth Amendment should likewise be prohibited, using the same line of reasoning, under the Eighth Amendment.

Kosilek v. Spencer is a prime example of a court's ambivalence toward the issue of housing transgender inmates, especially for post-operative transgender prisoners.[130] In *Kosilek*, the U.S. District Court of Massachusetts found that it is not necessary or permissible for the court to decide where a transgender inmate should be incarcerated after receiving sex reassignment surgery and that the matter must be decided, reasonably and in good faith, by the Department of Correction (DOC).[131] The court did note, however, that there are real risks of sexual assault and other violence for someone who is anatomically a female in a male prison[132] and went so far as to propose options to the DOC for Kosilek.[133] According to the court, Kosilek could continue to be housed in the general population in the male prison.[134] The court did acknowledge that "Kosilek would much prefer to be incarcerated in the women's prison" and left this option open to the DOC.[135] Alternatively, the court proposed that the DOC utilize the Interstate Corrections Compact to transfer Kosilek to a prison in another state, where she would be less notorious and, therefore, at less risk of harm (in the general population).[136] The court also suggested that Kosilek could be placed in a segregated unit or in a form of protective custody, or that the prison could create a modified protective custody arrangement that would provide the inmate with

129. *Id.* at 307.
130. Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).
131. *Id.* at 205.
132. *Id.* at 243.
133. *Id.* at 243-44.
134. *Id.* at 244.
135. *Id.*
136. *Id.*

both protections from other residents and access to treatment, work, educational programs, and recreation.[137] Unfortunately, three out of these four suggestions are centered on the same old general population versus administrative segregation paradigm.

V. POLICY REASONS FOR REFORM

A. HOUSING IS A CONSTITUTIONAL MATTER

The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[138] Yet, according to the Supreme Court, "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges.[139] While "the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment,[140] nonetheless, these "judgment[s] should be informed by objective factors to the maximum possible extent."[141] For example, on the issue of whether capital punishment for certain crimes violated contemporary social rules, the Court looked for "objective indicia" derived from history, the action of state legislatures, and sentencing by juries.[142] In fact, the Supreme Court's decision that deliberate indifference to an inmate's medical needs constituted cruel and unusual punishment rested largely on the fact that common law and state legislatures believed that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."[143]

The call for safe confinement for transgender prisoners is no different. The legislature has exhibited serious concerns for transgender prisoners. Title 28 of the Code of Federal Regulations (C.F.R.) states:

> In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placements would present management or security problems.[144]

Additionally, the C.F.R. says that "[p]lacement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each

137. *Id.* at 244-45.
138. Trop v. Dulles, 356 U.S. 86, 101 (1958).
139. Rummel v. Estelle, 445 U.S. 263, 274 (1980).
140. Coker v. Georgia, 433 U.S. 584, 597 (1977).
141. *Rummel*, 445 U.S. at 74-75.
142. Gregg v. Georgia, 428 U.S. 153, 173, 176-187 (1976).
143. Estelle v. Gamble, 429 U.S. 97, 103 (1976).
144. 28 C.F.R. § 115.42(c) (2013).

year to review any threats to safety experienced by the inmate,"[145] and "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration."[146] Lastly, and perhaps most importantly, the legislature has determined that:

> The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.[147]

Protectionist measures of this sort, though decreed by the legislature, have proven largely ineffective in the case law. It is evident that prison administrators are determined to continue their unfeeling housing of transgender inmates, in effect creating a system-wide practice of discrimination. This issue is a constitutional, Eighth Amendment matter, and under the objectivity requirement set forth in *Rummel v. Estelle*[148] it is time for the courts to impose an objective standard.

B. PRISON OFFICIALS REGULARLY DENY MEDICAL CARE ABSENT A SANCTIONED EXCUSE

One might argue that the judicial branch has been blasé about the issue because it does not engage in regulation or policy creation. Taking this assertion as true, the fact still remains that prison administrators are no better equipped than judges to make important medical decisions. Healthcare in United States prisons, jails, and detention centers is inadequate in terms of both accessibility and quality.[149] A *New York Times* editorial asserted that:

> Prison inmates are literally the sickest people in our society. Shoddy care and the denial of care are unfortunately not unique to private companies, which do not provide the majority of the health care that is supplied to inmates. Many publicly run systems, which provide most of the care for the nation's inmates, are equally bad. The root problem is that the country has tacitly decided to starve the prison system of medical care, even though AIDS, tuberculosis and hepatitis are

145. 28 C.F.R. § 115.42(d) (2013).
146. 28 C.F.R. § 115.42(e) (2013).
147. 28 C.F.R. § 115.42(g) (2013).
148. Rummel v. Estelle, 445 U.S. 263, 274 (1980).
149. *See, e.g.*, CORR. ASS'N OF N.Y., HEALTHCARE IN NEW YORK STATE PRISONS: A REPORT OF FINDINGS AND RECOMMENDATIONS BY THE PRISON VISITING COMMITTEE OF CORRECTIONAL ASSOCIATION OF NEW YORK (2000), *available at* http://static.prisonpolicy.org/scans/healthcare.pdf.

> rampant behind bars, and roughly one in six inmates suffers from a serious mental illness.[150]

The barriers to healthcare access are exacerbated for transgender, gender non-conforming, and intersex people. The volatile atmosphere in which transgender inmates must exist is already rife with discrimination and neglect. It is no surprise, therefore, that reports of care-related discrimination and neglect are fairly common.[151]

In addition to medical need, transgender prisoners must deal with issues around the provision of medical services. There are many reports of discriminatory providers, and transgender prisoners recount horror stories in which they were denied basic care, hormones, or other transition-related treatments.[152] "Despite the fact that medical experts agree that gender-related healthcare sought by transgender and intersex people is medically necessary, non-experimental, safe, and effective, these services are still routinely denied to imprisoned people."[153] According to one SRLP interviewee, "Medical services are poor for the average inmate. They see gender-related services as cosmetic, not essential to transition and to a healthy life."[154] Difficulties in overcoming administrative hurdles in order to be deemed entitled to gender-related care are only compounded by inconsistent care where inmates receive incorrect dosages of hormones, arbitrary termination of treatment, and so on.[155]

For those transgender inmates who do undergo medical treatment in relation to their gender, and consider it both medically necessary and a central aspect to their general well-being, empowering prison employees to determine their fate is highly risky. The SRLP report notes that:

> Numerous studies in the medical literature as well as the clinical experience of experts in the field demonstrate that denial of sexual reassignment therapies not only cause patients significant anguish and suffering but that it also results in significant morbidity and mortality. Untreated transsexual patients have a suicidality of 20-30%, which is reduced to less than 1-2% after treatment. Delay of treatment for transsexual patients not only exposes them to a longer duration of pain, suffering, and decreased social functionality, but also unnecessarily places their lives at risk. The longer the duration of suicidal feelings, the greater risk that a patient will be a completer. Treated transsexual patients have a durable and sustained remission of their illness

150. Editorial Desk, *Death Behind Bars*, N.Y. TIMES (Mar. 10, 2005), http://www.nytimes.com/2005/03/10/opinion/10thu2.html.

151. THE SYLVIA RIVERA LAW PROJECT, *supra* note 84, at 27.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 27.

> resulting in decreased psychiatric morbidity and mortality as well as improvements in well-being, social and occupational functioning, and interpersonal relationships.[156]

A lack of resources, combined with a heightened level of discrimination towards transgender persons, makes prison doctors and administrators ill-equipped to determine (a) whether a transgender prisoner deserves sexual reassignment surgery, (b) when the costs of safety outweigh the benefits of surgery, and (c) what constitutes adequate treatment for gender dysmorphia. These judgments are best left to qualified professionals (outside of the prison system) whose decisions are presumptively valid.

C. THE DECISIONS OF PRISON OFFICIALS ARE VULNERABLE TO POLITICAL PRESSURE

It is also important to consider how vulnerable prison administrators are to political pressures. In *Kosilek v. Spencer*, the court found that the Commissioner of the DOC, Maloney, was resistant to providing adequate medical care for transgender prisoners for "fear of controversy or criticism."[157] As a result, Michelle Kosilek was denied her prescribed female hormones and a possible sex reassignment surgery.[158] In an earlier trial, the court found that Maloney's refusal to allow these measures was "rooted in sincere security concerns, and in a fear of public and political criticism as well."[159] Maloney was conscious of both the public and political opposition to providing female hormones and sex reassignment surgery to any prisoner in Massachusetts, especially Kosilek.[160] Media that purported to gauge public support guided his judgment,[161] such as the following 2000 Boston Globe column:

> Robert Kosilek is as remarkable a man as you would ever want to meet. First, he's a certified wife killer, having been convicted of taking a wire to the throat of his beloved Cheryl, then hiding her body in the trunk of their car in the parking lot of a North Attleboro mall. Then he showed up at his trial in a dress, calling himself Michelle, telling anyone who would listen that his inner woman was trying to overcome his, well, outer man. Even his lawyer seemed unsure whether to call him he or she. Now in prison, serving a life term without possibility of parole, he's grown his stringy brown hair all the way down his back. He wears polish on his fingernails. He says he pines every moment of every day to be the woman he was always meant to be. And he's demanding that

156. *Id.* at 28.
157. Kosilek v. Spencer, 889 F. Supp. 2d 190, 201 (D. Mass. 2012), *rev'd*,—F.3d—(1st Cir. 2014).
158. *Id.*
159. Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002).
160. *Kosilek*, 889 F. Supp. 2d at 214.
161. *Id.*

> the state, meaning you and me, pay the $25,000 for a sex-change operation, which the more politically correct call a "sexual reassignment." But none of this is remarkable, just standard-issue bizarre. What's truly remarkable is his ability to make a complete and utter fool out of an otherwise thoughtful and respectful federal jurist, US District Judge Mark. L. Wolf. Indeed, (s)he's actually make a mockery of our entire penal system, and in the process is costing us thousands of dollars and dozens of hours of valuable court time.[162]

Furthermore, "[a]t the time of trial the DOC was supporting proposed legislation that would prohibit inmates with gender identity [disorder] from changing their names [and] . . . had not expressed a view on another bill that would prohibit providing inmates with hormones and sex reassignment surgery."[163] The court in the earlier case concluded that:

> Maloney did not regard sex reassignment surgery as an appropriate use of taxpayers' money. Maloney and his colleagues . . . thought that any such expenditure would be politically unpopular. Maloney did not want to authorize hormones or sex reassignment surgery for Kosilek or any other inmate unless he was legally obligated to do so.[164]

The real problem is not that prison administrators exhibit disdain for providing transgender inmates gender-appropriate care. It is that courts have provided them with an excuse by which to continue this discrimination, despite the fact that prison administrators already feel entitled to do so and regularly hinder the inmates at every step along their quest for treatment. Maloney, for instance, "did several things designed to avoid the virtually unprecedented, and foreseeably unpopular, step of providing female hormones to a male prisoner."[165] First, he engaged one medical doctor, Dr. Forstein, to serve as an expert in the litigation.[166] When Forstein recommended that Kosilek receive psychotherapy from an expert in gender identity disorders, be provided female hormones, and be given a consultation with an experienced surgeon who specialized in sexual reassignment surgery, Maloney fired him.[167] For Maloney, Forstein's unwillingness to take Kosilek's incarceration into account when providing recommendations was problematic.[168]

---

162. Brian McGrory, *A test case for a change*, BOSTON GLOBE (June 13, 2000), http://www.bostonglobe.com/metro/2000/06/13/test-case-for-change/s9jYsy33HXfJ3ajRNZYpMO/story.html.

163. *Kosilek*, 889 F. Supp. 2d at 215.

164. *Maloney*, 221 F. Supp. 2d at 170-171.

165. *Kosilek*, 889 F. Supp. 2d at 215-216.

166. *Id.* at 216.

167. *Id.*

168. *Id.*

In seeking another expert, Maloney made it clear "that [he] did not want to provide Kosilek or any other inmate hormones or sex reassignment surgery."[169] Dr. Packer, a prison doctor retained by Maloney, therefore sought out an expert who would provide this opinion.[170] Packer discovered Dr. Dickey, a Canadian doctor who met the requirement, after reading some of his published work.[171] Dr. Dickey argues that sex reassignment surgery should never be considered for inmates.[172] Instead, he is a proponent of freezing transgender prisoners in the "frame" in which they entered prison, i.e., a prisoner like Kosilek would only receive female hormones if they had been prescribed prior to her incarceration.[173] Subsequently, the court found that, "without having read Dr. Forstein's report, Dr. Dickey's article on treatment of transsexual inmates, Dr. Packer's memorandum summarizing Dr. Dickey's article, or the Standards of Care, Maloney adopted Dr. Dickey's recommended, inflexible 'freeze-frame' policy for the DOC."[174]

Under the Eighth Amendment, decisions concerning an inmate's medical care are to be made whilst taking the individual into account. As is evident in the Kosilek case, however, a prison official can be motivated by public opinion, the state, and politics. Recognizing that public opinion is largely against the funding of hormone therapy and sex reassignment surgery for prisoners and that both hormone therapy and sex reassignment surgery address a serious medical need, it is time to remove decision-making capacity from the hands of prison administrations. Otherwise, the bias that prison officials have against transgender prisoners, compounded with faux concerns for safety, will make housing the barrier to hormone therapy and sex reassignment surgery, treatments that have already been deemed medically necessary by the judicial system.

VI. CONCLUSION

Rather than continue to ignore the discrepancy between allowing transgender prisoners access to hormone therapy and sexual reassignment surgery while permitting prison administrators to decide whether there is adequate housing to warrant such treatment, courts should enforce the use of such medically necessary treatments when prescribed by a doctor. Although prisons may be justified in their concerns of safety, it is time to amend the structure of the prison industrial complex so that all prisoners are safe and free from abuse. Moving forward, prisons might consider classifying and housing each prisoner on a case-by case basis or constructing non-punitive housing alternatives such as single cells or separate units for all detainees who are at risk of being targeted for sexual assault or who fear being hurt or harassed. Likewise, it might be easiest to

169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

house transgender women in women's facilities and transgender men in men's facilities, or at the very least allow those prisoners to choose which facility would provide the highest level of physical and emotional safety for them. Most certainly, however, prison administrators should respect prisoner objections to being paired with a specific cellmate for fear of assault, so that stories like that of Kelly McAllister do not become all too common.