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# GENDER IDENTITY BEHIND BARS: AN ANALYSIS OF *KOSILEK V. SPENCER*

MOIRA COOPER

## I. INTRODUCTION

It was 1952.<sup>1</sup> Michael was just a toddler when his mother left him at the orphanage.<sup>2</sup> It was immediately apparent that the boy was “different.”<sup>3</sup> Nearly every adult figure in Michael’s life admonished him and tried to force him to conform to social dictates.<sup>4</sup> But Michael could not be changed. Although his life came to be plagued by a variety of tragedies, he is now known for one thing in particular: he has “a strong and persistent belief that he is a woman trapped in a man's body.”<sup>5</sup>

By ten-years-old, Michael was dressing up as a female and experiencing extreme confusion about his gender identity.<sup>6</sup> Just before his eleventh birthday, he was reunited with his mother, but his familial relations remained troubled.<sup>7</sup> Michael was repeatedly raped by his grandfather.<sup>8</sup> He was also stabbed by his stepfather after announcing his proclaimed desire to live as a girl.<sup>9</sup> As a teenager, Michael was forced to run away from home.<sup>10</sup> Confused and alone, he began a life of prostitution and illegal drugs, often dressing as a woman.<sup>11</sup>

From 1967 to 1968, Michael received female hormones from a physician in exchange for sex.<sup>12</sup> He grew breasts and finally began to “feel normal.”<sup>13</sup> However, peer cruelty escalated and Michael dropped out of

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<sup>1</sup> *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 163 (D. Mass. 2002).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> *Kosilek*, 221 F. Supp. 2d at 163.

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

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

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

<sup>11</sup> *Id.*

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

<sup>13</sup> *Kosilek*, 221 F. Supp. 2d at 163.

high school.<sup>14</sup> He was in and out of prison due to his perilous lifestyle.<sup>15</sup> Michael was regularly berated and assaulted on the street for his appearance and demeanor.<sup>16</sup> While imprisoned, Michael was gang-raped, suffered daily torture, and feared for his life.<sup>17</sup>

In an ultimate criminal act, Michael murdered his wife and received a life sentence without the possibility of parole.<sup>18</sup> Michael, now known as Michelle Kosilek, struggles to live through daily incarceration and to search for his “cure.”<sup>19</sup>

The Eighth Amendment of the United States Constitution reads: “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*”<sup>20</sup> One major issue prisoners face with regard to their Constitutional rights is determining which types of medical treatment (or *lacks* of treatment) violate the Eight Amendment’s prohibition against cruel and unusual punishment. The Supreme Court has decided that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ . . . proscribed by the Eighth Amendment.”<sup>21</sup> Thus, any prison personnel charged with the care of inmates may not show indifference—or worse, intentional disregard—for the medical needs of a prisoner.<sup>22</sup> In fact, a valid claim for inadequate care of a serious medical need can constitute a valid cause of action under Section 1983.<sup>23</sup>

A typical lawsuit arising from these issues would involve a prisoner who is seeking treatment that his prison doctors have refused to prescribe.<sup>24</sup> However, the issue becomes even more complicated when prison doctors actually prescribe some sort of treatment that the prison administration refuses to endorse.<sup>25</sup> Does the denial of prescribed treatment for medically recognized conditions always constitute cruel and unusual punishment? This is a particularly contested issue with respect to conditions that are little understood by the public, or widely viewed as nonessential to physical wellbeing, such as “gender identity disorder” (“GID”). To what extent does

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<sup>14</sup> *Id.* at 164.

<sup>15</sup> *Id.* at 163-64.

<sup>16</sup> *Id.* at 163.

<sup>17</sup> *See id.*

<sup>18</sup> *Id.* at 164.

<sup>19</sup> *Kosilek*, 221 F. Supp. 2d at 164.

<sup>20</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>21</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (internal citation omitted)).

<sup>22</sup> *See id.* at 104-05.

<sup>23</sup> *Id.* at 105; *see* 42 U.S.C. § 1983 (2006).

<sup>24</sup> *See Kosilek v. Spencer*, 889 F. Supp. 2d 190, 204 (D. Mass. 2012).

<sup>25</sup> *See id.* at 197-98.

the Eighth Amendment of the United States Constitution protect a prisoner's right to GID treatment?

## II. GID

The traditional model of gender identity is a binary system that associates particular genders with the biological sexes.<sup>26</sup> Thus, the “inner sense of self” that gender identity embodies is “aligned” with sex, as a feminine individual would be to a biological female.<sup>27</sup> These gender “constructions” assume a correlation between sex and gender does not always exist, but that has been entrenched by cultural values and socialization.<sup>28</sup> For others, there is a disconnect between “anatomical birth sex and psychological gender.”<sup>29</sup>

When gender identity does not “match” sex, an individual has what is commonly referred to as gender identity disorder (“GID”).<sup>30</sup> GID is a medically recognized mental condition that has been acknowledged by the American Medical Association, the Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> ed., “DSM-IV-TR”), and the International Classification of Diseases (10<sup>th</sup> revision).<sup>31</sup> The DSM series is a publication by the American Psychiatric Association, the professional organization representing United States psychiatrists, containing a listing of psychiatric disorders that are currently supported by sufficient empirical data.<sup>32</sup> In the DSM-IV-TR, GID is characterized as a “persistent discomfort with one’s

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<sup>26</sup> *Sexual Orientation & Gender*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/sexual-orientation-gender-4329.htm> (last visited July 1, 2013).

<sup>27</sup> *Gender Identity Disorder*, GLAD, [www.glad.org/uploads/docs/cases/gid-fact-sheet.pdf](http://www.glad.org/uploads/docs/cases/gid-fact-sheet.pdf) (last visited July 1, 2014).

<sup>28</sup> Rose McDermott & Peter K. Hatemi, *The Profession: Distinguishing Sex and Gender*, 44 PS: POL. SCI. & POL’Y. 89, 90 (Jan. 14, 2011).

<sup>29</sup> *Gender Identity Disorder*, *supra* note 27.

<sup>30</sup> *Id.*

<sup>31</sup> See Massachusetts Medical Society, California Medical Association, & Medical Society of the State of New York, *Removing Financial Barriers to Care for Transgender Patients*, AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES RESOLUTION 122 (A-08), available at <http://www.gires.org.uk/assets/Medpro-Assets/AMA122.pdf> (hereinafter “RES. 122 (A-08)”).

<sup>32</sup> *DSM-IV Frequently Asked Questions*, AMERICAN PSYCHIATRIC ASSOCIATION, available at <http://www.psychiatry.org/practice/dsm/dsm-frequently-asked-questions> (last accessed March 17, 2013). *Author’s note*: since the time of this writing, the American Psychiatric Association has updated to the DSM-V, which may not be entirely consistent with the information provided herein).

assigned sex and with one's primary and secondary sex characteristics, which causes intense emotional pain and suffering."<sup>33</sup>

The American Medical Association has expressed the necessity of medical treatment for GID, including the use of hormones and possibly sex reassignment surgery to alter genitalia and other sex characteristics, based on personal need.<sup>34</sup> It stated that untreated GID can result in "clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death."<sup>35</sup> Additionally, the delay of treatment can "cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the healthcare system."<sup>36</sup> The Association further stated that reputable medical research has demonstrated the "effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID."<sup>37</sup> Thus, the Association opposes the limitation of GID care that has been prescribed by sound medical opinion.<sup>38</sup> Similarly, it opposes any discrimination towards the gender-diverse community.<sup>39</sup>

### III. MEDICAL TREATMENT IN PRISONS

Because the Eighth Amendment's prohibition on cruel and unusual punishment is accepted and enforced within prisons, prison staff may not disregard the medical needs of an inmate.<sup>40</sup> But debate arises over the extent to which GID treatment is required, considering the specific, individual nature of GID. Several options exist, from counseling, to hormone therapy, all the way through full sex reassignment surgery.<sup>41</sup>

The original purpose of the Eighth Amendment was to prohibit torture, physical violence, and other barbarous practices at the hands of the

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<sup>33</sup> RES. 122 (A-08), *supra* note 31 (citing the Diagnostic and Statistical Manual of Mental Disorders, 4th ed. text revised).

<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.*

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

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

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

<sup>40</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976)

<sup>41</sup> E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 13 INT'L J. OF TRANSGENDERISM 165, 171 (2011).

state.<sup>42</sup> It has evolved to encompass “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”<sup>43</sup> Thus, all penal measures must be compatible with “the evolving standards of decency that mark the progress of a maturing society.”<sup>44</sup>

Courts must be vigilant in protecting prisoners’ rights to medical treatment because inmates have no option but to “rely on prison authorities to treat . . . medical needs; if the authorities fail to do so, those needs will not be met.”<sup>45</sup> In general, to prove that a prison official is liable for failing to meet an inmate’s medical need, the inmate must satisfy both objective and subjective aspects of a two part test: (1) his “medical need [is] objectively serious” and (2) the official “acted with deliberate indifference to the prisoner’s health or safety.”<sup>46</sup>

“Deliberate indifference” requires a higher level of culpability than a mere “negligence” standard.<sup>47</sup> It means “more than ordinary lack of due care for the prisoner’s interests or safety,” but less than “acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”<sup>48</sup> Because the deliberate indifference standard is more than negligence but less than an act done knowingly or purposefully, it can be equated most closely with the concept of recklessness.<sup>49</sup> Of course, acting knowingly or purposely will also satisfy the standard, because these mind states encompass a greater degree of culpability than does recklessness.<sup>50</sup> To possess this indifference, a prison 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.”<sup>51</sup>

Some courts have described an objectively serious medical need as 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

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<sup>42</sup> *Estelle*, 429 U.S. at 102.

<sup>43</sup> *Id.* (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>44</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>45</sup> *Id.* at 103.

<sup>46</sup> See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Estelle*, 429 U.S. at 104-05; *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir. 2001).

<sup>47</sup> *Farmer*, 511 U.S. at 835.

<sup>48</sup> *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

<sup>49</sup> See *Id.*

<sup>50</sup> See *id.*

<sup>51</sup> Linda D. Chin, *A Prisoner’s Right to Transsexual Therapies: A Look at Brooks v. Berg*, 11 CARDOZO WOMEN’S L.J. 151, 167 (2004) (quoting *Farmer*, 511 U.S. at 837).

necessity for a doctor's attention.”<sup>52</sup> In the New York case *Brooks v. Berg*, a biologically male inmate brought a suit requesting treatment for his GID.<sup>53</sup> When determining whether he had serious medical needs, the court considered: “(1) whether a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment, (2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain.”<sup>54</sup>

#### IV. *KOSILEK V. SPENCER*: A LANDMARK CASE

On September 4, 2012, District Court Judge Wolf took an unprecedented step and ordered an injunction for a prisoner's sex reassignment surgery.<sup>55</sup> In *Kosilek*, plaintiff Michelle Kosilek, a biological male, brought forth an action to request an injunction for a reassignment surgery.<sup>56</sup> Kosilek is a relatively unsympathetic character. She is serving a life sentence for murdering her wife.<sup>57</sup> She suffers from extreme mental anguish as a result of her GID.<sup>58</sup>

Kosilek has always had a “strong and persistent belief that [s]he is a woman trapped in a man's body.”<sup>59</sup> She has suffered lifelong abuse for this belief, including being stabbed by her stepfather and prostituted by medical doctors in return for hormone therapy.<sup>60</sup> “This anguish has caused Kosilek to attempt to castrate [her]self and to attempt twice to kill himself while incarcerated, once while he was taking the antidepressant Prozac.”<sup>61</sup>

The Massachusetts Department of Correction's (“DOC”) doctors prescribed Kosilek various treatments, including the ultimate recommendation of sex reassignment surgery.<sup>62</sup> They explained that sex reassignment surgery is the only adequate measure that will help her

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<sup>52</sup> *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir. 2001) (quoting *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 810 (7th Cir. 2000) (internal quotations omitted)).

<sup>53</sup> *Brooks v. Berg*, 270 F. Supp. 2d 302, 305, *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

<sup>54</sup> *Id.* (quoting *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003) (internal citations omitted)).

<sup>55</sup> *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 198 (D. Mass. 2012).

<sup>56</sup> *Id.* at 196.

<sup>57</sup> *Id.* at 197.

<sup>58</sup> *Id.* at 202.

<sup>59</sup> *Id.* at 213 (quoting *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 163 (D. Mass. 2002)).

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

<sup>61</sup> *Id.* at 214.

<sup>62</sup> *Id.* at 197.

recover from a great likelihood that she would otherwise commit suicide.<sup>63</sup> Still, the Commissioner of the DOC, Kathleen Dennehy, would not comply with the doctors' orders.<sup>64</sup> The state argued that it would create "insurmountable" security problems.<sup>65</sup>

When applying the relevant analysis, it is clear that Kosilek's Eighth Amendment claim is strong. She was able to establish both prongs of the test to find whether a prison's actions constitute an Eighth Amendment infraction.<sup>66</sup> Thus, the court ruled for the Plaintiff.<sup>67</sup>

First, Kosilek had a "serious medical condition," as evidenced by her diagnosis.<sup>68</sup> The DOC doctors prescribed the most radical treatment available, surgical intervention, which exhibits the severity of the condition.<sup>69</sup> Kosilek had extreme physical manifestations of her GID, including depression and self-mutilation.<sup>70</sup>

Second, Dennehy's denial of the prescribed treatment was deliberately indifferent, satisfying the subjective prong of the analysis.<sup>71</sup> Although Dennehy recognized the severity of Kosilek's needs, she did not allow her treatment to follow the suggested course.<sup>72</sup> Further, she did so for selfish and/or superficial reasons such as fear of negative publicity and personal bias.<sup>73</sup>

However strong Kosilek's Eighth Amendment claim may be, the remedy is not necessarily injunctive relief. Judge Wolf clarified that an inmate is not entitled to "ideal care" or whatever care she chooses.<sup>74</sup> Instead, "[c]ourts must defer to the decisions of prison officials concerning what form of adequate treatment to provide an inmate."<sup>75</sup> But the court has the ultimate task of deciding whether the care actually given to the inmate is adequate and sufficient.<sup>76</sup>

In this instance, the severity of Kosilek's condition, combined with the bad faith of the prison administrators, caused Judge Wolf to issue an

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

<sup>64</sup> *Id.* at 197-98..

<sup>65</sup> *Id.* at 198.

<sup>66</sup> *Id.* at 236-37..

<sup>67</sup> *Id.* at 240.

<sup>68</sup> *Id.* at 229.

<sup>69</sup> *Id.* at 197, 230.

<sup>70</sup> *Id.* at 229..

<sup>71</sup> *See id.* at 201-03, 237-38.

<sup>72</sup> *Id.* at 197-98, 202, 237

<sup>73</sup> *Id.* at 203.

<sup>74</sup> *Id.* at 208..

<sup>75</sup> *Id.* at 199.

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



injunction for sex reassignment.<sup>77</sup> This heightened remedy required Kosilek to prove more than that which satisfied the initial Eighth Amendment claim.<sup>78</sup> For an injunction, Kosilek was required to prove that:

(1) [H]e has a serious medical need; (2) sex reassignment surgery is the only adequate treatment for it; (3) the defendant knows that Kosilek is at high risk of serious harm if he does not receive sex reassignment surgery; (4) the defendant has not denied that treatment because of good faith, reasonable security concerns or for any other legitimate penological purpose; and (5) the defendant's unconstitutional conduct will continue in the future.<sup>79</sup>

This novel test creates a high threshold that will limit the injunctive remedy to very severe cases.

The court gave several reasons to support its conclusion in this case. First, the medical necessity of sex reassignment surgery for some individuals with extreme forms of GID is becoming more widely recognized.<sup>80</sup> For instance, in 2010, the United States Tax Court held that "the costs of . . . hormones and sex reassignment surgery are for certain individuals, tax deductible as forms of necessary 'medical care' for a serious, debilitating condition that is sometimes associated with suicide and self-castration, rather than nondeductible expenses for 'cosmetic' treatment."<sup>81</sup> The scientific community has embraced the needs of individuals with GID.<sup>82</sup> Now, the legal community is following suit.

Next, despite the state's argument that Kosilek's treatment denial was based on security concerns, Judge Wolf ruled that the real reason for denial of Kosilek's surgery was a fear of "controversy, criticism, and, indeed, ridicule, and scorn."<sup>83</sup> As Deputy Commissioner, before she was promoted to lead Commissioner of the DOC, Kathleen Dennehy attempted to fire DOC doctors who recommended sex reassignment surgery for Kosilek.<sup>84</sup> As Commissioner, Dennehy proceeded to halt certain prescribed GID treatments that transsexual inmates, including Kosilek, were using.<sup>85</sup>

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<sup>77</sup> *Id.* at 200, 251

<sup>78</sup> *Id.* at 200.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 197.

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

<sup>82</sup> *See, e.g.,* RES 122 (A-08), *supra* note 31.

<sup>83</sup> *Kosilek*, 889 F. Supp. 2d at 247.

<sup>84</sup> *Id.* at 201-02.

<sup>85</sup> *Id.* at 202.

She also testified untruthfully on several occasions.<sup>86</sup> For instance, Dennehy claimed that she did not know sex reassignment surgery was prescribed for Kosilek, and that claim was proven false.<sup>87</sup> The Commissioner even testified that she would rather retire than obey the Supreme Court's order to comply with a sex reassignment surgery injunction.<sup>88</sup>

Given Dennehy's apparent dishonesty, the court found that "deliberate indifference" was present in this case.<sup>89</sup> Dennehy's actions as Commissioner and during trial evidenced her impure motives for denying Kosilek's surgery.<sup>90</sup> She acted with a pattern of dishonesty that discredited her purported motive of "security concerns."<sup>91</sup> Dennehy does not have the medical credentials that are necessary to substitute her judgment for that of a professional DOC doctor. In any case, Dennehy ultimately admitted that the safety of Kosilek could be reasonably assured by placing Kosilek in protective custody.<sup>92</sup>

*Kosilek v. Spencer* is a groundbreaking case. It is the result of years of litigation, beginning in 2000 with *Kosilek v. Nelson*,<sup>93</sup> affirmed by *Kosilek v. Nelson*,<sup>94</sup> and entered into judgment as *Kosilek v. Maloney*.<sup>95</sup> As this case has evolved throughout a 12-year span, the medical community has changed and embraced the needs of those afflicted with GID. The effect of the medical push has enabled courts to look past traditional notions and embrace a new sense of fairness. Kosilek's severe medical necessity, juxtaposed against the inequitable methods of the prison administration to avoid the necessary treatment, created a perfect storm for the Massachusetts court to make such a ruling.

## V. ANALYSIS

GID/Eighth Amendment claims often arise in prisons when, for example, prisoners with GID wish to dress and be treated differently than others in the facility due to dissimilar gender roles.<sup>96</sup> Prisoners may also

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 201.

<sup>89</sup> *See id.* at 249-250.

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 240.

<sup>92</sup> *Id.* at 243.

<sup>93</sup> C.A. No. 92-12820-MLW, 2000 U.S. Dist. LEXIS 13355 (D. Mass. Sept. 12, 2000).

<sup>94</sup> *See* 29 F. App'x. 621, 622 (1st Cir. 2002).

<sup>95</sup> *See* 221 F. Supp. 2d 156 (2002).

<sup>96</sup> *See* *Konitzer v. Frank*, 711 F. Supp. 2d 874, 883 (E.D. Wis. 2010); *see also* *Kosilek*, 889 F. Supp. 2d at 197-98. .

contest the ability of prison staff of a particular sex to perform searches and pat downs on them.<sup>97</sup> Because the prisoner's gender does not match his or her biological disposition, it will generally not match the sex of the prison staff searcher (whose sex is typically controlled by the sex of the inmate).<sup>98</sup> In the same line of rationale, prisoners may challenge their placement in units with prisoners of a sex to which they do not relate or who harass them.<sup>99</sup> However, litigation concerning GID medical care is arguably the most crucial of this array of concerns; inmate health can be a matter of life or death. As such, the focus on *Kosilek* is of great importance to the prisoners' rights movement.

Caselaw illustrates that prisons today generally recognize GID as an objectively serious medical need that triggers Eighth Amendment protections.<sup>100</sup> Thus, at least *some* type of medical treatment is warranted.<sup>101</sup> However, in some relatively recent cases, courts have fallen short of deciding which treatments are *necessary* to adequately treat GID in particular instances.<sup>102</sup> For example, individuals exhibit different symptoms. Some individuals with GID experience adequate treatment with psychotherapy alone, through which they can "integrate their trans- or cross-gender feelings into the gender role they were assigned at birth and do not feel the need to feminize or masculinize their body."<sup>103</sup> Other individuals need hormone therapy, surgery, or both.<sup>104</sup> Still, others can go without any treatment.<sup>105</sup> They can feel satisfaction from simply changing gender roles and expressing this change to the community (hopefully, with recognition).<sup>106</sup>

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<sup>97</sup> See *Konitzer*, 711 F. Supp. 2d at 894.

<sup>98</sup> See *id.*; see also *Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993) (explaining that cross-gender, clothed-body searches of prisoners by prison officials may violate the Fourth and Eighth Amendments, but that these violations have been limited to searches of female prisoners by male officials).

<sup>99</sup> See 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, 170 (2006).

<sup>100</sup> See *Kosilek*, 889 F. Supp. 2d at 230 (citing, e.g., *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. Dep't of Corr.*, 731 F. Supp. 792 (W. D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *Meriwether v. Faulkner*, 821 F.2d 408, 411-413 (7th Cir. 1987)); see also *Konitzer*, 711 F. Supp. 2d at 905.

<sup>101</sup> See *Kosilek*, 889 F. Supp. 2d at 198.

<sup>102</sup> See, e.g., *Meriwether*, 821 F.2d at 413..

<sup>103</sup> *Coleman et al.*, *supra* note 41, at 170.

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

<sup>105</sup> *Id.*

<sup>106</sup> See *id.* at 170-71

Beyond the individual's degree or expression of GID, past treatment can affect the level of continued care necessary in a particular case.<sup>107</sup> For instance, if someone has pursued hormone therapy for an extended period of time, negative physical effects can occur when the body is forced to adjust back to a lack of those hormones.<sup>108</sup> The same can be said for individuals who have already begun initial surgical procedures for sex reassignment. When a person is incarcerated during these unique times, extra measures can become necessary to maintain proper health.

Some courts have allowed prisons to withhold relatively manageable and effective remedies from prisoners.<sup>109</sup> Hormone therapy, even when it is specifically requested by the inmate or prescribed by prison doctors, can be denied.<sup>110</sup> In the two illustrative cases of *Supre* and *Lamb*, prison officials rendered some type of treatment for GID but did not give the inmates hormone therapy.<sup>111</sup> The respective courts refused to acknowledge a constitutional right to hormone therapy under the Eighth Amendment while some other "reasonably effective" treatment options were made available instead.<sup>112</sup> Still, neither court denied the fact that the transsexual inmates in question were constitutionally entitled to at least some type of medical treatment.<sup>113</sup> For example, in *Supre*, prison officials chose to administer the inmate "testosterone replacement therapy and mental health treatment" rather than the estrogen therapy the prisoner requested, and the court accepted this administrative prerogative.<sup>114</sup>

*Meriwether v. Faulkner* provides an enlightening illustration of the modern discourse on GID treatment in prisons.<sup>115</sup> In *Meriwether*, a biologically male inmate was initially denied any treatment for his GID, including chemical, hormonal, psychiatric, or surgical remedies.<sup>116</sup> Prior to incarceration, that inmate received estrogen hormone therapy for nine years.<sup>117</sup> Initially, the district court dismissed the entire action for failure to

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<sup>107</sup> See e.g., *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792, 794, 797, 800 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991).

<sup>108</sup> See *id.*

<sup>109</sup> See *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986); *Lamb v. Maschner*, 633 F. Supp. 351, 353-54 (D. Kan. 1986).

<sup>110</sup> See *Supre*, 792 F.2d at 963; *Lamb*, 633 F. Supp. 2d at 353-54.

<sup>111</sup> See *Supre*, 792 F.2d at 963; *Lamb*, 633 F. Supp. 2d at 354.

<sup>112</sup> See *Supre*, 792 F.2d at 963; *Lamb*, 633 F. Supp. 2d at 353-54.

<sup>113</sup> See *Supre*, 792 F.2d at 963; *Lamb*, 633 F. Supp. 2d at 353

<sup>114</sup> *Supre*, 792 F.2d at 960.

<sup>115</sup> *Meriwether v. Faulkner*, 821 F.2d 498 (7th Cir. 1987)

<sup>116</sup> *Id.* at 410.

<sup>117</sup> *Id.*

state a claim.<sup>118</sup> But on appeal, the ruling was reversed and the case was remanded for further consideration.<sup>119</sup>

The court found that the inmate's GID diagnosis was appropriate (under guidance from the American Psychiatric Association's DSM-IV-TR).<sup>120</sup> Thus, he had an objectively serious medical condition.<sup>121</sup> The inmate's Eighth Amendment claim was merited because the prison's total disregard of *any* GID treatment (as distinguished from *Supre* and *Lamb*, where at least *some* medical remedies were afforded to the inmates) constituted a "deliberate indifference."<sup>122</sup> However, the court emphasized that the inmate did not have a right to *any particular type of treatment*, such as hormones, which were the focus of her complaint.<sup>123</sup>

This case created a respectable baseline for prison liability where there is an egregious instance of deliberate indifference towards a prisoner's GID. Further, *Supre* and *Lamb* support the proposition that at least minimal medical attention is necessary.<sup>124</sup> However, these rulings do not go far enough in addressing the needs of prisoners with GID. The rhetoric of these cases creates loose standards that rely largely on the deference of prison officials.

In other cases, courts have been downright offensive to the detriment of inmates with GID. In *Maggert v. Hanks*, *infra* note 125, a prisoner's claim for GID treatment was denied by the district court and affirmed on appeal because the prisoner did not establish a genuine issue of fact.<sup>125</sup> Echoing much of the same rhetoric as the judge in *Meriwether*, the court chose to elaborate on the topic of GID civil rights litigation for future reference.<sup>126</sup> The court's tone with regard to GID was aggressive. It explained, "[s]omeone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder."<sup>127</sup> The court also stated that the "cure" for GID can range from psychiatric treatment to hormone therapy to surgical procedure, but prisons do not have a duty to authorize curative treatment for GID such as hormonal therapy or surgery.<sup>128</sup> The analysis proceeded:

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<sup>118</sup> *Id.* at 408-09.

<sup>119</sup> *Id.* at 409.

<sup>120</sup> *See id.* at 411-12.

<sup>121</sup> *See id.* at 412-13.

<sup>122</sup> *See id.* at 413-14 (citing *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986); *Lamb v. Maschner*, 633 F. Supp. 351, 354 (D. Kan. 1986)).

<sup>123</sup> *Id.* at 413 (emphasis added)

<sup>124</sup> *See Supre*, 792 F.2d at 963; *Lamb*, 633 F. Supp. 2d at 353-54.

<sup>125</sup> 131 F.3d 670, 670-71 (7th Cir. 1997).

<sup>126</sup> *See id.* at 671.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. We do not want transsexuals committing crimes because it is the only route to obtaining a cure.<sup>129</sup>

In *Maggert*, although the court acknowledged that sex reassignment surgery was a successful, complete form of treatment for the inmate's gender dysphoria, the court ruled that that prisons are not required to provide such treatment.<sup>130</sup> This case creates a contrary line of precedent from *Kosilek*. The court elaborated, “[a] prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person.”<sup>99</sup> Judge Posner opined that neither Medicare nor standard health plans pay for such surgeries, and concluded, “[w]ithholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. . . . We do not want transsexuals committing crimes because it is the only route to obtaining a cure.”<sup>131</sup>

Clearly, the courts still come short of setting fair standards. Further, it appears that no clear standard has taken hold of this line of cases. The most controversial cases arise when prisoners with GID bring suit to request court orders for reassignment surgeries rather than more cost effective remedies such as hormone treatment. Politicians largely reject supporting such measures for fear that their constituents will adversely react to that particular use of tax dollars.<sup>132</sup> Moreover, the public and media “regularly ridiculed the idea that a murderer could ever be entitled to such ‘bizarre’ treatment.”<sup>133</sup> Thus, the traditional reaction of the courts has been to reject any such claim. In fact, to issue an injunction for a sex reassignment surgery has been branded “unprecedented.”<sup>134</sup>

The *Kosilek* case is obviously unique and has elicited an ample amount of criticism. It was considered “unprecedented” for the court to grant the Plaintiff's request for full-blown sex reassignment surgery.<sup>135</sup>

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<sup>129</sup> *Id.* at 672.

<sup>130</sup> *Id.* at 671.

<sup>131</sup> Tarzwell, *supra* note 99, at 187 (quoting *Maggert*, 131 F.3d at 671).

<sup>132</sup> See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 215 (D. Mass. 2012)

<sup>133</sup> *Id.* at 203.

<sup>134</sup> *Id.* at 196.

<sup>135</sup> See *id.* at 196-97, 250-51.

However, at least one other case has echoed the rhetoric of Judge Wolff, supporting the precedent opposite of *Maggert*.<sup>136</sup> In that case, *Phillips*, *supra* note 100, the court issued an injunction for continued hormone therapy for an inmate with GID.<sup>137</sup> The court recognized an exception to the general rule that no specific treatment is *required* for a prisoner with a GID diagnosis.<sup>138</sup> In *Phillips*, the plaintiff took estrogen for seventeen years prior to her incarceration.<sup>139</sup> But when the estrogen therapy was denied during her imprisonment, she experienced a reversal of many female body characteristics.<sup>140</sup> She had other adverse side effects such as bruising, discomfort, depression, and vomiting as “parts of her body reverted to looking and feeling characteristically male [while] plaintiff experience[d] life as a female.”<sup>141</sup> The *Phillips* court issued a preliminary injunction requiring the prison to provide the plaintiff with estrogen.<sup>142</sup>

To many people, it seems counter-intuitive to provide “adequate medical care” to prisoners while the average American citizen is guaranteed no such right.<sup>143</sup> The Supreme Court has responded to such criticism:

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates . . . may actually produce physical ‘torture or a lingering death.[.] Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.<sup>144</sup>

Further, there is a push to reinforce the rights of individuals with GID in other areas of the world. For example, transgender advocates are

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<sup>136</sup> See *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 801 (W.D. Mich. 1990), *aff’d*, 932 F.2d 969 (6th Cir. 1991).

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

<sup>138</sup> See *id.* at 799-800.

<sup>139</sup> *Id.* at 793-94.

<sup>140</sup> *Id.* at 794.

<sup>141</sup> *Id.* at 800, n. 11.

<sup>142</sup> *Id.* at 801.

<sup>143</sup> *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 198 (D. Mass. 2012).

<sup>144</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (internal quotations and citations omitted).

making a case for Medicaid to cover sex reassignment surgeries.<sup>145</sup> The law largely adheres to a binary system of sex.<sup>146</sup> In fact, courts generally will not recognize a mixed sex or sex alternate to pure male or female.<sup>147</sup> Notably, courts will not recognize a person's transgender or chosen sex until sex reassignment surgery is complete.<sup>148</sup> When this is the standard, it seems radical that public health institutions continue to combat providing sex reassignment that is, in many ways, legally necessary. While Judge Posner's argument was supported by the lack of funding for sex reassignment in many health plans and Medicaid, changes in these standards could (and arguably should) occur as well.

Moreover, the plight of prisoners with GID is even more serious than it is for those in the general public. The public is still coming to terms with such alternate lifestyles. Many children and adolescents with gender dysphoria are cast out from youth on. They are discriminated against and often punished for nonconformities or influenced to drop out of school.<sup>149</sup> They are disadvantaged from the start.<sup>150</sup> As a result, transgendered individuals are often filtered into "criminalized economies and [then] into prison."<sup>151</sup> Transgendered individuals are disproportionately represented in prisons.<sup>152</sup>

When in prison, inmates with GID also experience a unique type of domination and discrimination. They are often forced into sexual arrangements with alpha inmates.<sup>153</sup> They are also harassed at a terrifying prevalence when other inmates disapprove of their lifestyles.<sup>154</sup> The unique troubles of the transgendered community with legal and prison administrations warrant particular attention.

In the context of GID in prisons, courts will do well to follow on the same path that Judge Wolf paved in *Kosilek v. Spencer*. Otherwise, prisons risk (and the courts implicitly sanction) subpar medical treatment that flies in the face of Eighth Amendment jurisprudence. While prisoners are not free to choose their personal treatment remedies in an unregulated manner, it is clear that there is no effective remedy for GID aside from full

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<sup>145</sup> See generally, Jerry L. Dasti, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. Rev. 1738 (2002).

<sup>146</sup> *Id.* at 1742.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See Tarzwell, *supra* note 99, at 171-72.

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

<sup>151</sup> *Id.* at 171, 176.

<sup>152</sup> *Id.* at 176.

<sup>153</sup> See *id.* at 176-79

<sup>154</sup> *Id.* at 177.



sex reassignment surgery in some cases. In these rare cases, in which medical doctors prescribe the particular remedy as the sole effective measure, sex reassignment surgery should at least be an option. After all, as Justice Kennedy wrote:

[C]ourts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. Courts nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners.<sup>155</sup>

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<sup>155</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (internal quotations and citations omitted).