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Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates

Travis Wright Colopy

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SETTING GENDER IDENTITY FREE: EXPANDING TREATMENT FOR TRANSSEXUAL INMATES

Travis Wright Colopy[†]

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*“Come senators, congressmen
 Please heed the call
 Don’t stand in the doorway
 Don’t block up the hall
 For he that gets hurt
 Will be he who has stalled
 There’s a battle outside and it is ragin’
 It’ll soon shake your windows and rattle your walls
 For the times they are a-changin’”*¹

*“We are in a new era in which diagnosis has such social and political implications that one is constantly on the front lines fighting on issues our forebears were spared.”*²

INTRODUCTION

Historically, courts and legislatures have been reluctant to establish legal protections for transgender and transsexual people in the United States.³ This may be due, in part, to the slow pace at which American society itself has come to accept this very misunderstood psychological and biological phenomenon. Fortunately, as scientific research and social acceptance mature, this minority is beginning to enjoy greater rights and recognition.

In recent years, the transgender community has enjoyed significant changes in law and society. In February 2010, the U.S. Tax Court in *O’Donnabhain v. Commissioner* ruled that sex-transitioning treatments were tax deductible.⁴ The following November, the first openly transsexual judge in the nation was elected to the California

¹ BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 2005) (1964).

² Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES SEXUAL BEHAV. 427, 428 (2010) (quoting RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 10 (1981)).

³ See Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009).

⁴ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 77 (2010).

bench.⁵ Anti-discrimination legislation protecting jobs and housing is becoming increasingly popular, and the Affordable Care Act removed some barriers to better health care.⁶

These changes demonstrate greater legal recognition and social acceptance of transgender people in the United States. More importantly, these are changes that promote the interests of all transsexual citizens, not just the few who cry out and demand justice for themselves.⁷ While a U.S. Tax Court ruling may not influence how all state and federal courts will interpret the rights of transgender people in other contexts, it may convince some that social expectations are changing and that action is required to guarantee constitutionally-entitled protections.

The Eighth Amendment's history perhaps best reflects how courts have expanded constitutional protections in light of evolving social standards of decency. The Eighth Amendment's simple language⁸ belies the array of protections it grants prison inmates and the duties it imposes on prison officials, including the foremost duty—to provide for inmates' basic needs.⁹ Adequate, if minimal, health care is well recognized as a basic need.¹⁰

Transgender inmates face greater struggles than much of the non-incarcerated transgender community. Some advocates for transsexual inmates' rights argue that prisons should provide the full treatment series—psychotherapy, hormone therapy, and sex reassignment surgery—prescribed by the World Professional Association of Transgender Health's (WPATH) Standards of Care.¹¹ WPATH is an inter-

⁵ *Woman Becomes Nation's 1st Transgender Trial Judge*, CNSNEWS.COM (Nov. 16, 2010), <http://www.cnsnews.com/news/article/woman-becomes-nations-1st-transgender-tr>.

⁶ *See infra* Part II.B.

⁷ *See generally* Farmer v. Brennan, 511 U.S. 825 (1994); *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997); *De'lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003); *Praylor v. Texas Dep't of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005). In these cases, the plaintiff inmates sued only for his or her individual healthcare—not for the healthcare of all transsexual inmates as a class. Of course, transsexual inmates may bring such class actions for better treatment. *See Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D. W. Va. 1981).

⁸ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

⁹ *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) ("[T]hose deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.") (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

¹⁰ Sharon Dolovitch, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U.L. REV. 881, 881-82 (2009).

¹¹ *See* Travis Cox, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 342

national organization that promotes greater understanding and appropriate care for those suffering from gender identity disorder (GID).¹² The Standards of Care represent the international medical community's consensus on the required care for transgender people.¹³ These advocates contend that given the unique needs of transsexuals, denying the full treatment series violates the Eighth Amendment. However, my own analysis demonstrates that any treatments beyond psychotherapy and hormones exceed the constitutionally-mandated degree of care.¹⁴

In this Note, I argue that (1) the standard for adequate medical care requires only sex-appropriate hormone therapies for those transsexual inmates that need them, (2) sexual reassignment surgery is, in most cases, beyond the threshold of minimal adequate care and thus not required by the Eighth Amendment, and (3) prisons must provide housing that ensures the safety of transsexual inmates and the proper administration of adequate health care.

Part I will discuss general background information concerning what transsexualism is, the treatments prescribed by the medical community, and the significant problems transsexuals face in the United States. Part II will introduce the tax court case *O'Donnabhain v. Commissioner* and other indicia of the improving social, legal, and political situation for transsexuals. Part III will discuss Eighth Amendment protections for inmate health care, and case law demonstrating problems with current prison policies regarding care for transsexual inmates. Part IV will propose changes to prison policies so as to balance the respective constitutional rights and duties of inmates and officials.

I. TRANSEXUALISM DEFINED

For most people, there is no disparity between how their body develops sexually and how they self-identify their gender. It is therefore difficult for many to understand the legal and social difficulties that transgender and transsexual people must endure in the United States. That our society's standards of decency have only recently progressed

(2009); Harper Jean Tobin, Note, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 396 (2007).

¹² See *World Professional Association for Transgender Health: Mission Statement*, WORLD PROF. ASS'N OF TRANSGENDER HEALTH (Sept. 27, 2011), http://www.wpath.org/about_mission.cfm.

¹³ See HARRY BENJAMIN INT'L GEND. DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 1 (6th ed. 2001), available at <http://www.wpath.org/documents2/socv6.pdf> [hereinafter STANDARDS OF CARE].

¹⁴ See *infra* Part IV.

to the point of accepting transgender and transsexual people is best revealed by examination of the legal and social prejudices that systematically deny their participatory rights. This begins with understanding what exactly it is about transsexualism, medically and socially, that makes individuals with this condition easy prey for social prejudice.

A. Understanding the Relationship between Gender and Sex

To understand transgender people, the distinction between sex and gender must also be understood. Transgenderism exists because sex and gender are not necessarily identical.¹⁵ Sex is an objective physical attribute determined by an individual's primary sex organs, the genitalia.¹⁶ No one has direct influence over how their own or another's sex develops in the womb. Post-natal sex, however, may be decided (perhaps arbitrarily) when the child's genitalia is ambiguous or disfigured by a careless circumcision.¹⁷

Gender is completely subjective, and better understood as sense of self.¹⁸ Gender identity may be suppressed, but it cannot be changed. There is an increasing amount of scientific evidence that gender-sex incongruity is related to how the brain structure that governs gender develops in response to sex hormones in the womb.¹⁹ This does not mean that transgender people have brain deformities.²⁰ Instead, the gender-sex incongruity only means that the brain developed under different hormonal influences than the rest of the body.

It is also important to distinguish the terms "transgender" and "transsexual." Transgender people are those individuals whose subjective gender does not align with their objective sex.²¹ "Transgender" is an umbrella category that includes transsexuals as a unique

¹⁵ George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORRECTIONAL HEALTH CARE 280, 280 (2009).

¹⁶ *Id.*

¹⁷ Sometimes performing surgeries on "intersex infants," or those infants with sexually ambiguous genitalia, is not even medically necessary but merely a procedure for the "purposes of 'confirming' an earlier assignment to either male or female genders." Drescher, *supra* note 2, at 431.

¹⁸ Brown, *supra* note 15, at 280.

¹⁹ Linda D. Chin, Note/Comment, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks v. Berg*, 11 CARDOZO WOMEN'S L.J. 151, 159 (2004); Dick F. Swaab, *Sexual Differentiation of the Brain and Behavior*, 21 BEST PRAC. & RES. CLINICAL ENDOCRINOLOGY & METABOLISM 431, 436-37 (2007).

²⁰ Chin, *supra* note 19, at 159.

²¹ Brown, *supra* note 15, at 280.

subset.²² Transsexuals are transgender individuals who feel that their physical sex is so divergent from their mental gender that they want to make the physical alterations to align their sex with their gender, or to make their body feel right for their mind.²³

Unfortunately, social understanding often lags behind scientific discovery.²⁴ All too often, transsexualism is misconstrued as just another facet of homosexuality, or degraded as a sexual perversion or a mere psychological delusion.²⁵ But transsexualism does not bear relation to sexual proclivity, sexual orientation, or mental illness.²⁶ Rather, it is entirely concerned with self-identification of gender identity.²⁷ No gender identity precludes anyone from being “heterosexual/straight, homosexual/gay/lesbian or identify as queer.”²⁸

It is easier for society to dismiss and marginalize transgender people as exceptionally rare “freaks” when people are unaware of how many transgender people there are in the population. Transgenderism is far from rare; one survey estimates that only 2–5 percent (one in fifty to one in twenty) of Americans are transgender.²⁹ Transsexualism, however, is quite rare, with birth rates of only about 0.00833 percent (one in 12,000) male-to-female and 0.00333 percent (one in 30,000) female-to-male individuals.³⁰ When contrasted with an esti-

²² Beth Rankin, *Transsexual v. Transgender: Explaining the Intricacies*, FUSION MAGAZINE (2004), <http://fusion.kent.edu/archives/spring04/trans/transprint.html>.

²³ Swaab, *supra* note 19, at 435. Despite this distinction, as one commentator phrased it: “[b]oth terms describe a section of the sexual minority seeking only to feel comfortable in their own skin.” Rankin, *supra* note 22.

²⁴ Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L.J. 133, 143 (2010).

²⁵ O’Donnabhain v. Comm’r, 134 T.C. 34, 78 (2010). In *Cuoco v. Morit-sugu*, the prison officials argued that Cuoco was not a transsexual, just a “homosexual who took estrogen for aesthetic purposes.” 222 F.3d 99, 105 (2d Cir. 2000).

²⁶ See Howell, *supra* note 24, at 136-37.

²⁷ Tobin, *supra* note 11, at 397.

²⁸ *Teaching Transgender*, NAT’L CTR. FOR TRANSGENDER EQUAL. 25 (Jan. 2009), http://transequality.org/Resources/NCTE_Teaching_Transgender.pdf [hereinafter NCTE].

²⁹ *Transgender Issues: A Fact Sheet*, TRANSGENDER L. & POL’Y INST. 1 (2008), <http://www.transgenderlaw.org/resources/transfactsheet.pdf>; the transgenderism statistic estimates the number of individuals who “experience some degree of gender dysphoria.” *Id.*; one population estimate for the United States gives a range between 7,000 and 200,000 transgender people. Tobin, *supra* note 11, at 397.

³⁰ Marek Mędraś & Paweł Józków, *Transsexualism—Diagnostic and Therapeutic Aspects*, 61 POLISH J. ENDOCRINOLOGY 412, 412 (2010). A more recent study estimated a much higher prevalence of transsexualism in the population: 1 in 3,639 male-to-females and 1 in 22,714 female-to-males. *Id.* at 413. The NCTE reports

mated 4–5 percent (one in twenty-five to one in twenty) of males and 2–3 percent (one in fifty to one in thirty-three) of females being born homosexual,³¹ it is easier to comprehend how miniscule, and easily ignored, a sexual and social minority transsexuals are. The real hurdle that transsexuals face is the social, and perhaps cultural,³² predisposition towards viewing sex and gender as a naturally aligned binary phenomenon.³³ Our society prefers the conception that an individual at birth will, by biological necessity, be only a male or female in mind and body for life.³⁴ For many raised according to this view, it is difficult to comprehend that sex and gender do not go hand-in-hand and that, in neither case, does one cause the other.

Neither transgenderism nor transsexualism is a mental illness. However, transsexuals as a class suffer from a condition called “Gender Identity Disorder” (GID) or “Gender Dysphoria,” which arises from the severity of their gender-sex incongruity.³⁵ The Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV) currently lists GID as a psychological disorder.³⁶ GID is described as:

transsexualism rates are between a 0.25-1 percent of the population. NCTE, *supra* note 28, at 19.

³¹ Richard Green, *Transsexual Legal Rights in the United States and United Kingdom: Employment, Medical Treatment, and Civil Status*, 39 ARCHIVES SEXUAL BEHAV. 153, 153 (2010).

³² NCTE, *supra* note 28, at 19.

³³ Howell, *supra* note 24, at 133. In many, if not all facets of society and administration in the United States, the conventional binary gender system is used.

³⁴ See Drescher, *supra* note 2, at 431 (“To maintain this gender binary, most cultures traditionally insisted that every individual be assigned to the category of either man or woman at birth and that individuals conform to the category to which they have been assigned thereafter.”).

³⁵ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (4th ed. 2000) [hereinafter DSM-IV-TR].

³⁶ *Id.* at 580; It is an interesting point that the DSM used to list homosexuality as a psychological disorder for some time as well. The DSM-I published in 1952 classified homosexuality as a “sociopathic personality disturbance” and the DSM-II published in 1968 reclassified homosexuality as a “sexual deviation” and as “sexual orientation disturbance.” To accompany the removal of homosexuality as an illness per se from the DSM-III in 1973, the American Psychiatric Association issued this statement:

Whereas homosexuality in and of itself implies no impairment in judgment, stability, reliability, or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodations, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed on homosexuals greater than that imposed on any other persons. Further, the APA supports and urges the enactment of civil rights legislation at local, state, and federal levels that would insure homosexual citizens the same protections now guaranteed to others. Further, the APA supports and urges the repeal of all legislation making criminal offenses of sexual acts performed by consenting adults in private.

- (1) [a] strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex);
- (2) [a] persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex;
- (3) [a] disturbance [that] is not concurrent with a physical intersex condition; and
- (4) [a] disturbance [that] causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.³⁷

Gender dysphoria has been more simply described as the “discomfort felt when one’s physical gender assigned at birth is incongruous with one’s gender identity.”³⁸ Although the categorization as a mental disorder implies that the disturbance comes from within, external pressure to conform to cultural sexual norms contributes to the identity discomfort.³⁹ Naturally, for many reasons, controversy regarding inclusion of GID in the DSM-IV abounds.⁴⁰ Despite the inherent negative connotations of a “mental” or “psychological” disorder, many transsexuals recognize that their best path to receiving benefits under current medical policies is grounded in having a clinically-categorized condition.⁴¹

Drescher, *supra* note 2, at 434-35.

³⁷ DSM-IV-TR, *supra* note 35, at 581.

³⁸ Cox, *supra* note 11, at 343.

³⁹ Judith S. Stern & Claire V. Merkin, *Brian L. v. Administration for Children’s Services: Ambivalence Toward Gender Identity Disorder as a Medical Condition*, 30 WOMEN’S RTS. L. REP. 566, 569 (2009).

⁴⁰ Arguments to remove GID include “societal intolerance of difference, the human cost of diagnostic stigmatization, using the language of psychopathology to describe what some consider to be normal behaviors and feelings, and . . . inappropriately focusing psychiatric attention on individual diversity rather than opposing the social forces that oppress sexual and gender nonconformity.” Drescher, *supra* note 2, at 429.

⁴¹ *Id.* at 441; see also Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 453, 455-56 (2008).

B. Effective Therapies for Treating Gender Identity Disorder

For transsexuals wanting to pursue sex transformation, WPATH drafted the Standards of Care.⁴² The Standards of Care represent the international medical community's consensus on treatment of GIDs.⁴³ These guidelines detail a clinical sequence of escalating treatments that facilitate a controlled transition ensuring that patients receive only those treatments that are medically warranted.⁴⁴ The sequence first calls for psychiatric therapy,⁴⁵ followed by hormonal sex reassignment with psychiatrist approval.⁴⁶ Then, the patient must complete a real-life experience of no less than one year during which he or she lives fully in his or her community as the intended sex.⁴⁷ Finally, after a successful real-life experience, and with approval of two psychiatrists, the patient may undergo surgical sex reassignment.⁴⁸

Given that the suffering arises from the incongruity, the only effective remedy is to bring subjective gender and objective sex into harmony. The ultimate goal of the clinical process is not just physical transformation, but also to improve the patient's psychological well-being and chances for "self-fulfillment" in society.⁴⁹ Without these therapies, transsexuals are at risk of serious psychological problems beyond GID, such as depression, anxiety,⁵⁰ self-mutilation, and suicidal tendencies.⁵¹

Unfortunately, for many transsexuals, seeking this care is prohibitively expensive.⁵² The estimated cost for female-to-male surgery is

⁴² O'Donnabhain v. Comm'r, 134 T.C. 34, 37 (2010).

⁴³ See STANDARDS OF CARE, *supra* note 13, at 1.

⁴⁴ *Id.* at 1-2 (describing the Standard's gatekeeping function as a "clinical threshold [that] is passed when concerns, uncertainties, and questions about gender identity persist during a person's development, become so intense as to seem to be the most important aspect of a person's life, or prevent the establishment of a relatively unconflicted gender identity").

⁴⁵ See *id.* at 3, 11-13.

⁴⁶ See *id.* at 3, 8, 13-14.

⁴⁷ See *id.* at 3, 17-18.

⁴⁸ See *id.* at 3, 8, 18-22.

⁴⁹ Chin, *supra* note 19, at 160 (quoting STANDARDS OF CARE, *supra* note 13, at 1).

⁵⁰ Lee, *supra* note 41, at 450.

⁵¹ Amy Zimmerman Hodges, *Identifying the Linguistic Boundaries of Sex: Court Language Choice in Decisions Regarding the Availability of Sex and Procreation*, 11 CARDOZO WOMEN'S L.J. 413, 437 (2005).

⁵² 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, 174 (2006).

approximately \$50,000.⁵³ Male-to-female surgeries can cost as much as \$100,000.⁵⁴ Comparatively, hormone treatment is inexpensive. Hormones can cost between \$300 and \$2,400 per year, depending on the brand and dosage prescribed.⁵⁵ In a single year, the Department of Corrections (DoC) spent only \$4,400 on hormones for two inmates.⁵⁶ These procedures and treatments are rarely covered by health insurance or government-funded health-care assistance, and most transgender people do not even have insurance for regular health-care needs.⁵⁷ Only recently has the Internal Revenue Service granted medical expense tax deductions to help defray the costs.⁵⁸ Although the cost of treatment is high, it is not the highest hurdle transsexuals must overcome. Due to discrimination in the workplace and housing market, many transsexuals cannot adequately provide for themselves or pay for the procedures⁵⁹ that will improve their quality of life.

C. Social and Economic Problems Transsexuals Endure

As suggested earlier, GID may be the result of external social forces. Unlike racial and ethnic minorities, homosexuals, and the physically and mentally disabled,⁶⁰ neither transgender people nor transsexuals are explicitly protected by federal antidiscrimination laws. While transsexuals have a legally recognized psychiatric condition that would otherwise be covered by the Americans with Disabilities Act, the Act specifically excludes transsexuals, as well as transvestism and GID.⁶¹

⁵³ Bradley A. Sultan, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195, 1205 (2003).

⁵⁴ *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997).

⁵⁵ *Sex Reassignment Surgery Cost*, COSTHELPER, <http://www.costhelper.com/cost/health/sex-reassignment-surgery.html> (last updated Aug. 2009).

⁵⁶ Cox, *supra* note 11, at 361.

⁵⁷ *Transgender Issues: A Fact Sheet*, TRANSGENDER LAW, <http://www.transgenderlaw.org/resources/transfactsheet.pdf> (last visited Oct. 27, 2011).

⁵⁸ *O'Donnabhain v. Comm'r*, 134 T.C. 34, 77 (2010).

⁵⁹ *Preliminary Findings: National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE 1 (Nov. 2009), http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf [hereinafter *NTDS*].

⁶⁰ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006), *amended by the ADA Amendments Act of 2008*, Pub. L. No. 110-325 § 12101 (2008).

⁶¹ Green, *supra* note 31, at 158.

Title VII of the Civil Rights Act of 1964 has also historically not granted transgender and transsexual plaintiffs explicit protection. Beginning in the 1970s, when plaintiffs alleged that they were fired due to their transsexual status, the circuit courts rejected arguments that the term ‘sex’ as protected under Title VII incorporates ‘gender,’ which encompasses transsexuals,⁶² and held that the statute only maintains the “traditional notions of ‘sex.’”⁶³ The Ninth Circuit supported this plain reading conclusion by denying that a narrow interpretation of Title VII raised equal protection issues, asserting that transsexuals are neither a suspect class nor a “discrete and insular minority” as categorized by an “immutable characteristic determined solely by the accident of birth.”⁶⁴ The Seventh Circuit went so far as to say that, “even if one believes that a woman can be so easily created from what remains of a man,” discrimination must be based on being a woman and not a transsexual for Title VII to apply.⁶⁵ This rule foreclosed any hope for relief in the workplace for many years.

Discrimination against transgender and transsexual people is based on either direct knowledge of gender identity status or nonconforming expressions of gender identity.⁶⁶ A 2009 survey of several thousand transgender and transsexual people in the United States reported that 13 percent of transgender people were unemployed, 26 percent had been fired due to their transgender status, and 97 percent reported being harassed at work.⁶⁷ The poverty rates are even more shocking. Twenty-seven percent earn less than \$20,000 and 15 percent earning less than \$10,000; in the general population, only 7 per-

⁶² *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977).

⁶³ *Id.* The court even noted that the prohibition on sex discrimination was itself barely included and was added last minute “without prior hearing or debate.” *Id.* at 662.

⁶⁴ *Id.* at 663 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)); *see also Sommers v. Budget Mktg., Inc.*, 667, F.2d 748, 750 (8th Cir. 1982) (agreeing with the Ninth Circuit that “the word ‘sex’ in Title VII is to be given its traditional definition, rather than an expansive interpretation,” which does not protect gender identity or a plaintiff not properly classified as either male or female); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085, 1087 (7th Cir. 1984) (“[T]he words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder . . .”).

⁶⁵ *Ulane*, 742 F.2d at 1087.

⁶⁶ JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY: EXECUTIVE SUMMARY 3 (2011), available at http://transequality.org/PDFs/NTDS_Exec_Summary.pdf.

⁶⁷ *NTDS*, *supra* note 59, at 1-2.

cent reported less than \$10,000.⁶⁸ It is clearly evident that transsexual individuals disproportionately suffer from economic inequalities.

When it comes to housing discrimination, there are no protections,⁶⁹ and given their higher rates of poverty, many transgender people end up living on the streets. In the 2009 survey, 11 percent of transgender people had been evicted due to their transgender status, and 19 percent had been, or were currently, homeless.⁷⁰

Without a stable place to live or work in the “legitimate” economy,⁷¹ many transsexuals must choose between poverty or criminal activity in the sex and drug trades to pay for black market health care or just to survive day-to-day.⁷² As a result, transsexuals have become an overrepresented minority in prisons where they face even greater neglect and victimization.⁷³ The total U.S. combined state and federal prison population is just over two million inmates.⁷⁴ As of January 2011, there were roughly 210,000 inmates in federal prisons.⁷⁵ A 2007 survey estimated that 50 to 100 transsexual inmates were held in federal facilities.⁷⁶ Comparing even the more common male-to-female transsexual birth rate of one in 12,000 to the estimated rate in federal prison of one in 2,100,⁷⁷ it becomes evident that transsexual incarceration rates are disproportionate to those of the general population. There must be some sociological or economic reasons behind this, because it is clear that being born with a gender-sex incongruity does not make one naturally more inclined to commit crime. Fortu-

⁶⁸ *Id.* at 2.

⁶⁹ See Tarzwell, *supra* note 52, at 167-68.

⁷⁰ NTDS, *supra* note 59, at 3.

⁷¹ Tarzwell, *supra* note 52, at 167-68.

⁷² Cox, *supra* note 11, at 359; see Tarzwell, *supra* note 52, at 170; Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When the Victim is a Transsexual*—Schwenk v. Hartford: *The Intersection of Prison Rape, Title VII and Societal Willingness to Dehumanize Transsexuals*, 9 AM. U. J. GENDER, SOC. POL’Y & L. 505, 538 (2001).

⁷³ Brown, *supra* note 15, at 281-82; Tarzwell, *supra* note 52, at 168; Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1218 (2004); see also Dana O’Day-Senior, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453, 470 (2008) (noting that transgender immigrants are particularly at-risk for detention and incarceration by ICE).

⁷⁴ Correctional Populations, BUREAU JUST. STATS. (2009) available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>.

⁷⁵ *Quick Facts About the Bureau of Prisons*, FED. BUREAU PRISONS, <http://www.bop.gov/news/quick.jsp> (last updated Oct. 29, 2011).

⁷⁶ Brown, *supra* note 15, at 281. The estimated rate for state facilities is 500 to 750 transsexual inmates. *Id.*

⁷⁷ Mędraś & Józków, *supra* note 30, at 412.

nately, it appears that some of the factors—access to insurance, political representation, and judicial protection—that contribute to this disproportionate incarceration rate are improving, giving hope that these rates will become more proportionate and transsexual individuals will have a greater chance at social fulfillment.

II. LEGAL AND SOCIAL DEVELOPMENTS DEMONSTRATING INCREASED ACCEPTANCE OF TRANSSEXUALS

A. O'Donnabhain v. Commissioner

In February 2010, the U.S. Tax Court decided a precedent-setting case in an “issue of first impression”⁷⁸ that significantly advanced the interests and legal recognition of transsexuals in the United States.

O'Donnabhain was born a genetic male with unambiguous male genitalia.⁷⁹ She lived as a man, and even raised a family, despite feeling very uncomfortable in the male gender role.⁸⁰ While in psychotherapy, O'Donnabhain revealed her belief that she was really female despite having a male body.⁸¹ Due to the discord between her subjective gender identity and objective sex, she suffered from depression, low self-esteem, and anxiety.⁸² Consequently, O'Donnabhain's psychiatrist started her on treatment in accordance with the WPATH Standards of Care. O'Donnabhain completed the full course, culminating in the transformation from male to female, and responded positively both emotionally and physically.⁸³ Because these procedures were not covered by her health insurance or any government-funded health-care system, O'Donnabhain itemized the costs as deductions on her federal income tax return under I.R.C. § 213.⁸⁴

I.R.C. § 213 permits taxpayers to deduct medical expenses that are “not compensated for by insurance or otherwise, for medical care of the taxpayer . . . to the extent that such expenses exceed 7.5 percent of adjusted gross income.”⁸⁵ Medical care includes “the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . . .”⁸⁶ Medical

⁷⁸ O'Donnabhain v. Comm'r, 134 T.C. 34, 53 (2010).

⁷⁹ *Id.* at 35.

⁸⁰ *Id.*

⁸¹ *Id.* at 36.

⁸² *Id.*

⁸³ *See id.* at 39-41.

⁸⁴ *Id.* at 42, 49.

⁸⁵ I.R.C. § 213(a) (2011).

⁸⁶ *Id.* § 213(d)(1)(A).

care does not, however, cover cosmetic surgery “unless the surgery or procedure is necessary to ameliorate a deformity arising from . . . a congenital abnormality. . . .”⁸⁷ The purpose of cosmetic surgery is only to improve appearances; it does not “meaningfully promote the proper function of the body or prevent or treat illness or disease.”⁸⁸ The issue before the court was whether O’Donnabhain’s sex reassignment hormone treatments and surgeries were merely cosmetic alterations, or actually treated a disease or condition.

The court began its analysis by stating that tax deductions are strictly confined to expenses for medical care that prevents or alleviates physical or mental defects or illnesses.⁸⁹ The court ruled that GID constituted a disease under § 213.⁹⁰ The court then evaluated the relationship between the malady and the treatment, based on two key values. First, the court stated that in matters relating to the health care of an individual, it gives deference to the medical judgments of the practitioner who treated the patient-taxpayer.⁹¹ Second, given a legitimate medical concern, the treatment should “bear a direct or proximate therapeutic relation” to the need.⁹² The tax court therefore concluded that hormone therapy and genital reassignment surgery are effective treatments for GID.⁹³ However, the court noted that breast augmentation surgery was not an effective treatment and was merely cosmetic.⁹⁴ The court, therefore, allowed O’Donnabhain to deduct the expenditures for her transformation other than for breast augmentation.⁹⁵

This decision exemplifies expanding protections and assistance for transgender and transsexual interests in the United States, and marks a trend toward easing the financial burdens of those wishing to make the transformation. Furthermore, analyzing what is or is not taxed, such as cigarettes and alcohol, or what is tax deductible, such as charitable donations and necessary medical treatments, may serve as a good measure for what the public values. In regards to transsexual inmates, this decision introduced two compelling factors related to

⁸⁷ *Id.* § 213(d)(9)(A).

⁸⁸ *Id.* § 213(d)(9)(B).

⁸⁹ O’Donnabhain v. Comm’r, 134 T.C. 34, 49 (2010).

⁹⁰ *Id.* at 59, 63.

⁹¹ *Id.* at 64.

⁹² *Id.* at 65 (quoting *Havey v. Comm’r*, 12 T.C. 409, 412 (1949)).

⁹³ *Id.* at 66-67.

⁹⁴ *Id.* at 72-73 (“Petitioner has not . . . adduced evidence that the breast augmentation surgery ameliorated a deformity within the meaning of section 213(d)(9)(A). . . [and] [t]he parties have stipulated that petitioner’s breast augmentation ‘did not promote the proper function of her breasts.’”)

⁹⁵ *Id.* at 77.

GID treatment: the care provided must meet the patient-specific diagnosis and only qualified and experienced medical personnel may make decisions regarding that care.

B. Positive Indications of Evolving Standards of Decency

Transgender and transsexual people have not only made progress in the courthouse, but also among the general population, in congressional halls, and with important initiatives that will improve their social standing and quality of life.

Electoral success is a very clear signal that a political and social minority is gaining traction, demonstrating that the people trust them to manage public affairs. In November 2010, Victoria Kolakowski was elected to California's Superior Court in Alameda County.⁹⁶ Kolakowski underwent sex reassignment surgery in 1991 and is the first openly transgender trial court judge in the United States.⁹⁷ While it is likely that other sitting judges are transgender, Kolakowski is the first to be elected despite being open about her transsexual status and surgery.⁹⁸ This victory demonstrates a remarkable step for transgender people into the public arena. Kolakowski is the most prominent example of electoral success, but she is not alone in making political headway for the transgender community.⁹⁹

Legislation has also been developed at local, state, and federal levels to provide explicit protections against gender identity-based discrimination for transgender individuals. Since 1994, the Employment Nondiscrimination Act has been repeatedly put before Congress in one form or another. Despite widespread support among House members and the general public, it has not yet passed.¹⁰⁰ While there are no federal protections yet, thirteen states and the District of Co-

⁹⁶ *Woman Becomes Nation's 1st Transgender Trial Judge*, *supra* note 5; see also *Setbacks and Victories at the Polls: Transgender Candidates Win!*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Nov. 3, 2010), <http://transequality.org/news10.html#midterm> [hereinafter *Transgender Candidates Win!*].

⁹⁷ *Woman Becomes Nation's 1st Transgender Trial Judge*, *supra* note 5.

⁹⁸ *Id.* Admittedly, Kolakowski was elected in a county near San Francisco, a municipality well-known for progressive policies and legislation regarding homosexuals and transsexuals.

⁹⁹ *Transgender Candidates Win!*, *supra* note 96.

¹⁰⁰ *ENDA by the Numbers*, NAT'L CTR. FOR TRANSGENDER EQUAL. 2 (2010), http://www.transequality.org/Resources/enda_by_the_numbers.pdf; as of 2010 there were 202 representatives co-sponsoring the bill and according to a 2008 survey of New York voters 78% were in favor of "anti-discrimination measures that include gender identity and sexual orientation." *Id.*

lumbia have passed antidiscrimination laws prohibiting discrimination based on gender identity. Unfortunately, these protect little more than a third of the U.S. population.¹⁰¹

However, the circuit courts have demonstrated a progressive willingness to protect transsexuals under Title VII. The nation's circuit courts recognize that although the exact wording of Title VII may not protect transsexuals, there are other characteristics of a transsexual's identity that can serve as the basis for a cause of action. Beginning with *Smith v. City of Salem*, the Sixth Circuit upheld a verdict in favor of the transsexual plaintiff on grounds that the discrimination stemmed from the plaintiff's "failure to conform to sex stereotypes by expressing less masculine and more feminine mannerisms and appearance."¹⁰² However, this new interpretation is not without limits. An employer may discharge a transsexual employee if that employee's gender identity expression raises an overriding concern. In *Etsitty v. Utah Transit Authority*, the Tenth Circuit upheld the employer's right to fire a transsexual employee who used women's public restrooms despite still having male genitalia.¹⁰³ The court recognized that the Utah Transit Authority's potential liability constituted a "legitimate, nondiscriminatory reason" for releasing Etsitty, despite the fact that her using a women's restroom was a nonconforming behavioral expression of her gender identity.¹⁰⁴ Although a transsexual's gender identity and expression are protected, he or she must still be careful not to cross practical boundaries between the sexes.

Homeless and evicted transsexuals also have hope for greater housing protection. In January 2011, the U.S. Department of Housing and Urban Development (HUD) announced new regulations that will ensure that all eligible people, regardless of gender identity or sexual orientation, can seek housing assistance.¹⁰⁵ HUD based its decision in

¹⁰¹ *Transgender Issues: A Fact Sheet*, *supra* note 57.

¹⁰² *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); The court was reflecting the values established in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). *Id.* at 572; *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 735 (6th Cir. 2005) (upholding a discrimination claim for a plaintiff alleging that he had been fired for "grooming deficiencies" and not "acting masculine enough").

¹⁰³ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007).

¹⁰⁴ *Id.*; *see also Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493-94 (9th Cir. 2009) (upholding the school's decision to prohibit a transsexual from using a women's bathroom until she "could prove completion of sex reassignment surgery" for safety reasons).

¹⁰⁵ *NCTE: HUD Proposes New Regulation –Includes Gender Identity*, NAT'L CENTER FOR TRANSGENDER EQUAL. (Jan. 21, 2011), <http://transequity.org/news.html>.

part on the data gathered in the 2009 survey by the National Center for Transgender Equality (NCTE) and the National Gay and Lesbian Task Force, which was “evidence demonstrating the dire need for housing protections for the transgender community.”¹⁰⁶ The new regulations include provisions which will make clear that all HUD public housing programs are open to eligible lesbian, gay, bisexual, and transgender (LGBT) families, prohibit landlords from asking about gender identity or sexual orientation, and prohibit financial lenders from discriminating on the basis of gender identity or sexual orientation.¹⁰⁷ In response to this monumental advancement in transgender and transsexual interests, Mara Kiesling, NCTE’s executive director, said that these regulations will profoundly affect many lives because “[e]very American needs and deserves a home.”¹⁰⁸

The transgender community is also making headway in the health-care arena. Transsexuals have great difficulty obtaining insurance coverage when they disclose their transsexual status or any “transition-related medical history.”¹⁰⁹ Fortunately, some health insurers are beginning to provide coverage for transsexual procedures when there is a demonstrated need.¹¹⁰ In 2008, the American Medical Association started requesting that health insurers cover more transgender and transsexual health-care needs.¹¹¹ The Affordable Care Act also makes affording health insurance or receiving coverage under existing plans easier for transgender people.¹¹² What the bill provides for transsexuals is increased access to insurance for a group that has great difficulty due to high rates of unemployment and poverty, protection from being denied or dropped from coverage, and bans on discrimination.¹¹³

¹⁰⁶ *Id.*; this data is discussed *supra* Part I.C.

¹⁰⁷ NCTE: *HUD Proposes New Regulations—Includes Gender Identity*, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ *Transgender Health and the Law: Identifying and Fighting Health Care Discrimination*, TRANSGENDER L. CTR. 1 (July 2004), <http://www.transgenderlawcenter.org/pdf/Health%20Law%20fact%20sheet.pdf>.

According to a 1997 survey by the Transgender Community Health Project of the San Francisco Department of Health, 52 percent of male-to-females were without insurance and 41 percent of female-to-males were without insurance. See *Transgender Issues: A Fact Sheet*, *supra* note 57.

¹¹⁰ Cox, *supra* note 11, at 363.

¹¹¹ *AMA Supports Transgender Care, Hormones, Sex-Reassignment Therapy*, TEACHTHEFACTS.ORG (June 19, 2008), <http://vigilance.teachthefacts.org/2008/06/ama-supports-transgender-care-hormones.html>.

¹¹² *Health Care Reform Signed into Law: How Will It Impact Transgender People?*, NAT’L CENTER FOR TRANSGENDER EQUAL. (Mar. 23, 2010), <http://www.transequality.org/news10.html#hcr>.

¹¹³ *Id.*

While this reform provides great assistance to millions of uninsured Americans, including thousands of transsexuals, it contains no provisions covering transgender-specific treatments.¹¹⁴ Although this act does not extend protections to the extent many transcommunity advocates desire, this reform still significantly reduces, and will hopefully eliminate, the amount of discrimination transgender and transsexual people face in the medical insurance industry.¹¹⁵

These advancements demonstrate that the American people are increasingly accepting transgender and transsexual people, and the representatives and industries that serve them are also beginning to take heed. While this progress may not go as far as some might want, these are steps in the right direction and provide a foundation for advancement in a number of areas, including the penal system.

III. EIGHTH AMENDMENT PROVISIONS FOR INMATE HEALTH CARE

The Eighth Amendment provides that there shall be no “cruel and unusual punishments inflicted.”¹¹⁶ The Supreme Court has stated that this amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . .”¹¹⁷ When the Founding Fathers wrote the Eighth Amendment they could not have contemplated the specific needs of prisoners today. Indeed, their only goal in drafting the amendment was to “proscribe tortures and other barbarous methods of punishment.”¹¹⁸ As a result, the protections afforded to prisoners under the Eighth Amendment have necessarily expanded along with society’s evolving standards of decency.¹¹⁹

Distilling the Eighth Amendment’s broad ideals, two requirements are placed on the justice and correctional systems. First, punishments are constitutional only if they are lawfully handed down by the state; any conditions imposed by prison officials beyond what is necessary to execute that sentence are a violation of the Eighth Amendment.¹²⁰ Second, state and federal governments have a consti-

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ U.S. CONST. amend. VIII.

¹¹⁷ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹¹⁸ *Estelle*, 429 U.S. at 102 (internal quotation marks omitted).

¹¹⁹ *Weems v. United States*, 217 U.S. 349, 378 (1910) (explaining that the clause forbidding cruel and unusual punishments “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

¹²⁰ See *Dolovitch*, *supra* note 10, at 883-85, 892-93; the Supreme Court has declared that “[w]hile the State has the power to punish, the Amendment stands to

tutional duty to provide for inmates' basic needs;¹²¹ any refusal to meet these needs is a violation of the Eighth Amendment.¹²² One district court avowed its ardent belief that the Constitution protects the inmate's right to humane treatment, not in order to found a nation that "coddles criminals," but to form a society of decent people who "do not allow other human beings in their custody to suffer needlessly from serious illness or injury."¹²³

A. Standard for Expanding Eighth Amendment Protections

Courts recognize a strong moral and legal correlation between society's standards of decency and Eighth Amendment protections. This correlation may be helpful, if not necessary, in convincing the courts that a class or minority is constitutionally entitled to greater protections in the penal system. Although it has not yet crafted a test with exacting elements, the Supreme Court has established general guidelines that help demonstrate that society has changed its perception of the decency or humanity of specific penal conditions or punishments.¹²⁴

The Court first suggested these guidelines in 1958 in *Trop v. Dulles*, where the plaintiff had lost his U.S. citizenship after being court-martialed for wartime desertion during World War II.¹²⁵ Concerned that the Nationality Act of 1940 granted the military the power to decide who may "continue to be Americans and who shall be stateless,"¹²⁶ the Court determined that "[c]itizenship is not a license that expires upon misbehavior" unless voluntarily relinquished or expressly abandoned by language or conduct.¹²⁷ The Court stated that punishment wielded by the state must be within the appropriate scope of the Eighth Amendment, which is neither "precise" nor "static."¹²⁸ Accordingly, the Eighth Amendment's power and meaning is drawn

assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

¹²¹ Howell, *supra* note 24, at 145.

¹²² *Helling v. McKinney*, 509 U.S. 25, 32 (1993) ("When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs...it transgresses the substantive limits on state action set by the Eighth Amendment.").

¹²³ *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

¹²⁴ *Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977).

¹²⁵ *Trop*, 356 U.S. at 87.

¹²⁶ *Id.* at 90.

¹²⁷ *Id.* at 92.

¹²⁸ *Id.* at 100-01.

from “the evolving standards of decency that mark the progress of a maturing society.”¹²⁹ The Court reinstated Trop’s citizenship because it found that to destroy an individual’s political existence and participation in organized society is “a form of punishment more primitive than torture.”¹³⁰

Later, in *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of capital punishment for murder¹³¹ and established guidelines based on the moral maxim it recognized eighteen years earlier. The Court found an “assessment of contemporary values” reflected in “objective indicia” to be helpful, though not conclusive, in evaluating certain punishments.¹³² These objective indicia include legislative response to judicial decisions,¹³³ decisions by the “directly involved” juries,¹³⁴ and whether the punishment “comports with the basic concept of human dignity.”¹³⁵ Using these rather broad criteria, the Court found that society still placed great value on capital punishment and did not rule that its use to punish the most heinous criminals was unconstitutional.¹³⁶

One year later, the Supreme Court was asked to review capital punishment’s constitutionality in regard to rape in *Coker v. Georgia*.¹³⁷ The Court applied the analysis used in *Gregg*,¹³⁸ but found that where society still accepted capital punishment for murder, it was no longer appropriate for rape.¹³⁹ The specific findings were that legislatures in many states had responded to prior judicial decisions by eliminating capital punishment for rape,¹⁴⁰ at least nine out of ten juries did not sentence convicted rapists to death,¹⁴¹ and that death is

¹²⁹ *Id.* at 101.

¹³⁰ *Id.* at 101.

¹³¹ *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

¹³² *Id.* at 173.

¹³³ *Id.* at 179. The Supreme Court generally believes that the will and values of the people are reflected in the actions of their elected representatives. *See id.* at 180-81.

¹³⁴ *Id.* at 181 (The Court sees the jury’s value as “maintain[ing] a link between contemporary community values and the penal system.” (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968))).

¹³⁵ *Id.* at 182; punishments must be penologically justified and not cause gratuitous suffering. *Id.* at 183.

¹³⁶ *Id.* (“[C]apital punishment is an expression of society’s moral outrage at particularly offensive conduct.”).

¹³⁷ *Coker v. Georgia*, 433 U.S. 584, 586 (1977).

¹³⁸ *Id.* at 592.

¹³⁹ *Id.* at 593-94.

¹⁴⁰ *Id.* at 594.

¹⁴¹ *Id.* at 597.

disproportionate to the crime.¹⁴² The Court, therefore, reversed Coker's death sentence.¹⁴³

When the courts are convinced that society, as reflected by these indicia, has sufficiently altered its valuation of a punishment's suitability, constitutional interpretation may shift accordingly. This standard is not limited to evaluating punishments, but extends to analysis of the penological conditions that accompany the implementation of those punishments. If a plaintiff can demonstrate that society places value on improving prison conditions, then the courts may ensure that prison officials properly observe inmates' new or expanded rights.

B. Prison Health Care under the Eighth Amendment

As society shifted away from quick corporal punishment in favor of longer incarceration, prison conditions imposed on inmates became more important. Accordingly, Eighth Amendment interpretations had to adapt as well. One very important change in Eighth Amendment jurisprudence is that it now includes a requirement that inmates receive health care from the institutions that incarcerate them.¹⁴⁴ The Supreme Court determined that the principles the Eighth Amendment embodies¹⁴⁵ require the states to provide this care because inmates rely on those authorities for their wellbeing.¹⁴⁶

Although prisoners have a right to health care, this right is not unlimited. Prisons are not required to comply with all requests or expend all available resources to ensure that prisoners get every desirable creature comfort. Judge Posner affirmed this in *Maggert v. Hanks*, stating that "[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."¹⁴⁷ While the degree of care an inmate may or should receive is always a

¹⁴² *Id.* This is not to say that the Court was unsympathetic to the victims. Indeed, it recognized that, following murder, this crime is the "ultimate violation of self" and "undermines the community's sense of security." However, the Court was also forced to recognize that "[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* at 597-98.

¹⁴³ *Id.* at 600.

¹⁴⁴ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

¹⁴⁵ *Id.* at 102; Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 28 ((1995); Chin, *supra* note 19, at 165 (quoting Eighth Amendment principles from *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁴⁶ *Estelle*, 429 U.S. at 103.

¹⁴⁷ Chin, *supra* note 19, at 162 (quoting *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997)).

matter of judicial discretion, there is no question that the inmate is entitled to some degree of health care. People may ask why convicts are entitled to health care when there are so many law-abiding citizens who have no access to adequate, if any, health care. The simple, though perhaps unpopular, answer is that the Supreme Court has established that inmates have an affirmative constitutional right to institutionally-provided health care, whereas the non-incarcerated population does not.¹⁴⁸

Estelle v. Gamble established the general principle that all prisoners have a constitutional right to government-funded health care for “serious medical needs.”¹⁴⁹ *Estelle* addressed inmates generally, as opposed to transsexual inmates specifically. The Supreme Court reasoned that denying medical treatment may result in “physical torture or a lingering death,” the kind of suffering which serves no penological purpose.¹⁵⁰ From this, the Court established the “deliberate indifference” standard, which states that the “deliberate indifference [of prison authorities] to serious medical needs [of inmates] constitutes the ‘unnecessary and wanton infliction of pain.’”¹⁵¹ A finding of deliberate indifference may result from a doctor improperly treating a prisoner’s needs or other officials intentionally denying, delaying, or interfering with a prisoner’s access to proper treatment.¹⁵² However, a medical professional’s decision to not pursue a particular treatment option does not, by itself, constitute cruel and unusual punishment.¹⁵³ Negligence and malpractice are also insufficient to bring a claim under the Eighth Amendment.¹⁵⁴ The Court, therefore, rejected *Gamble*’s claim for “lack of diagnosis and inadequate treatment” on the grounds that, while greater diagnosis may have been necessary, it was a medical decision not to pursue more.¹⁵⁵ The prison doctors did not deny him care; they just did not do everything possible to treat his injury. This effectively established that only *some* treatment must be provided for serious medical needs in order to comply with the Eighth Amendment. This left open the question of *how much* care inmates deserve and *what* reaches the level of a “serious medical need.”¹⁵⁶

¹⁴⁸ *Id.* at 166.

¹⁴⁹ *Estelle*, 429 U.S. at 104.

¹⁵⁰ *Id.* at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

¹⁵¹ *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976)).

¹⁵² *Id.* at 104-05.

¹⁵³ *Id.* at 107.

¹⁵⁴ *Id.* at 106.

¹⁵⁵ *Id.* at 107; *see also* *Russell v. Sheffer*, 528 F.2d 318, 319 (4th Cir. 1975)

(“Questions of medical judgment are not subject to judicial review.”).

¹⁵⁶ *Chin*, *supra* note 19, at 166 (quoting *Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003)).

Unfortunately, there is no clear standard by which to make bright line determinations.¹⁵⁷ Courts have wrestled with multiple definitions of serious medical need that are similar only in that they can be easily circumvented with a plausible excuse by a disinterested prison official.¹⁵⁸

The Supreme Court further illuminated the deliberate indifference standard in *Farmer v. Brennan* where it considered the complaint of a preoperative male-to-female plaintiff who, despite her greater vulnerability, was placed in the prison's male general population that had a known "violent environment and a history of inmate assaults."¹⁵⁹ The Supreme Court decided that a prison official is not deliberately indifferent unless he "knows of and disregards an excessive risk to inmate health or safety."¹⁶⁰ The Court further elaborated that officials must know facts "from which the inference could be drawn that a substantial risk of serious harm exists" and actually draw that inference.¹⁶¹ Unfortunately, an objective standard of obviousness is inappropriate.¹⁶² The Court held that a plaintiff need not show that the official intended the harm or knew of a specific risk, but only that the official acted despite knowing there was a risk of harm to someone.¹⁶³ The Court, however, allowed officials to elude liability by showing that even the obvious escaped them.¹⁶⁴

These are the tests that transsexual inmates must satisfy in order to obtain medical care for GID.¹⁶⁵ The key issue is whether there are sufficient facts for the prison official, most likely the prison doctor, to

¹⁵⁷ Cox, *supra* note 11, at 348.

¹⁵⁸ *Id.* One option is a need that "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997)). Another possibility is a need "where 'the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992)) (quoting *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)).

¹⁵⁹ *Farmer v. Brennan*, 511 U.S. 825, 830-31 (1994).

¹⁶⁰ *Id.* at 837.

¹⁶¹ *Id.*

¹⁶² *Id.* at 841; the Supreme Court unfortunately expressed no fear that without an objective test prison officials could easily ignore obvious dangers to inmates. *Id.* at 842. One commentator believes that this standard "creates incentives for officers *not* to notice, despite the fact that when prison officials do *not* pay attention, prisoners may be exposed to the worst forms of suffering and abuse." Dolovitch, *supra* note 10, at 892 (emphasis in original).

¹⁶³ *Farmer*, 511 U.S. at 842; the Court reiterates later that the official must actually prove that he was unaware of an obvious risk to an inmate's health or safety. *Id.* at 844.

¹⁶⁴ *Id.* at 843 n.8.

¹⁶⁵ O'Donnabhain v. Comm'r, 134 T.C. 34, 62, n.40 (2010).

know that the inmate is transsexual and draw the inference that treatment for GID is needed.¹⁶⁶ This question of fact may initially seem to require that the inmate prove that he or she is a transsexual suffering from GID. However, it actually requires that the prisons or prison systems have medical staff available that can appropriately diagnose transsexualism because a lay inmate cannot ground a claim on a mere self-diagnosis. A proper medical diagnosis will resolve that question of fact and provide a clear basis from which the physician can draw the required inference that the inmate requires treatment.

There is, of course, no constitutional requirement to provide inmates with nonessential medical procedures.¹⁶⁷ Given that many non-essential procedures are not covered by health insurance for the tax-paying public who pay the inmates' medical bills, it would be inappropriate to cover such procedures for inmates.¹⁶⁸ Judge Posner viewed GID care as nonessential, saying that "gender dysphoria is not generally considered a severe enough condition to warrant expensive treatment at the expense of others than the person suffering from it."¹⁶⁹ Fortunately, medical science has progressed in the fifteen years since Judge Posner's writing, and now seven U.S. Courts of Appeals and the Supreme Court have recognized that GID qualifies as a serious medical need requiring appropriate medical attention.¹⁷⁰ That alone is sufficient to warrant some treatment for diagnosed transsexuals. But the specific level of treatment required largely remains unanswered. The cases that have attempted to resolve the issue are discussed below.

¹⁶⁶ See *Praylor v. Texas Dep't Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997).

¹⁶⁷ *Chin*, *supra* note 19, at 151-52 & n.6. ("The author is not suggesting that GID is not the right choice for many transgender individuals. The author is arguing that inmates should not benefit from surgeries that are arguably not necessary to keep them alive.").

¹⁶⁸ *Id.*

¹⁶⁹ *Maggert*, 131 F.3d at 672.

¹⁷⁰ *O'Donnabhain*, 134 T.C. at 62, n.40; *see also* *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *White v. Farrier*, 849 F.2d 322, 325-27 (8th Cir. 1988); *Phillips v. Michigan Dep't of Corr.*, 932 F. 2d 969 (6th Cir. 1991); *Farmer v. Brennan*, 511 U.S. 825, 829 (1994); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *Allard v. Gomez*, 9 F. App'x 793, 794 (9th Cir. 2001); *Praylor*, 430 F.3d at 1209; *Maggert*, 131 F.3d at 671.

C. Current Prison Policies Regarding Transsexual Inmate Health Care

Many medical uncertainties are resolved by the policies that legislatures or administrative departments draft as guidance for prison officials and medical staff. These policies generally limit the medical care a prison physician can administer.¹⁷¹ The health care that transsexuals receive for GID is very restricted. The Federal Bureau of Prisons' policy states:

It is the policy of the Bureau to maintain a transsexual inmate at the level of change existing upon admission. Should the [Bureau] determine that either progressive or regressive treatment changes are indicated, the Medical Director must approve these prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration (with appropriate documentation from community physicians/hospitals) and with the Medical Director's approval.¹⁷²

This policy, and others like it, freezes the degree of care available to a transsexual inmate. This might be acceptable for those transsexuals who were receiving treatment before incarceration, but not for inmates who might be diagnosed while in prison. In some cases, incarceration might be an inmate's first opportunity for real diagnosis and health care.

While inflexible policies may seem unfavorable, having no written policy may be even worse, because it subjects transsexual inmates to the risk that prison officials, with full discretion, will make deci-

¹⁷¹ *Policy Documents*, FED. BUREAU OF PRISONS, <http://www.bop.gov/DataSource/execute/dsPolicyLoc> (last visited Oct. 10, 2011). It is worth noting that these healthcare policies range between three and seventeen years old and are possibly based on outdated scientific studies. A 2009 survey reported that nineteen states have no policies for managing transsexual inmates and twenty-five states including the District of Columbia and the Bureau of Prisons had policies. Brown & McDuffie, *supra* note 15, at 283-84.

¹⁷² Sultan, *supra* note 53, at 1218 n.171; this policy is currently under attack in federal court and may likely be repealed in favor of a more flexible standard. Jillian T. Weiss, *Incarcerated Transgender Woman Can Pursue Case for Appropriate Medical Care*, THE BILERIC PROJECT (June 11, 2010), http://www.bilerico.com/2010/06/incarcerated_transgender_woman_can_pursue_case_for.php.

sions “primarily informed by bias or other inappropriate considerations.”¹⁷³ But even if there are written policies, the degree of understanding of the policy author presents yet another problem. Despite the fact that these policies explicitly address treatment standards for transsexual inmates suffering from GID, there is no requirement that anyone involved in the drafting process have any experience with GID care or transsexual issues.¹⁷⁴

Providing transsexual inmates with the appropriate level of treatment necessitates a change in health-care policy on both the state and federal levels. The patchwork of state policies and troublesome adherence to those policies demonstrates the risks involved in mixing flat prohibitions and too much official discretion. The goal, therefore, should be to craft a universal policy that gives prison medical officials the latitude to provide the health care necessary to treat transsexual inmates based on their individual medical needs, but includes sufficient guidelines to balance what the inmate may request and what the doctor may provide. The policy should also be written or reviewed by medical and legal professionals who have experience dealing with GID needs and issues.

D. Past Decisions on Transsexual Inmate Health Care Point to a Better Policy

Over the past two decades, the federal circuit courts have decided several cases dealing with treatments for inmates suffering from GID. Although not all were decided in the transsexual inmate’s favor, each exposed the strengths and weaknesses of current policies and official actions. These cases also highlight the remarkable difference between *some* care and *adequate* care. Taken together, these cases suggest

¹⁷³ Tarzwell, *supra* note 52, at 197; the risk of harm to inmates from a lack of official policy has been demonstrated in other circumstances, such as inadequate housing, where courts have found the prison officials liable: “As a result of an insufficient number of jailers, the lack of written standards or policies by the jail administration concerning jail inspection and the inadequate communication between the jail floors, the security of the jail and the safety of the inmates is put into serious jeopardy.” *Dawson v. Kendrick*, 527 F. Supp. 1252, 1269 (S.D. W. Va. 1981). The court also found those administrators neglected their medical duties because they did not have medical professionals screen or examine inmates upon arrival, sufficient medical supplies, an equipped medical facility with medical personnel present, or the ability to arrange care by psychiatrists, psychologists, or other mental health personnel. *Id.* at 1272-73; *Cuoco v. Moritsugu*, 222 F.3d 99, 104 (2d Cir. 2000) (“[The warden] refused to hear Cuoco’s complaints, remarking that Cuoco ‘should act like a man the way God intended.’”).

¹⁷⁴ Tarzwell, *supra* note 52, at 208.

elements for a better medical standard that balance the respective constitutional rights and duties of inmates and officials.

1. *The Elements of a Better Policy for Transsexual Inmate Health Care*

The first important standard for treating a transsexual inmate's serious medical need is requiring prison doctors to continue hormone treatments that the inmate pursued prior to incarceration. This requirement is not only to provide GID-specific treatment, but also to prevent the severe physical and mental withdrawal that may arise from discontinuing treatment.¹⁷⁵ *De'lonta v. Angelone* demonstrated the great dangers to an inmate's physical and mental health caused by discontinuing hormone therapy, and, therefore, the necessity of continuing ongoing treatments.¹⁷⁶ Prior to incarceration, and even at a previous facility, De'lonta received estrogen, but upon transfer to another prison, the prison doctor immediately discontinued her estrogen treatment under a new state DoC policy that prohibited both medical and surgical treatment for GID.¹⁷⁷ However, this new policy called for first tapering off hormone dosage before finally discontinuing hormones altogether.¹⁷⁸ Cutting off the estrogen so abruptly caused both psychological and physical suffering.¹⁷⁹ De'lonta began to suffer from nausea and depression and developed an intense urge to mutilate herself, including attempts at autocastration.¹⁸⁰ Consequently, she brought an Eighth Amendment claim alleging denial of adequate medical treatment for GID.¹⁸¹ The district court decided that her claim was merely a disagreement over medical judgment, which is not actionable under the Eighth Amendment, and that "De'lonta was receiving *some* treatment."¹⁸² The Fourth Circuit disagreed, stating that even if GID were not a serious medical need, the self-mutilation resulting from terminating the estrogen treatment certainly was a serious medical need requiring treatment.¹⁸³ It also said that while "some treatment" was provided—counseling and antidepressants—and may have alleviated the condition, it was not provided for that purpose or

¹⁷⁵ Cox, *supra* note 11, at 361.

¹⁷⁶ *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003).

¹⁷⁷ *Id.* at 632.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 632-33.

¹⁸³ *Id.* at 634.

reasonably expected to prevent further harm.¹⁸⁴ The Court, therefore, ordered the prison to provide her “constitutionally adequate treatment.”¹⁸⁵ This decision not only demonstrates recognition of GID as a serious medical need but also that not treating GID can produce secondary serious medical needs that can be even more harmful. More importantly, this court recognized the gulf between some care and adequate care.

The second element follows logically from the first: if an inmate may continue treatment for a condition he was properly diagnosed with prior to incarceration, then inmates who are diagnosed after incarceration should not be denied care either. It also follows from this that prison officials should not deny diagnosis requests in order to avoid having to provide any treatment that might follow. In *Brooks v. Berg*, the plaintiff had felt that she had a female gender identity since childhood, but only became aware of GID after she was incarcerated, and realized that it was the only medical treatment that would alleviate her suffering.¹⁸⁶ After repeated unanswered requests up the administrative chain of prison authority, Brooks claimed a failure to provide “necessary medical treatment for [her] serious medical need,” including diagnostic examinations.¹⁸⁷ On appeal, the district court recognized that Brooks only requested “minimal, though appropriate treatments and all necessary examinations/testing,” but that prison officials had reduced her requests to just “body altering requests,” which were rejected.¹⁸⁸ Brooks was simply requesting to see a qualified doctor who could determine what treatment, if any, was necessary.¹⁸⁹ The court noted that the prison officials also misinterpreted the Federal Bureau of Prisons-drafted policy’s silence regarding whether previously undiagnosed inmates could receive treatment as a prohibition on providing care to transsexuals diagnosed in prison.¹⁹⁰ Inmates diagnosed with other physical or mental illnesses are not denied treatment “simply because their conditions were not diagnosed prior to incarceration.”¹⁹¹ The court concluded that a “blanket denial

¹⁸⁴ *Id.* at 635.

¹⁸⁵ *Id.* at 636. However, having remanded the case for further proceedings, the court declined to “comment on the type of treatment, if any, to which De’lonta is entitled.” *Id.*

¹⁸⁶ *Brooks v. Berg*, 270 F. Supp. 2d 302, 304 (N.D.N.Y. 2003).

¹⁸⁷ *Id.* at 304, 306. In her testimony, Brooks stated that “I was never seen by medical staff, which prevented them from determining whether or not such treatment was necessary in my case specifically.” *Id.* at 306.

¹⁸⁸ *Id.* at 305-06.

¹⁸⁹ *Id.* at 306.

¹⁹⁰ *Id.* at 312.

¹⁹¹ *Id.*

of medical treatment” is contrary to the Eighth Amendment. This decision placed an obligation on prison officials to provide inmates diagnostic examinations in order to determine whether a serious medical need that requires treatment is indicated.¹⁹²

The necessary corollary of this rule is that when an inmate is not diagnosed as a transsexual suffering from GID or as not needing a particular treatment, there is no Eighth Amendment violation for denying that inmate the desired care.¹⁹³ In *Praylor v. Texas Department of Criminal Justice*, the plaintiff claimed that he was unconstitutionally denied treatment for his GID.¹⁹⁴ The court rejected his claim because prison officials demonstrated that Praylor did not qualify for medical treatment under the prison’s policy for treating transsexual inmates. The officials also demonstrated that providing hormones would interfere with prison security and that psychotherapy treatment was available to transsexual inmates.¹⁹⁵ Judging from the policy, which required psychological screening of transsexual inmates and hormone therapy only for medical necessity¹⁹⁶—diagnostic tools used by the WPATH Standards of Care¹⁹⁷—an experienced official was involved in the determination.

Brooks also speaks to the final element of a better universal policy: ensuring that the appropriate prison officials make the decisions concerning transsexual inmate health care. In requiring diagnostic examinations, the court stated further that a medical professional, and not a lay administrator, must determine any treatment for the inmate patient.¹⁹⁸ Furthermore, treatment decisions, whether to provide or deny care, must be based on the “sound medical judgment” of the medical professional.¹⁹⁹ The court noted that even Brooks, who believed that a wide variety of surgeries may be appropriate, recognized what the prison officials did not, that only a “qualified medical professional” could determine what treatment was “minimal though appropriate.”²⁰⁰ This standard arose from a decision the previous year in *Kosilek v. Maloney*, where the court stated that “adequate care” meant treatment by “qualified personnel” in accordance with “prudent pro-

¹⁹² *Id.*

¹⁹³ *Praylor v. Texas Dep’t Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005).

¹⁹⁴ *Id.* at 1208.

¹⁹⁵ *Id.* at 1209.

¹⁹⁶ *Id.*

¹⁹⁷ See STANDARDS OF CARE, *supra* note 13, at 1, 8.

¹⁹⁸ *Brooks v. Berg*, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003).

¹⁹⁹ *Id.* at 312.

²⁰⁰ *Id.* at 305.

fessional standards in the community.”²⁰¹ However, the court recognized that other prudent and practical concerns, such as the need to maintain security and safety, might override an inmate’s constitutional right to GID treatment.²⁰² But if an official decides that his duty to ensure an inmate’s safety must override the duty to provide adequate care to that inmate, only a court can decide whether there is an Eighth Amendment violation.²⁰³ While this standard does not grant an absolute right to adequate care, it still protects inmate patients from decisions based on inappropriate considerations or troublesome interpretations of official policy or medical practice.²⁰⁴

2. *Cost is Not Grounds for Denying Treatment*

When legal arguments are exhausted, some prison officials try defending their decisions to deny medical treatment on practical grounds. Judge Posner in *Maggert v. Hanks* asserted that prisons had no duty to provide treatments for GID in part because they are “protracted and expensive” procedures, and the cost of full transformation can reach \$100,000 for a male-to-female procedure.²⁰⁵ In support of some judicial determinations that attending physicians are solely responsible for health-care decisions, medical advocates are quick to point out that doctors are trained to not consider cost or pass judgment as to whether the patient deserves the treatment.²⁰⁶ Leaving medical decisions to those concerned with the budget only ensures that needless suffering will ensue.²⁰⁷ This would also violate the “sound medical judgment” standard established in *Brooks*.²⁰⁸

Furthermore, prisons readily provide other costly procedures to inmates. In 2005, the DoC estimated that one coronary bypass costs \$37,000 and one kidney transplant costs \$33,000, whereas it estimated that complete sex reassignment would cost only \$20,000.²⁰⁹ In 2004, the DoC paid only \$2,300 for hormone therapy for two inmates, but

²⁰¹ *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

²⁰² *Id.* at 162.

²⁰³ *Id.*

²⁰⁴ *See* *Gregg v. Georgia*, 428 U.S. 153, 181 (1976).

²⁰⁵ *Maggert v. Hanks*, 131 F.3d 670, 671-72 (7th Cir. 1997). Judge Posner, however, said the decision was not based solely on cost, but rather that, at that time, GID was not widely recognized as a sufficient serious medical need. *Id.* at 672.

²⁰⁶ Chin, *supra* note 19, at 174.

²⁰⁷ *See id.*

²⁰⁸ *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003).

²⁰⁹ Cox, *supra* note 11, at 361. Between 2005 and 2007, five kidney transplants were performed. *Id.* *Fields v. Smith*, 712 F. Supp. 2d 830, 837 (E.D. Wis. 2010).

paid \$2.5 million for inmates to take antipsychotic drugs.²¹⁰ Providing expensive procedures such as those, but denying substantially less expensive and intensive treatments, like hormone therapy, appears to be a decision based on considerations other than the patient's medical needs or even cost. This also clearly violates the *Brooks* standard.

Fortunately, at least one federal court has completely foreclosed prison officials from taking a particular treatment's cost into account when deciding what care is available to an inmate.²¹¹ In *Kosilek v. Maloney*, the plaintiff was a transsexual who suffered from depression that led to suicide and autocastration attempts.²¹² Having been denied care by Maloney, Kosilek filed suit against him in his official capacity as the DoC commissioner, asking the court for provisions that would be made obligatory a year later in *Brooks*.²¹³ Kosilek simply wanted a doctor experienced with GID to diagnose and prescribe adequate treatment, and for the prison officials to provide that treatment.²¹⁴ Unlike in *Brooks* and *De'lonta v. Angelone*, Maloney adopted his own policy for GID care that froze care upon incarceration.²¹⁵ Maloney adopted this policy due to a variety of administrative concerns: security, public and political criticism, and that GID treatments may be an inappropriate use of taxpayer money.²¹⁶ The court recognized that security is a legitimate concern, but declared that it is "[im]permissible to deny an inmate adequate medical care because it is costly."²¹⁷ If Maloney denied Kosilek adequate care for GID based on "cost or controversy," he violated the Eighth Amendment.²¹⁸ This outcome protects transsexual inmate patients from administrative decisions based on inappropriate considerations and compels prison officials to rely on the sound medical judgment of experienced medical professionals for diagnosis and treatment.

Even if cost was a legitimate concern for prison administrators, the care that is currently accessible, and the care that would be accessible under the more liberal standard described below, is not cost pro-

²¹⁰ *Fields*, 712 F. Supp. 2d at 837. Hormone therapy only costs the DoC about \$300 to \$1000 per inmate per year, whereas the antipsychotic drug Quetiapine costs between \$2,555 and \$2,920 per inmate per year. *Id.*

²¹¹ *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002).

²¹² *Id.* at 158, 165.

²¹³ *Id.* at 159; *Brooks v. Berg*, 270 F. Supp. 2d 312 (N.D.N.Y. 2003).

²¹⁴ *Kosilek*, 221 F. Supp. 2d at 159.

²¹⁵ Although this policy was similar to the policy established by the Federal Bureau of Prisons, Maloney developed it after consulting with DoC doctors and attorneys, and was not merely employing an already established policy. *Id.*

²¹⁶ *Id.* at 162.

²¹⁷ *Id.* at 161.

²¹⁸ *Id.* at 162.

hibitive because of four important limiting factors. First, to receive treatment, a prison doctor must diagnose the inmate patient as a transsexual suffering from GID.²¹⁹ Second, the quantum of diagnosed transsexual inmates is miniscule.²²⁰ Third, not all transsexual prisoners will want treatment or have the same medical needs.²²¹ Fourth, despite Judge Posner's concerns,²²² given the safety risks,²²³ it is unreasonable to assume that transsexuals will commit crimes just to receive medical treatment.²²⁴ With enforceable diagnosis guidelines, low numbers, variable need, and no incentive to abuse the system, even if all transsexual inmates were provided greater care, the total costs would not be prohibitive compared to the rest of the health-care budget.²²⁵

These medical and cost considerations form a strong foundation for a better policy. These are broad ideals that do not prohibit refinement as greater scientific understanding of transsexualism develops and medical treatments improve. A policy built on this foundation will meet an inmate's specific medical needs and provide proper guidance to prison officials as to when treatment must be provided. It will also conform to both the medical consensus on GID treatment (as codified in the Standards of Care²²⁶) and balance the inmates' constitutional rights with the prison officials' constitutional duties. Courts, therefore, only need to be convinced that such a policy is effective at treating GID, and that society values its implementation.

IV. The Eighth Amendment Requires Gender Identity Disorder Treatment

That the Eighth Amendment requires care for prisoners' basic needs is clear.²²⁷ While treatment for GID may not seem like a basic need, adequate medical treatment for serious medical needs certainly

²¹⁹ STANDARDS OF CARE, *supra* note 13, at 3.

²²⁰ Brown & McDuffie, *supra* note 15, at 281-282.

²²¹ Cox, *supra* note 11, at 360-61.

²²² Judge Posner stated, "[w]e do not want transsexuals committing crimes because it is the only route to obtaining a cure." *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997).

²²³ *See infra* Part IV.E.

²²⁴ There are no reported cases of transsexuals committing crime just to receive treatment to support Posner's concern. Sultan, *supra* note 53, at 1207-06.

²²⁵ Cox, *supra* note 11, at 360-62.

²²⁶ *See* STANDARDS OF CARE, *supra* note 13.

²²⁷ *See supra* Part III.B.

is.²²⁸ *Estelle v. Gamble* established that prison officials must provide only *some care*.²²⁹ But “some care” might practically mean “no care” if that care does not adequately or effectively address the severity of the serious medical need. While there is no constitutional requirement that treatment must cure an inmate’s condition or illness, the care provided must at least mitigate the inmate’s suffering while he or she is in the state’s custody.²³⁰ The duties imposed on prison officials by this requirement for appropriate mitigating care may be interpreted in two ways.

One interpretation says that *at least* a minimum of adequate care is required. This provides a lower limit for the degree of care officials must provide, below which is a denial of care that “constitutes unnecessary and wanton infliction of pain.”²³¹ However, it does not establish an upper limit on the care that inmates may demand. This interpretation, therefore, conflicts with the Supreme Court’s qualification to the deliberate indifference standard that medical judgments not to pursue a particular treatment are not grounds for a claim.²³²

The second, and perhaps more appropriate, interpretation of the Eighth Amendment requires *only* the minimum treatment required to effectively treat the condition. This maintains the lower limit needed to protect inmates’ constitutional rights; in fact, it may raise it slightly. However, it caps treatment at the point where the serious medical problem has been cured or substantially alleviated. This view is in accordance with the tax court’s belief that the treatment should “bear a direct or proximate therapeutic relation” to the need.²³³ This is also a flexible policy in line with the Standards of Care that meets the patient’s specific needs. If a transsexual inmate requires only psychiatric therapy to alleviate GID, then that is all that the Eighth Amendment requires, and all that prison officials must provide. However, if in another case the inmate cannot be adequately treated with psychiat-

²²⁸ See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); see also *Maggert v. Hanks*, 131 F.3d 670, 671 (“The Eighth Amendment has been interpreted to forbid prisons to ignore the serious medical, including psychiatric, afflictions of prisoners.”).

²²⁹ See *supra* Part III.B.

²³⁰ *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998) (“‘[P]resently medically necessary’ describes treatment ‘without which an inmate could not be maintained without significant risk of either further serious deterioration of his/her condition or significant reduction of the chance of possible repair after release, or without significant pain or discomfort.’”).

²³¹ *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²³² *Id.* at 107.

²³³ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 65 (2010) (quoting *Havey v. Comm’r*, 12 T.C. 409, 412 (1949)).

ric therapy, then, upon proper diagnosis, hormones should be provided.

The Ninth Circuit used a standard for adequate care regarding other aspects of inmate care that reflects many of the same values as the second interpretation.²³⁴ In *Johnson v. Lewis*, the plaintiff inmates, suing as a class, alleged that their Eighth Amendment right to official provision for their basic needs was violated.²³⁵ On two occasions following prison unrest, the inmates were kept out in the yard, exposed to extreme elements with few provisions for protection, waste, hygiene, or nourishment for extended periods of time.²³⁶ The district court rejected their claim under a standard of care similar to that expressed in *Estelle v. Gamble*.²³⁷ Because the prison officials had provided *some* protection from the elements, food, water, medical care, and sanitation, they were not liable for violating their Eighth Amendment duties because they did not cause sufficient harm.²³⁸ On appeal, the Ninth Circuit reversed the district court because the prison officials meeting “some needs” at “some times” did not establish that sufficient or adequate care was in fact provided.²³⁹ While the officials were not obligated to provide every possible amenity, they had a duty to meet the inmates’ basic needs.

The Tenth Circuit went a little further, holding that a prison official may be liable when he makes efforts “reasonably calculated to reduce the risk [of harm]” that fail, if he intentionally refuses reasonable alternatives and the risk continues.²⁴⁰ Applying this to transsexual inmate patients, if the prison doctor provides psychotherapy, but the inmate’s depression or urges for self-mutilation continue, the doctor may be liable under the Eighth Amendment for not providing the hormones necessary to alleviate the suffering.

A narrower interpretation of the Eighth Amendment is most appropriate for advancing transsexual inmates’ health-care interests. Although it may eliminate access to surgical sex reassignment, it strengthens the right to sex-appropriate hormone therapy. Using this interpretation in conjunction with the case law discussed above,²⁴¹ a better policy for treating inmates with GID can be crafted.

²³⁴ See *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000).

²³⁵ *Id.* at 729.

²³⁶ *Id.* at 729-31.

²³⁷ See *supra* Part III.B.

²³⁸ *Johnson*, 217 F.3d at 731.

²³⁹ *Id.* at 732.

²⁴⁰ *Tafoya v. Salazar*, 516 F.3d 912, 918 (10th Cir. 2008).

²⁴¹ See *supra* Part III.D.

A. Sound Medical Diagnosis without Discrimination

Inmates' have a constitutional right to the care they need. The first step to protecting that right is ensuring that prison officials can provide the proper treatment without judicial intervention. The sooner an inmate's medical condition is treated, the less pain and suffering the inmate will experience.²⁴² Prison officials can only treat a serious medical need if it has been diagnosed by an experienced medical professional. An inmate's right to sound medical diagnosis was recognized in *Brooks v. Berg*.²⁴³ But the court in *Brooks* left open the questions of what is sound medical judgment and what is an experienced medical professional.

The WPATH Standards of Care state that, in treating patients with GID, an experienced medical professional, at the very least, is one who has "basic general clinical competence in diagnosis and treatment of mental or emotional disorders."²⁴⁴ Specialization experience with GID requires an advanced degree in clinical behavioral science, specialized training in assessing DSM-IV sexual disorders—especially those disorders that implicate Eighth Amendment concerns, such as GID—competence in psychotherapy, and continuing GID treatment education.²⁴⁵ If these are the minimum requirements for competently diagnosing and treating GID patients, it stands to reason that only a medical professional possessing these qualifications has the sound medical judgment required to treat a transsexual inmate. Furthermore, given that the Standards of Care are WPATH's interpretation of the international medical community's consensus on GID treatment,²⁴⁶ sound medical judgment for treating a transsexual inmate must reflect the Standards of Care, though balanced against the legitimate practical concerns of the prison environment. If examined by a qualified medical professional, a diagnosis is a simple matter and only requires meeting the clinical threshold described in the Standards of Care²⁴⁷

²⁴² None of the courts in the cases discussed *supra* Part III explicitly recognized that in the time between the plaintiff filing the complaint and the court's final ruling the plaintiff is still suffering from GID symptoms and denied effective care unless temporary injunctive relief was granted. In the case of *Kosilek v. Maloney*, it was ten years before a final ruling was handed down. 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

²⁴³ See *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003).

²⁴⁴ STANDARDS OF CARE, *supra* note 13, at 6.

²⁴⁵ *Id.* at 6-7.

²⁴⁶ *Id.* at 1.

²⁴⁷ *Id.* at 2 (stating that "[a] clinical threshold is passed when concerns, uncertainties, and questions about gender identity persist during a person's development, become so intense as to seem to be the most important aspect of a person's life, or prevent the establishment of a relatively unconflicted gender identity").

and comparing the patient's indicated symptoms to the DSM-IV guidelines.²⁴⁸

Another open question is which prisoners are entitled to a diagnosis. All inmates who feel that they have a gender-sex incongruity are entitled to be examined by a medical professional and, if indicated, diagnosed as a transsexual. There are two key reasons for requiring universal access to sound medical diagnosis. First, as stated above, an undiagnosed serious medical need cannot be treated. Second, many transsexuals only "come to terms with their true gender identity during mid-life."²⁴⁹ In some cases, prison might be the first time these inmates have access to real health care and the opportunity to have any medical problems diagnosed and treated. In any case, though, it would be wrong for prison officials to deny an inmate the opportunity to be examined in order to avoid treating a serious medical need. It is important to note, however, that a medical examination will not necessarily yield a GID diagnosis. If upon examination the inmate patient is diagnosed as suffering from GID, then the medical professional has an array of effective, though limited, treatment options at his disposal to which the patient may then be constitutionally entitled.

B. Psychotherapy is Some Care but Not Necessarily Adequate Care

Psychotherapy is the first and least intensive treatment for GID, as prescribed by the WPATH Standards of Care.²⁵⁰ The Standards of Care state that not all transsexuals require every step of the treatment sequence to become comfortable with their incongruity, and that not all will require psychotherapy to move on to hormone treatment.²⁵¹ The real therapeutic value of psychotherapy is that it aids the "discovery and maturational processes that enable self-comfort."²⁵² However, despite the valuable role it plays in providing comfort, psychotherapy is not a cure for GID.²⁵³ This is evident from the fact that many transsexuals still pursue the more intensive hormonal and surgical therapies despite successful psychotherapy. It has also been demonstrated in many of the cases discussed above. For example: O'Donnabhain only found relief after starting hormone treatment,²⁵⁴ De'lonta experi-

²⁴⁸ See *supra* notes 35-36, and accompanying text.

²⁴⁹ Howell, *supra* note 24, at 180.

²⁵⁰ See STANDARDS OF CARE, *supra* note 13, at 3, 11.

²⁵¹ See *id.*

²⁵² *Id.* at 11.

²⁵³ See *id.* at 12.

²⁵⁴ O'Donnabhain v. Comm'r, 134 T.C. 34, 39 (2010).

enced severe psychological deterioration after being denied hormones despite the fact that psychotherapy was available;²⁵⁵ but Praylor had to be satisfied with only psychotherapy because he was not diagnosed as needing anything more.²⁵⁶ Despite rejecting arguments that prisons have a duty to provide extensive care for GID, even Judge Posner pointed out that while “less drastic treatments are available for this condition” only the more intensive treatments have been successful in treating it.²⁵⁷

Given that psychotherapy is not very intensive, relatively easy to provide, and unlikely to create security concerns,²⁵⁸ prison officials routinely provide it to transsexual inmates.

C. Prescribing Hormones Following Sound Medical Diagnosis

According to the WPATH protocols, following psychotherapy, gender-specific hormones are the next level of treatment.²⁵⁹ The Standards of Care place great emphasis on hormone therapy due to its proven medical effectiveness and widespread patient satisfaction with the results. Hormones are generally necessary for “successful living in the new gender” and for reducing “psychiatric co-morbidity.”²⁶⁰ Hormones alleviate GID symptoms by altering physical characteristics to align with the desired gender.²⁶¹ In many, if not most, cases, hormones are sufficient to relieve GID symptoms, thereby removing the need to pursue the more intensive and permanent surgeries.²⁶²

Being incarcerated is an abrupt life change, and it presents many health risks to transsexuals. The Standards of Care insist that hormone treatment should not be discontinued.²⁶³ Discontinuing hormone therapy can cause emotional instability, “regression of hormon-

²⁵⁵ See *De'lonta v. Angelone*, 330 F.3d 630, 632-35 (4th Cir. 2003).

²⁵⁶ *Praylor v. Texas Dep't Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005).

²⁵⁷ *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997).

²⁵⁸ See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (citing security concerns as a legitimate reason to deny hormones and reassignment surgery).

²⁵⁹ STANDARDS OF CARE, *supra* note 13, at 13.

²⁶⁰ *Id.* Mario Maj, 'Psychiatric Comorbidity': *An Artefact of Current Diagnostic Systems?*, 186 BRIT. J. PSYCHIATRY 182, 182 (2005) (“[Comorbidity] has recently become very fashionable in psychiatry to indicate not only those cases in which a patient receives both a psychiatric and a general medical diagnosis (e.g. major depression and hypertension), but also those cases in which a patient receives two or more psychiatric diagnoses (e.g. major depression and panic disorder.”).

²⁶¹ STANDARDS OF CARE, *supra* note 13, at 13.

²⁶² *Id.* at 14.

²⁶³ *Id.*

ally-induced” physical changes, and severe psychological problems, including “depression, anxiety and suicidality.”²⁶⁴ Rapid discontinuation may cause even more severe health risks.²⁶⁵ The cases discussed above in Parts III.B and III.D have also clearly demonstrated the troubles transsexual inmates experience when they are denied hormone therapy.²⁶⁶ Fortunately, many courts have recognized the value that hormone therapy has for transsexuals suffering from GID.

Given the demonstrable effectiveness of hormone therapy and the risks of denying it, the Eighth Amendment must provide that prison medical personnel prescribe sex-appropriate hormones to all diagnosed transsexual inmate patients. This does not mean that all transsexuals are automatically entitled to hormones. The Eighth Amendment only requires effective treatment for a serious medical need. The inmate must actually have a serious medical need, diagnosed by a medical professional. Not providing treatment to one who has not been diagnosed as having a serious and treatable medical condition does not violate the Eighth Amendment.²⁶⁷

All inmates diagnosed with GID should have access to the necessary treatments. Prisons are currently only required to provide hormones to those who medically qualify, but it is inconsistent with the principles embodied in the Eighth Amendment to universally deny these treatments to all transsexuals.²⁶⁸

D. Sex Reassignment Surgery is Not Required

Currently, no prison facilities in the United States have policies that provide sex reassignment surgeries (SRS), either genital or non-genital, to transsexual inmates.²⁶⁹ Based on a standard that only requires minimum effective treatments and not fully curing long-term conditions, SRS is beyond the medical needs of most transsexual inmates.²⁷⁰

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See Howell, *supra* note 24, at 154 (“[A]ccess to cross gender hormone therapy . . . improves people’s quality of life.”); see also *De’Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003).

²⁶⁷ See *Praylor v. Texas Dep’t Criminal Justice*, 430 F.3d 1208, 1208-09 (5th Cir. 2005).

²⁶⁸ *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003).

²⁶⁹ Howell, *supra* note 24, at 155.

²⁷⁰ Chin, *supra* note 19, at 175 (arguing that Gender Reassignment Surgery is above a basic medical necessity); see *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998) (“‘[P]resently medically necessary’ describes treatment ‘without which an inmate could not be maintained without significant risk of either further serious dete-

The minimum effective requirement limits prisoners' claims because the treatment provided should not exceed that which is necessary to alleviate or cure the condition while the inmate is incarcerated. This comports with the *Estelle* qualification that a medical decision not to pursue a treatment option does not violate the Eighth Amendment²⁷¹ and Posner's opinion that prisoners should not receive care that is generally unavailable to nonincarcerated persons.²⁷² SRS is not medically available or necessary for many transsexuals,²⁷³ and, due to prejudicial difficulties in the workplace, many cannot even afford it.²⁷⁴

Surgery is not necessary for all GID cases, and the WPATH Standards of Care recommend reserving it for only the most serious cases.²⁷⁵ Most transsexuals are able to successfully complete their transitions without it.²⁷⁶ Hormones alleviate most symptoms and ease suffering without causing serious complications, except for when those hormones are discontinued. Surgery creates a much greater risk of harm. Although desperate transsexuals may believe that surgery is a "life saving measure[],"²⁷⁷ the Eighth Amendment does not require it.

There are also significant issues beyond medical necessity. The effectiveness of surgical procedures for GID patients is still under study.²⁷⁸ Furthermore, the many postoperative complications that may follow give rise to both physical and legal problems.²⁷⁹ While a well-performed surgery may itself entail little risk for the patient,²⁸⁰ the potential future health complications can be severe.²⁸¹ Surgery does not necessarily produce fully functioning sex organs, and some genital constructions may detach²⁸² or collapse,²⁸³ requiring extensive

roration of his/her condition or significant reduction of the chance of possible repair after release, or without significant pain or discomfort."").

²⁷¹ *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

²⁷² *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) ("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 one.").

²⁷³ See STANDARDS OF CARE, *supra* note 13.

²⁷⁴ *NTDS*, *supra* note 59, at 2.

²⁷⁵ See STANDARDS OF CARE, *supra* note 13, at 18-19. One transsexual stated that surgery was not necessary for finding comfort with his identity saying: "I don't really want to mess with my body like that. . . . I'm a different kind of a thing, a new thing, and that's okay." *Cox*, *supra* note 11, at 364.

²⁷⁶ *Tobin*, *supra* note 11, at 400.

²⁷⁷ *Cox*, *supra* note 11, at 365.

²⁷⁸ *Id.* at 364.

²⁷⁹ *Id.* at 364-65.

²⁸⁰ *Tobin*, *supra* note 11, at 399.

²⁸¹ *Id.* at 400.

²⁸² *Cox*, *supra* note 11, at 365.

reconstruction to repair the damage.²⁸⁴ To require SRS puts officials in a constitutional bind. If the Eighth Amendment prohibits conduct that may cause a prisoner to suffer, it should not require a drastic treatment that may lead to harm or illness for an inmate.

A study published in February 2011 that followed postoperative transsexuals in Sweden revealed many problems plaguing transsexuals who completed SRS.²⁸⁵ The study stated that prior data concerning postoperative transsexuals was inconsistent and inconclusive, with some reporting improvement both psychiatrically and psychologically following hormone therapy and SRS and others reporting “regrets, psychiatric morbidity, and suicide attempts.”²⁸⁶ Following 324 Swedish transsexuals who had SRS over a thirty-year period, the study reported that these individuals had three times the risk of death,²⁸⁷ higher rates of suicide, cardiovascular disease, malignancies,²⁸⁸ increased risk of hospitalization for non-GID psychiatric disorders, and greater rates of conviction than the general population.²⁸⁹ The report’s authors suggested that postoperative transsexuals have greater health problems because many avoid the health-care system out of fear of discrimination and that they generally had “more psychiatric ill-health than the general population prior to the sex reassignment,” which may continue even after successful transformation.²⁹⁰

Refusing SRS to inmates is inconsistent with the *O’Donnabhain* decision. However, there is a difference between IRC § 213 and the Eighth Amendment. Section 213 allows tax deductions for all effective treatments for GID. There is no cap to § 213’s allowances, as long as the expenses relate to medically effective procedures. The Eighth Amendment, however, does not require therapies that exceed what is necessary to treat the inmate’s condition while he or she is incarcerated.

An exception may be permissible for inmates sentenced to life without parole. The WPATH Standards of Care require a successful

²⁸³ Tobin, *supra* note 11, at 399 (quoting Lynn Conway, *Postoperative Care Following Vaginoplasty (SRS)*, ARTIFICIAL INTELLIGENCE LAB, UNIV. OF MICHIGAN ELECTRICAL ENG’G & COMPUTER SCI. DEP’T, <http://ai.eecs.umich.edu/people/conway/TS/BM/SRS-BM.html> (last updated Aug. 1, 2009)).

²⁸⁴ *Id.* at 400 (quoting Conway, *supra* note 282)).

²⁸⁵ See Cecilia Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE 1 (Feb. 22, 2011), <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0016885>.

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.* at 4.

²⁸⁸ *Id.* at 5.

²⁸⁹ *Id.* at 6.

²⁹⁰ *Id.*

twelve-month minimum life experience in order to qualify for SRS.²⁹¹ This is a test for how well the transsexual individual functions in society as the intended sex. For life prisoners, the prison is their life experience and is the community in which they will live and die.²⁹² Given how rare these cases are, there may be little harm in extending the degree of care. Therefore the standard that a long-term condition need not be cured in prison may be relaxed because the inmate may never find medical relief outside.

E. Appropriate Housing for Transsexual Inmates

If sex-altering treatment is provided, transsexual inmates will require special housing accommodations to protect them from inmate predation. Although Judge Posner rejected pleas for medical relief, he recognized the physical dangers associated with being a transsexual and affirmed the right to protection “from harassment by prisoners who wish to use [transsexual inmates] as a sexual plaything.”²⁹³

Unfortunately, housing for transsexual inmates presents a confusing paradox because all available options present constitutional problems.²⁹⁴ Placing transsexual inmates in the general population creates a serious risk of violent assault. But placing those inmates in administrative segregation for protection may punish them beyond the sentences for their crimes.²⁹⁵

As one commentator stated, “[p]rison rapes do not occur in a vacuum.”²⁹⁶ Prison society operates according to a “code” that divides the strong from the weak and the dominant from the subjugated along lines of “fighting ability and manliness.”²⁹⁷ Weaker or more stereotypically feminine inmates are at the bottom of prison society and at the highest risk of victimization.²⁹⁸ The threat of sexual violence in prisons is so well recognized that Congress passed legislation to combat it: the Prison Rape Elimination Act of 2003.²⁹⁹ The Act’s findings estimated that, in the twenty years prior to enactment, over one mil-

²⁹¹ STANDARDS OF CARE, *supra* note 13, at 20.

²⁹² See Cox, *supra* note 11, at 350.

²⁹³ Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997).

²⁹⁴ Tedeschi, *supra* note 145, at 44; see Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987).

²⁹⁵ “When convicted offenders are sentenced to time in prison, living in prison for that time under existing conditions is the punishment.” Dolovitch, *supra* note 10, at 907.

²⁹⁶ Peek, *supra* note 73, at 1226 (quoting Terry A. Kupers, PRISON MASCULINITIES 113 (2001)).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1226-27.

²⁹⁹ Prison Rape Elimination Act, 42 U.S.C. § 15601 (2008).

lion inmates had suffered some form of sexual abuse, and that inmates with mental conditions or illness were especially susceptible to attack.³⁰⁰ Transsexuals are at substantially greater risk of violent and sexual assault in prison due to their femininity or gender nonconforming behavior or appearance. A survey of California prisons revealed that 59 percent of transgender inmates reported sexual assault, compared to just 4 percent of the general population.³⁰¹ A national survey, reported that 16 percent were physically assaulted and 15 percent sexually assaulted.³⁰²

Administrative segregation, as the name implies, is commonly used for punishing misbehaving inmates or isolating the most dangerous convicts.³⁰³ Placing transsexual inmates in administrative segregation because of their transsexual status and not for any misconduct, even if it is for their protection, effectively punishes them for being transsexual.³⁰⁴ It is punishment because it denies them the privileges—such as, socializing with others and outdoors activities—that the general population enjoys.³⁰⁵ It begs the question of why the perpetrators of violent assaults are not segregated instead, in order to protect the vulnerable inmates. If the violent inmates are segregated from society because they could not properly function in it, they should also be removed from the general prison population for violating its integrity and security as well. The most likely answer is that it is easier this way because there are far fewer victims than predators.³⁰⁶ As with medical care,³⁰⁷ an official's constitutional duty to provide

³⁰⁰ *Id.* §§ 15601 (2)-(3).

³⁰¹ Christine Nader & Trisha J. Pasdach, *Correctional Facilities*, 11 GEO. J. GENDER & L. 77, 94 (2010).

³⁰² *Healthy People 2020 Transgender Health Fact Sheet*, NAT'L LGBT TOBACCO CONTROL NETWORK 4 (Nov. 2010), <http://www.lgbttobacco.org/files/TransgenderHealthFact.pdf>.

³⁰³ *Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987) (“Whether a prisoner may be subjected to the restrictive and necessarily harsh conditions of administrative segregation, not resulting from his own misconduct, for such a long period of time is a very difficult question.”).

³⁰⁴ Howell, *supra* note 24, at 144, 192 (arguing that such actions constitute a punishment in excess of the one the state handed down for the crime); *Meriwether*, 821 F.2d at 416 (“Plaintiff complains that by being confined in administrative segregation, she is denied adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons.”).

³⁰⁵ Peek, *supra* note 73, at 1239.

³⁰⁶ *See Meriwether*, 821 F.2d at 417 (“Prison officials must be accorded wide-ranging deference in matters of internal order and security . . .”).

³⁰⁷ *See supra* Part III.D.1.

security to all inmates may override a single inmate's constitutional rights.³⁰⁸

A common sentiment may be that if the inmate did not want to risk the dangers of prison, then he should not have committed the crime. However, the dangers of physical and sexual assault are not an inherent condition of institutional incarceration and are not part of the state's sentence for the crime. The sentenced time to be served is the extent of the state's lawful punishment.³⁰⁹ The Eighth Amendment's role is to ensure that states and the deputies charged with carrying out the sentences uphold that ideal. If these risks were factored in, then the sentences ought to be shortened.

Some suggest that a way to avoid these risks is to house transsexual inmates according to their subjective gender rather than their objective sex.³¹⁰ However, this does not entirely eliminate the risk,³¹¹ and it raises serious questions about privacy rights for the objectively female inmates.³¹² No court has decisively ruled on this point.³¹³ But it is not entirely unheard of for a preoperative transsexual to be housed according to subjective gender identity rather than physical sex. In 2009, Jasmine Anderson, an objectively-male transsexual, was imprisoned for selling drugs. Though initially housed in a male facility, she was eventually transferred to a women's facility in northern Ohio.³¹⁴ This is certainly the exception rather than the rule, but it is encouraging that prison officials are making exceptions for inmates who need special accommodation.

A more progressive but controversial plan would be to have transsexual-only facilities. Though it may sound impractical, Italy has established a prison specifically to house transgender inmates.³¹⁵ It was not a huge undertaking, housing only thirty transgender inmates in a former prison for women, and Italy's most famous transsexual, a

³⁰⁸ *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (“[T]he State has a legitimate interest in not having a male with female breasts in a male prison and in not placing persons with functional male genitals in a female prison. Thus, their actions do not constitute an arbitrary decision without a penological justification.”) (citation omitted).

³⁰⁹ Dolovitch, *supra* note 10, at 907-08.

³¹⁰ Howell, *supra* note 24, at 147.

³¹¹ Peek, *supra* note 73, at 1242.

³¹² *Id.* at 1243.

³¹³ *See id.*

³¹⁴ Kay Sedgmer, *A Struggle with Your Identity... Born as a Male, She Has Endured a Rough Road to Find Herself*, TIMESLEADERONLINE.COM (Nov. 29, 2009), <http://www.timesleaderonline.com/page/content.detail/id/514420.html?nav=5010>.

³¹⁵ Nick Squires, *Italy Opens First Prison for Transsexuals*, TRANSGENDER TODAY (Jan. 29, 2010), <http://www.transgendertoday.com/2010/01/29/italy-opens-first-prison-for-transsexuals/>.

former member of parliament, believed that the prison allowed these inmates to “serve their time without being persecuted for their sexual identity.”³¹⁶ Given the small number of transsexual prisoners, a similar program in the United States would be less financially burdensome than politically untenable.

Physical security is not only an interest for transsexual inmates, but a constitutional right.³¹⁷ It is also in society’s best interest to keep prisoners safe from violence at the hands of fellow inmates because “brutalized inmates [are] more likely to commit crimes when released . . . [because they] suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment”³¹⁸ With difficulty finding stable employment,³¹⁹ inmates who were brutalized in prison are more likely to become homeless or require government assistance and have higher rates of recidivism.³²⁰

Providing health care along with safe housing may promote rehabilitation more than anything else for transsexual inmates.³²¹ Given that many transsexual inmates were driven to crime to survive or pay for some form of treatment, providing adequate treatment and protecting them from victimization may help them successfully reintegrate into society as the desired gender and thereby prevent recidivism.³²²

If the *O’Donnabhain* standard influences the way courts treat transsexual inmates, then new housing protocols must be established to protect inmates. The Eighth Amendment prohibits conduct by prison officials that puts inmates at risk of harm. If seeking medical treatment would put the inmate at risk of some other physical harm, then the Eighth Amendment in providing for that medical treatment

³¹⁶ *Id.*

³¹⁷ See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (stating that “[t]he Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is reasonable safety.”).

³¹⁸ Howell, *supra* note 24, at 151-152 (citing 42 U.S.C. § 15601(8), (11) (2003)).

³¹⁹ Rose, *supra* note 72, at 538.

³²⁰ Howell, *supra* note 24, at 152.

³²¹ *Cf.* Howell, *supra* note 24, at 188 (arguing that inmates should have access to “amenities” such as healthcare because it “further[s] the rehabilitation mission of correctional facilities”).

³²² A 20 year study of recidivism rates of inmates who received specialized counseling reported that eighty-two percent of inmates who did not receive this counseling eventually returned to prison, whereas only sixty-one percent of inmates who had received the treatment returned to prison. *20 Year Prison Study—Treatment Works: Crime Statistics*, CRIMEINAMERICA.NET (Mar. 18, 2010), <http://crimeinamerica.net/2010/03/18/20-year-prison-study%E2%80%94treatment-works-crime-statistics/>.

must also compel other protections to prevent any harm from other inmates reacting to that treatment. If this were not true, then the Eighth Amendment's protections would become paradoxical or impossible for prison officials to uphold in practice, and would unfairly force inmates to decide which right is most important to them. Some compromise must be found that can adequately serve both interests because transsexual inmates should not be forced to choose between treating their serious medical need and suffering at the hands of predators.

CONCLUSION

Transsexualism has been recognized as a serious medical need.³²³ Accordingly, under *Estelle v. Gamble*, prisoners diagnosed as transsexual have a constitutionally protected right to adequate medical care under the Eighth Amendment.³²⁴ The American public has recognized that transgender and transsexual individuals are a social and sexual minority deserving increased legal and institutional protections. It is only right, constitutionally and morally, that these greater protections granted by federal and state governments extend to transsexuals in the carceral care of those governments. After all, inmates are constitutionally entitled to state-provided health care, whereas the population at large is not.

For many years, proposals regarding adequate care for transsexuals have been debated by advocacy groups and commentators. While these are valuable efforts, courts are not required to acquiesce to every demand to change the law.³²⁵ Hopefully, the opinion of a forward-thinking administrative tax court, when coupled with strong demonstrations of evolving social expectations, will carry more weight in the analysis of what treatment transsexual inmates are entitled to. The *O'Donnabhain* court decided that if there is a legitimate and serious medical need, and the treatment bears "a direct or proximate therapeutic relation" to that need, a transgender individual is entitled to the tax benefit for medical expenses.³²⁶ Translated to the Eighth Amendment

³²³ *O'Donnabhain v. Comm'r*, 134 T.C. 34, 62, n.40 (2010).

³²⁴ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

³²⁵ *See Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) ("Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. . . . [S]uch opinions may be helpful and relevant with respect to some questions, but 'they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.'") (citations omitted).

³²⁶ *O'Donnabhain*, 134 T.C. at 65 (quoting *Havey v. Comm'r*, 12 T.C. 409, 412 (1949)).

context, it should mean that the level of care that properly diagnosed transsexual inmates receive is adequate for the severity of their GID. Inmates who feel that they have an incongruity between their gender and sex are, at the very least, entitled to medical examination to determine whether they are in fact transsexual. If sound medical judgment indicates a transsexual diagnosis, then care is required. If the medical judgment determines that the inmate only requires psychotherapy, then that is all that the inmate is entitled to. But, if another inmate requires more, the care provided should not be limited by non-medical concerns or the fact that another inmate required less intensive care. Consequently, if a prison official relies on sound medical judgment, then the complaining inmate does not have an Eighth Amendment claim.³²⁷ If sex-altering treatment is provided, appropriate steps must be taken to protect the inmate from predation.

Our social and cultural predilection for a gender binary system and shunning of criminals should not lead us to deny transsexual inmates proper treatment. Indeed they are criminals, but the sentence the justice system imposed was the extent of our moral condemnation for their actions. Denying them adequate treatment for GID is punishing them not for their crimes, but for their medical condition. Offending cultural norms is not offending society's laws. Punishing the former certainly constitutes a "cruel and unusual punishment."³²⁸ More importantly, if we can rehabilitate transgender inmates in both the medical and social sense, perhaps they will not return to prison.

The relationship between society's evolving standards of decency and the Eighth Amendment provisions is always subject to change. Change has occurred. It is time that constitutional interpretations mirror that evolution. The hope now is to find a court willing to take the leap.

³²⁷ *Estelle*, 429 U.S. at 107 (1976).

³²⁸ U.S. CONST. amend. VIII.