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## The Constitutionality and Future of Sex Reassignment Surgery in United States Prisons

*Brooke Acevedo\**

Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.\*\*

### I. INTRODUCTION

No inmate in the United States has successfully undergone sex reassignment surgery<sup>1</sup> while incarcerated.<sup>2</sup> However, in a groundbreaking settlement agreement, the California Department of Corrections has agreed to pay for inmate Shiloh Quine to undergo sex reassignment surgery.<sup>3</sup> The terms of the settlement limit its application exclusively to Quine.<sup>4</sup> However, as a result of the agreement, the state has also produced strict guidelines for transgender<sup>5</sup> inmates seeking to undergo sex reassignment

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\* J.D. Candidate 2017, University of California Hastings College of the Law; B.A. Anthropology 2013, University of Texas, at Austin. My inspiration to write this paper came from a friend who is incarcerated. I would like to thank her for she has taught me an immense amount about courage and hope. I also am eternally grateful to my family and friends for their love and support.

\*\* *Brown v. Plata*, 563 U.S. 493, 510–11 (2011).

1. Sex reassignment surgery is also commonly referred to as “sex affirming” or “gender affirming” surgery. I will use “sex reassignment surgery” to be consistent with the World Professional Association for Transgender Health.

2. Emma Margolin, *California OKs First-Ever Sex Reassignment Surgery for Trans Inmate*, MSNBC (Aug. 10, 2015, 6:12 PM), <http://www.msnbc.com/msnbc/california-oks-first-sex-reassignment-surgery-trans-inmate>.

3. Joint Notice of Settlement Agreement at 3, *Quine v. Beard*, No. C 14-02726 JST (N.D. Cal. Aug. 7, 2015).

4. *Id.* at 4.

5. “Transgender” is a “term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth.” *Transgender*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (Jan. 15, 2014), <http://www.transequality.org/issues/resources/transgender-terminology>.

surgery.<sup>6</sup> The settlement is a victory for Quine who was diagnosed with gender dysphoria<sup>7</sup> in 2008;<sup>8</sup> however, the settlement excused the court from ruling on the constitutionality of the procedure for transgender inmates living with gender dysphoria.<sup>9</sup>

The federal prison system and all of the states should provide sex reassignment surgery for incarcerated transgender individuals with gender dysphoria who seek it because adequate medical care is guaranteed to all inmates. Sex reassignment surgery is a constitutional right for these inmates living with gender dysphoria who have been recommended to undergo the procedure from multiple independent doctors after a finding of medical necessity.

The rest of the states should follow the California Department of Healthcare Services and implement guidelines outlining the criteria for inmates seeking sex reassignment surgery to successfully be recommended for and undergo the surgery.

In this paper I will explore some of the difficulties faced by incarcerated transgender individuals. I will then examine the legal and social challenges to sex-reassignment surgery for transgender inmates, and finally I will discuss the medical necessity and future of the procedure.

## II. BACKGROUND

### A. SEXUAL ASSAULT AND BIAS

After release, Ashley Diamond, a transgender woman who spent over three years incarcerated, said, “In prison, I was a toy for the boys and a jester for the staff.”<sup>10</sup> Ashley was sexually assaulted eight times while incarcerated and is still combatting suicidal thoughts from her experiences in prison.<sup>11</sup> Another California transgender inmate, Ele Tsu, explained the troubling plight for transgender women in prison: “Rapes occur with frequency. And we’ve learned to keep our big mouths shut because what

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6. CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES, Supplement to CCHCS/DHCS Care Guide: Gender Dysphoria, *Guidelines for Review of Requests for Sex Reassignment Surgery (SRS)* (May. 24, 2016), available at [http://www.cphcs.ca.gov/docs/careguides/Guidelines%20for%20Review%20of%20Requests%20for%20Sex%20Reassignment%20Surgery%20\(SRS\).pdf](http://www.cphcs.ca.gov/docs/careguides/Guidelines%20for%20Review%20of%20Requests%20for%20Sex%20Reassignment%20Surgery%20(SRS).pdf).

7. Gender dysphoria is defined as the “inconsistency between phenotype and gender.” Definition available at Gender Dysphoria Overview, 53; WPATH Standards of Care, Medically Necessary statement.

8. Joint Notice of Settlement Agreement, *supra* note 4, at 17.

9. William Bigelow, *Transgender Inmate to Receive Sex Reassignment Surgery at State Expense*, BREITBART (Aug. 10, 2015), <http://www.breitbart.com/california/2015/08/10/transgender-inmate-to-receive-sex-reassignment-surgery-at-state-expense/>.

10. Deborah Sontag, *Ashley Diamond, Transgender Inmate is Out of Prison, But Far From Free*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2015/09/25/us/ashley-diamond-transgender-inmate-out-of-prison-but-not-fully-free.html>.

11. *Id.*

happens is we are victimized again. We're called liars; people say, [y]ou enticed them, you didn't have your bra on, you were dressed in an overly feminine condition. You asked for it."<sup>12</sup> Diamond and Tsu's repeated victimization while in prison is far from unique. For many transgender inmates this is a common consequence of living transgender while in prison.

The rate of sexual assault and violence towards transgender individuals is horrifically high in the United States,<sup>13</sup> and the risk of assault increases dramatically for incarcerated transgender individuals.<sup>14</sup> Almost one in six transgender individuals are incarcerated at some point in their lives, and this figure is even higher for transgender women.<sup>15</sup> According to a report by the Bureau of Justice Statistics in 2015, 11 percent of transgender inmates have been sexually assaulted by prison staff and 24 percent have been sexually assaulted by other inmates in the last twelve months.<sup>16</sup> From inmate surveys conducted throughout the United States between 2007 to 2012, the Bureau of Justice found that 34.6 percent of state and federal transgender inmates experienced sexual victimization.<sup>17</sup> According to another study, more than half of all California transgender inmates are victims of rape.<sup>18</sup> Prison is unsafe and all inmates can be victims of sexual or violent attacks, however the stark disparities for transgender individuals compared to the rest of the prison population<sup>19</sup> are devastating.

In addition to rape, transgender inmates are also frequently victims of other forms of physical violence and non-physical violence, such as

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12. Tali Woodward, *Life in Hell: In California Prisons, an Unconventional Gender Identity Can Be Like an Added Sentence*, SAN FRANCISCO BAY GUARDIAN (<date omitted>), [https://web.archive.org/web/20151125173344/http://www.sfbg.com/40/24/cover\\_life.html](https://web.archive.org/web/20151125173344/http://www.sfbg.com/40/24/cover_life.html).

13. *Sexual Violence in the Transgender Community Survey, unpublished data*, FORGE (2005), available at [http://www.ovc.gov/pubs/forge/sexual\\_numbers.html](http://www.ovc.gov/pubs/forge/sexual_numbers.html); G. Kenagy, 2005, "The Health and Social Service Needs of Transgender People in Philadelphia," *International Journal of Transgenderism* 8(2/3):49–56; G. Kenagy and W. Bostwick, 2005, "Health and Social Service Needs of Transgendered People in Chicago," *INTERNATIONAL JOURNAL OF TRANSGENDERISM* 8(2/3):57–66.

14. ALLEN J. BECK, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 2 (2014), available at [http://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf).

15. HARPER JEAN TOBIN, RAFFI FREEDMAN-GURSPAN, & LISA MOTTET, NAT'L CTR. FOR TRANSGENDER EQUAL., A BLUEPRINT FOR EQUALITY: A FEDERAL AGENDA FOR TRANSGENDER PEOPLE 42, [http://www.transequality.org/sites/default/files/docs/resources/NCTE\\_Blueprint\\_June2015\\_0.pdf](http://www.transequality.org/sites/default/files/docs/resources/NCTE_Blueprint_June2015_0.pdf) (last updated June 2015).

16. Allen J. Beck, PREA Data Collection Activities, (2015), U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics*, 2015.

17. OFFICE OF JUSTICE PROGRAMS, *supra* note 16.

18. VALERIE JENNESS, UC IRVINE CTR. FOR EVIDENCE-BASED CORR., TRANSGENDER INMATES IN CALIFORNIA'S PRISONS: AN EMPIRICAL STUDY OF A VULNERABLE POPULATION 14 (Apr. 8, 2009), available at <http://ucicorrections.seweb.uci.edu/files/2013/06/Transgender-Inmates-in-CAs-Prisons-An-Empirical-Study-of-a-Vulnerable-Population.pdf>.

19. *Id.*

taunting, sometimes even resulting in death.<sup>20</sup> Incarcerated transgender individuals are subject to mistreatment and harassment by both correctional officers and other inmates.<sup>21</sup> Slurs, solicitations for sex, and psychological abuse have also been reported.<sup>22</sup> Transgender inmates at one prison “reported being forced to walk topless through a sea of male prisoners to get their clothes each week.”<sup>23</sup> It is likely that much like other forms of violence, the rate of abuse and violence towards transgender individuals is underreported.<sup>24</sup> Sadly, it is not uncommon for inmates who report violence and abuse to be retaliated against by prison officers and other inmates.<sup>25</sup>

Michelle Murray, a transgender inmate in federal custody, has brought legal action against prison officials for verbal harassment and abuse, among other violations related to her gender identity.<sup>26</sup> Murray alleged prison officials violated her Eighth Amendment right by (1) placing her in segregated confinement on several occasions, (2) failure of prison officials to provide her with, or make available hair and skin products, (3) numerous prison officials verbally harassing her about her bodily appearance, her presumed sexual preference, and her transsexualism, (4) physical abuse by prison officials on three separate occasions, and (5) prison officials’ deliberate indifference to her medical needs.<sup>27</sup> However, the Sixth Circuit Court of Appeals affirmed summary judgment for the prison.<sup>28</sup> The appellate court offered Murray little sympathy; it stated, “If Murray’s allegations are true, the behavior of the prison officials was certainly not commendable. Although we do not condone the alleged statements, the Eighth Amendment does not afford us the power to correct every action, statement, or attitude of a prison official with which we might disagree.”<sup>29</sup> The court reviewed Murray’s claims with skepticism and established a difficult precedent for other inmates who suffer similar abuse to prevail in this circuit.

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20. Jessica Pishko, *Life as a Transgender Inmate: Confronting a Hostile System Behind Bars and in Court*, THE GUARDIAN (Aug. 4, 2015, 8:30 AM), <http://www.theguardian.com/us-news/2015/aug/04/life-transgender-inmate-california-prison-culture>.

21. JASON LYDON, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK’S NATIONAL LGBTQ PRISONER SURVEY 3 (Oct. 2015), available at <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.October-21-2015.pdf>.

22. JAILHOUSE LAWYER’S HANDBOOK, ISSUES OF IMPORTANCE TO TRANSGENDER PRISONERS (Center for Constitutional Rights & National Lawyer’s Guild eds., 5th ed. 2010), available at <http://jailhouselaw.org/issues-of-importance-to-transgender-prisoners/>.

23. *Id.*

24. FORGE, TRANSGENDER RATES OF VIOLENCE 1, (Oct. 2012), available at <http://forge-forward.org/wp-content/docs/FAQ-10-2012-rates-of-violence.pdf>.

25. JAILHOUSE LAWYER’S HANDBOOK, *supra* note 25.

26. *Id.*

27. Murray v. United States Bureau of Prisons, No. 95-5204, slip op. at 1-4 (6th Cir. 1997).

28. *Id.* at 1.

29. *Id.* at 3.

In 2003, Congress passed the Prison Rape Elimination Act (PREA).<sup>30</sup> The Act's purpose was to "eliminate sexual abuse in confinement" by mandating the development of national standards.<sup>31</sup> One requirement of PREA was that facilities "conduct a thorough incident review at the end of every investigation of alleged sexual abuse" and that review must consider whether the victim was targeted for being LGBT.<sup>32</sup> The legislation was largely a victory for incarcerated individuals and advocates who have been fighting for their voices to be heard and for governmental action to the abuses occurring everyday behind prison walls.<sup>33</sup> However, many also criticize the legislation for not going far enough to protect prison's most vulnerable populations like transgender inmates.<sup>34</sup> One problem with PREA is that the Department of Justice (DOJ) is not auditing all facilities and assuring compliance with the regulations.<sup>35</sup> Instead, states can simply "provide written assurances they will spend DOJ funds to make progress towards compliance with PREA standards though they have not yet complied with them."<sup>36</sup>

Despite PREA's shortcomings, the Act has helped at least one transgender inmate in court.<sup>37</sup> Sandy Brown, a transgender prisoner in Maryland was routinely taunted, harassed, and placed in solitary confinement while serving a five-year sentence.<sup>38</sup> She sued the prison under PREA and was awarded \$5,000 in compensation.<sup>39</sup>

## B. BARRIERS TO MEDICAL CARE

Barriers to access of personal items and medical care are also a common occurrence for transgender inmates.<sup>40</sup> Seventeen percent of transgender inmates report being denied hormones and twelve percent

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30. PREA Essentials, NATIONAL PREA RESOURCE CENTER, <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> (last visited Nov. 6, 2016).

31. *Id.*

32. *Standing with LGBT Prisoners: An Advocate's Guide to Ending Abuse and Combating Imprisonment*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 62, available at [http://www.transequality.org/sites/default/files/docs/resources/JailPrisons\\_Resource\\_FINAL.pdf](http://www.transequality.org/sites/default/files/docs/resources/JailPrisons_Resource_FINAL.pdf) [hereinafter *Standing with LGBT Prisoners*].

33. LYDON, *supra* note 24, at 44–45; Alex Friedmann, Prison Rape Elimination Act Standards Finally in Effect, but Will They Be Effective?, PRISON LEGAL NEWS (Sept. 15, 2015), <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/>.

34. Friedman, *supra* note 33.

35. Gary Gately, *DOJ Faulted for Not Requiring PREA Audits*, JUV. JUSTICE INFORMATION EXCHANGE (June 26, 2014), <http://jjie.org/doj-faulted-for-not-requiring-prea-audits/>.

36. *Id.*

37. Jacob Gershman, *Judge Rules in Favor of Transgender Inmate Who Alleged Harassment*, WALL ST. J. LAW BLOG, (Sept. 25, 2015, 3:06 PM) <http://blogs.wsj.com/law/2015/09/25/judge-rules-in-favor-of-transgender-inmate-who-alleged-harrassment/>.

38. *Id.*

39. *Id.*

40. LYDON, *supra* note 21.

report “denial of routine medical care because of bias.”<sup>41</sup> Hormone therapy is a form of treatment for gender dysphoria.

The goals of hormone therapy for individuals with gender dysphoria are (i) to significantly reduce hormone production associated with the person's birth sex and, thereby, the secondary sex characteristics of the individual's birth sex and (ii) to replace circulating hormones, with feminizing or masculinizing hormones, using the principles of hormone replacement treatment developed for hypogonadal patients.<sup>42</sup>

Ashley Diamond sued the Georgia Department of Corrections in February of 2015 for access to hormone therapy and protection against prison rape.<sup>43</sup> The Justice Department intervened on her behalf.<sup>44</sup> Even though Diamond was technically not eligible for parole, the Georgia Department of Corrections paroled her after serving less than a third of her sentence and thus evaded the issue of whether they were responsible for providing hormone therapy and protection.<sup>45</sup>

Andrew Reid, a transgender woman in an Arkansas prison, was denied hormone therapy and unsuccessfully attempted to castrate herself.<sup>46</sup> After being admitted to and released from the hospital, she succeeded in completely castrating herself.<sup>47</sup> Reid brought an action under the Eighth Amendment against prison officials for failing to provide her with hormone therapy.<sup>48</sup> In December 2015, a federal appeals court upheld the lower court ruling, holding that the state and prison officials had sovereign immunity absent a showing of a constitutional violation.<sup>49</sup> The court found no Eighth Amendment violation because the prison continued to provide mental health care to Reid.<sup>50</sup>

### C. SEX REASSIGNMENT SURGERY

The World Professional Association for Transgender Health (WPATH) has developed Standards of Care for the health of transsexual, transgender,

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41. *Id.* at 169.

42. Joint Notice of Settlement Agreement, *supra* note 4, at 8.

43. Deborah Sontag, *Transgender Inmate Who Sued Georgia Gets Unexpected Parole*, N.Y. TIMES (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/us/transgender-inmate-who-sued-georgia-gets-unexpected-parole.html?mtref=www.nytimes.com&r=0>.

44. Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men's Prison*, N.Y. TIMES (Apr. 5, 2015), <http://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html>.

45. Sontag, *supra* note 44.

46. Steve Barnes, *Transgender Arkansas Inmate Denied Right to Sue Prison-Court*, YAHOO NEWS, (Dec. 17, 2015), <http://news.yahoo.com/transgender-arkansas-inmate-denied-sue-prison-court-035230166.html>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

and gender non-conforming individuals.<sup>51</sup> WPATH is recognized as authoritative by several professional organizations such as the American Medical Association, the American Psychiatric Association, and the American Psychological Association.<sup>52</sup> WPATH explains that all treatment for gender dysphoria must be individualized; there is no one size fits all treatment.<sup>53</sup> Therapeutic options include “changes in gender expression and role, hormone therapy, surgery, and psychotherapy.”<sup>54</sup> Male-to-female genital surgical procedures include: penectomy, orchiectomy, clitorplasty, and vulvoplasty.<sup>55</sup> For female to male patients, genital surgical procedures include: hysterectomy/ovariectomy, reconstruction of the fixed part of the urethra, vaginectomy, scrotoplasty, and the implantation of erection and/or testicular prostheses.<sup>56</sup>

The Standards of Care set forth six criteria for metoidioplasty or phalloplasty in female to male patients and vaginoplasty for male to female patients:

Persistent, well documented gender dysphoria;

Capacity to make fully informed decision and to consent to treatment;

Age of majority in a given country;

If significant medical or mental health concerns are present, they must be well controlled;

12 continuous months of hormone therapy as appropriate to the patient’s gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones);

12 continuous months of living in a gender role that is congruent with their gender identity.

[And] it is recommended that these patients also have regular visits with a mental health or other medical professional.<sup>57</sup>

In addition to these six criteria being met, WPATH also requires “two referrals from qualified mental health professionals who have independently evaluated the patient.”<sup>58</sup>

Vaginoplasty is an option for transitioning male-to-female individuals involving the removal of the male genitalia and the creation of female

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51. *Standards of Care*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351) (last visited Nov. 6, 2016).

52. Professional Organizations Statements Supporting Transgender People in Health Care, LAMBDA LEGAL, [http://www.lambdalegal.org/sites/default/files/publications/downloads/ll\\_trans\\_professional\\_statements.rtf\\_.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/ll_trans_professional_statements.rtf_.pdf) (last updated May 25, 2016).

53. Standards of Care, Version 7, ECF No. 10–1, *quoted in* Norsworthy v. Beard, 87 F.Supp. 3d 1164, 1170 (2015).

54. Norsworthy, 87 F.Supp. 3d at 1171.

55. Standards of Care, *supra* note 53, at 57.

56. *Id.*

57. *Id.* at 60–61.

58. Norsworthy, 87 F.Supp. 3d at 1171.



genitalia.<sup>59</sup> This procedure “removes the principal source of testosterone in the body and creates congruence between the patient’s gender identity and her primary sex characteristics.”<sup>60</sup> The Standards of Care explain this procedure to be the last and only option in some cases.

While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria. For the latter group, relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.<sup>61</sup>

Sex reassignment surgical treatments for gender dysphoria are not elective procedures.<sup>62</sup> A minority of the medical community and other groups refuse to accept that sex reassignment surgery is actually needed and not merely cosmetic.<sup>63</sup> However, a failure by this minority to fully understand gender identity, transgenderism, or gender dysphoria should not affect a transgender prisoner’s access to medical treatment. In addition, access to medical treatment cannot be based on financial or political factors.<sup>64</sup> When multiple qualified mental health professionals and surgeons deem these procedures medically necessary for an incarcerated individual and the individual meets the criteria above, the individual is eligible to undergo surgery. The state or federal government incarcerating the individual is then responsible to pay for the inmate’s surgical procedures as a part of its affirmative duty to provide adequate medical care. We cannot ignore the medical needs of our transgender inmates, who often turn to self-castration when their medical requests are denied.<sup>65</sup>

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59. *Id.*

60. *Id.*

61. Standards of Care, *supra* note 56, at 54-55 (citing Hage & Karim, 2000).

62. *Id.*, at 55.

63. Melissa Pandika, *A Case Against Sex Change Surgeries*, OZY (Nov. 11 2015), <http://www.ozy.com/immodest-proposal/-a-case-against-sex-change-surgeries/39103>; Julie Bindel, *The Operation That Can Ruin Your Life*, STANDPOINT (Nov. 2009), <http://standpointmag.co.uk> (follow “Writers A-Z” hyperlink; then follow “Julie Bindel” hyperlink; then follow “The Operation That Can Ruin Your Life” hyperlink); *Kosilek v. Spencer*, 774 F.3d 63, 76 (1st Cir. 2014) (mentioning Dr. Schmidt finding the Standards of Care to be merely guidelines, and “that he does not specifically recommend SRS, but at a patient’s request he will release medical files and send a letter indicating that a patient is ready for surgery for their chosen SRS provider”).

64. *See, e.g.*, *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (treatments cannot be denied merely because they are expensive); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) (treatment must be “based on medical considerations”); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 182 (D. Mass. 2002) (treatments cannot be denied merely because they are controversial).

65. JAILHOUSE LAWYER’S HANDBOOK, *supra* note 25; Samantha Michaels, “3 Years of Torture is Enough”: A Transgender Inmate Sues Georgia Prisons, (Mar. 2, 2015, 6:00 AM)

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### III. LEGAL ANALYSIS

#### A. LEGAL STANDARD FOR MEDICAL CARE

The Eighth Amendment prohibits cruel and unusual punishment.<sup>66</sup> Prisoners are still entitled to this Constitutional protection. In *Brown v. Plata*, the Court stated:

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.<sup>67</sup>

Thus, individuals do not lose their Eighth Amendment protection against cruel and unusual punishment by virtue of their incarceration.

The Supreme Court of the United States held that the deliberate indifference to the serious medical needs of prisoners violated the Eighth Amendment.<sup>68</sup> The Court further stated that because an inmate must rely on prison authorities to treat his or her medical needs, the failure to address those needs “may actually produce ‘torture or lingering death’ [and] [i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”<sup>69</sup> In *Estelle v. Gamble*, an inmate brought a §1983 action against the medical doctor and two correctional officials of the state prison for inadequate treatment of a back injury sustained while doing prison work.<sup>70</sup> Inmate Gamble was placed in administrative segregation less than a month after his injury because of his refusal to work due to his severe back pain.<sup>71</sup> A prison doctor treated Gamble regularly, and he took medication related to his injury.<sup>72</sup> However, nearly four months after his injury, Gamble was brought before the prison disciplinary board for his continued refusal to work due to his injury.<sup>73</sup> Gamble’s treating physician testified that Gamble “was in first class medical condition”; thus, Gamble remained in administrative segregation.<sup>74</sup> Four days later, a medical assistant examined

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available at <http://www.motherjones.com/politics/2015/02/transgender-inmate-sues-georgia-prisons-torture>.

66. U.S. CONST, amend. VIII.

67. 563 U.S. 493, 510 (2011) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311, (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

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

69. *Id.* at 103.

70. *Id.* at 97.

71. *Id.* at 99.

72. *Estelle*, 429 U.S. at 99 (1976).

73. *Id.* at 101.

74. *Id.*

Gamble and ordered him hospitalized.<sup>75</sup> The next day Gamble was treated for irregular cardiac rhythms.<sup>76</sup> Two days later, Gamble again experienced chest, back, and arm pain and asked to see a doctor and prison officials refused.<sup>77</sup> The Court held that Gambles claims of lack of medical diagnosis and inadequate medical treatment for his injury did not amount to an Eighth Amendment violation.<sup>78</sup> The Court stressed that Gamble was seen by medical personnel seventeen times over a three month period, and that the failure to pursue one treatment plan over another treatment does not give rise to a constitutional violation.<sup>79</sup>

In order to succeed on an Eighth Amendment challenge, a prisoner must satisfy a two-prong test for deliberate indifference.<sup>80</sup> The first prong requires an objective analysis where an inmate must show that she is incarcerated under conditions posing a substantial risk of harm.<sup>81</sup> In cases involving a denial of medical care, “an inmate must show that he has a serious medical need for which he has not received adequate medical care.”<sup>82</sup> The second prong is a subjective analysis that requires a prison official to have had a “sufficiently culpable state of mind,” or one of “deliberate indifference” to the health and safety of the inmate<sup>83</sup> If the inmate meets both prongs, then an Eighth Amendment violation has occurred.<sup>84</sup>

#### B. CASES APPLYING THE EIGHTH AMENDMENT TO SEX REASSIGNMENT SURGERY

The legal battle for sex reassignment surgery for transgender inmates has been contentious and tumultuous in recent years. In September 2012, a United States District Court judge granted Michelle Kosilek's request for gender-reassignment surgery to treat her severe gender dysphoria.<sup>85</sup> Kosilek was convicted of first-degree murder in 1992 and has been fighting since then to receive sex reassignment surgery.<sup>86</sup> Kosilek brought an action against the Massachusetts Department of Corrections alleging that failure to provide her sex reassignment surgery as treatment for her gender dysphoria amounted to deliberate indifference to her serious medical need

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 107.

79. *Id.*

80. *Farmer v. Brennan*, 511 U.S. 825, 825 (1994).

81. *Id.*

82. *Kosileck v. Spencer*, 889 F. Supp. 2d 190, 199 (2012).

83. *Id.* at 302-03 (applying the “deliberate indifference” standard from *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

84. *Farmer*, 511 U.S. at 834.

85. *Kosileck*, 889 F. Supp. 2d at 190-91.

86. *Kosileck v. Spencer*, 774 F.3d 63, 68–69 (1st Cir. 2014).

constituting an Eighth Amendment violation.<sup>87</sup> The district court stated that to prevail, Kosilek must prove:

(1) [s]he has a serious medical need; (2) sex reassignment surgery is the only adequate treatment for it; (3) the defendant knows that Kosilek is at high risk of serious harm if [s]he does not receive sex reassignment surgery; (4) the defendant has not denied the treatment because of good faith, reasonable security concerns or for any other legitimate penological purpose; and (5) the defendant's unconstitutional conduct will continue in the future.<sup>88</sup>

After 28 days of trial, the district court found that Kosilek had proved the above requirements and her gender identity disorder constituted a serious medical need triggering the Eighth Amendment.<sup>89</sup> However, in December 2014, the First Circuit Court of Appeals reversed the district court's decision, holding that the Department of Correction's (DOC) decision not to provide sex reassignment surgery did not amount to an Eighth Amendment violation.<sup>90</sup> The court considered "the community standard of medical care, the adequacy of the provided treatment, and the valid security concerns articulated by the DOC" in reaching its conclusion.<sup>91</sup> The majority stated:

[W]e are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking SRS in the future. Certain facts in this particular record—including the medical providers' non-uniform opinions regarding the necessity of SRS, Kosilek's criminal history, and the feasibility of postoperative housing—were important factors impacting the decision.<sup>92</sup>

The majority stated that the specific facts involving Kosilek's case did not make the DOC's denial of surgery improper under the Eighth Amendment.<sup>93</sup> The majority also claimed that its decision would not bar future litigants from successfully seeking SRS in the future.<sup>94</sup> However, the court did not articulate what a successful litigant would look like.

Circuit Judges, Thompson and Kayatta filed vehement dissents.<sup>95</sup> Judge Thompson stated:

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87. Kosileck, 889 F. Supp. 2d at 197.

88. *Id.* at 200.

89. *Id.*

90. Kosileck, 774 F.3d at 63.

91. *Id.*

92. *Id.* at 91.

93. *Id.*

94. *Id.*

95. Kosileck, 774 F.3d at 113.

I am confident that I would not need to pen this dissent, over twenty years after Kosilek's quest for constitutionally adequate medical care began, were she not seeking a treatment that many see as strange or immoral. Prejudice and fear of the unfamiliar have undoubtedly played a role in this matter's protraction...I am confident that this decision will not stand the test of time, ultimately being shelved with the likes of *Plessy v. Ferguson*, 163 U.S. 537 16 S.Ct. 1138, 41 L.Ed 256 (1896) deeming constitutional state laws requiring racial segregation, and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) finding constitutional the internment of Japanese Americans in camps during World War II.<sup>96</sup>

Judge Thompson's ominous words are troubling but ring true. Further, feasibility of postoperative housing should not be a factor in determining whether to provide a medically necessary procedure. Each state should respond to this need by creating housing for transgender inmates or housing transgender inmates with the gender matching their identity, absent factors such as criminal history that would make doing so difficult or potentially unsafe. The court's decision to overturn the district court finding undoubtedly was plagued by prejudice and fear of the unfamiliar.

In 2014, Virginia Department of Corrections escaped the possibility of being ordered to provide sex reassignment surgery for Ophelia De'lonta by paroling her.<sup>97</sup> A United States District Court judge ordered that De'lonta be examined by a gender specialist before determining whether or not the sex reassignment surgery was medically necessary.<sup>98</sup> The Virginia Department of Corrections released De'lonta after thirty years of her seventy-three-year sentence was completed.<sup>99</sup> De'lonta had been fighting for Virginia Department of Corrections to provide her with adequate medical treatment since 1999.<sup>100</sup>

California courts have also been confronted with the issue of sex-reassignment surgery for a transgender inmate with gender dysphoria. In 2014, Michelle Norsworthy brought a section 1983 action against California prison officials and medical staff for denying her sex reassignment surgery, asserting the failure to do so was a violation of her Eighth Amendment right to be free from cruel and unusual punishment.<sup>101</sup>

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96. *Id.*

97. Diane Walker, *Transgender Inmate Granted Parole*, NBC (Jan. 15, 2014), <http://www.nbc12.com/story/24466381/transgender-inmate-granted-parole>.

98. *Id.*

99. *Transgender Inmate Ophelia De'Lonta Wins Appeal to See Gender Specialist in Long Struggle for Sex-Reassignment*, QUEERTY, <http://www.queerty.com/transgender-inmate-ophelia-delonta-wins-appeal-to-see-gender-specialist-in-long-struggle-for-sex-reassignment-20130831>.

100. *Id.*

101. *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1185 (N.D. Cal. 2015).

Norsworthy was diagnosed with gender dysphoria in 2000 but had experienced confusion about her gender identity since childhood.<sup>102</sup> Since 2000, she had sought out hormone therapy and sex reassignment surgery since 2000.<sup>103</sup> Norsworthy was denied sex reassignment surgery although her psychologist had repeatedly concluded it was medically necessary.<sup>104</sup>

On April 2, 2015, the United States District Court for the Northern District ordered the California Department of Corrections (CDCR) to pay for Norsworthy's sex-reassignment surgery.<sup>105</sup> Under the CDCR regulations at that time of the Norsworthy order, vaginoplasty was not considered a medically necessary procedure and, therefore, would not be provided unless the inmate's attending physician prescribed the treatment as clinically necessary and the procedure was approved by two of the institutions committees.<sup>106</sup> The surgery was scheduled to for July 2014, but was pushed back after California submitted an appeal.<sup>107</sup> The Ninth Circuit noted that, "the case raises serious legal questions about whether denying the surgery violates Ms. Norsworthy's constitutional rights against cruel and unusual punishment."<sup>108</sup> However, days before the Ninth Circuit was to hear the appeal, Governor Jerry Brown paroled Norsworthy.<sup>109</sup> This deliberate move allowed the Ninth Circuit to evade having to decide the constitutionality of denying the surgery to Norsworthy and the potential unfavorable implications to the state.<sup>110</sup>

In yet another case, Shiloh Quine, a transgender woman, filed a complaint against the CDCR to provide her with sex reassignment surgery as treatment for her gender dysphoria and for the ability to access commissary items available to CDCR inmates at women's facilities.<sup>111</sup> Quine is currently serving a life sentence without the possibility of parole.<sup>112</sup> On August 7, 2015, in United States District Court for the

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102. *Id.* at 1169.

103. *Id.* at 1173.

104. Norsworthy v. Beard, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/norsworthy-v-beard>.

105. Norsworthy, 87 F. Supp. 3d at 1195.

106. CAL. CODE REGS. tit. 15, § 3350.1(b), (d) (2016).

107. *Gov. Brown Allows Parole for Transgender Inmate*, KCRA (Aug. 7, 2015, 7:35 PM), <http://www.kcra.com/news/gov-brown-weighs-parole-for-transgender-inmate/34595264>.

108. The Associated Press, *Transgender California Inmate Wins Parole*, N.Y. TIMES (Aug. 8, 2014), [http://www.nytimes.com/2015/08/09/us/transgender-california-inmate-wins-parole.html?\\_r=0](http://www.nytimes.com/2015/08/09/us/transgender-california-inmate-wins-parole.html?_r=0).

109. Paige St. John, *In a First, California Agrees to Pay for Transgender Inmate's Sex Reassignment*, L.A. TIMES (Aug. 10, 2015), <http://www.latimes.com/local/california/la-me-inmate-transgender-20150810-story.html>.

110. *Id.*

111. *Quine v. Beard*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/quine-v-beard>.

112. Deborah Sontag, *Transgender Inmate Who Sued Georgia Gets Unexpected Parole*, N.Y. TIMES (Aug. 31, 2015), [http://www.nytimes.com/2015/09/01/us/transgender-inmate-who-sued-georgia-gets-unexpected-parole.html?mtref=www.nytimes.com&\\_r=0](http://www.nytimes.com/2015/09/01/us/transgender-inmate-who-sued-georgia-gets-unexpected-parole.html?mtref=www.nytimes.com&_r=0).

Northern District of California, all parties involved agreed that sex reassignment surgery was medically necessary for Shiloh Quine, a transgender inmate housed in CDCR.<sup>113</sup> This was a landmark settlement and a victory for civil rights, health advocates, and the transgender community. By the terms in the agreement Shiloh Quine will be the first transgender inmate to undergo sex reassignment surgery while in prison and subsequently be moved to a women's prison.<sup>114</sup> However, per the settlement agreement, the surgery is "limited in scope and application to this case and Plaintiff only."<sup>115</sup>

As part of the Quine settlement, CDCR also agreed to formulate guidelines for transgender inmates seeking sex reassignment surgery as treatment for gender dysphoria.<sup>116</sup> CDCR announced the new guidelines in October of 2015 and became the first state in the nation to adopt a specific policy for transgender inmates seeking the procedure.<sup>117</sup> The standards set up a committee to review all requests for sex reassignment surgery to be comprised of two physicians from medical services, and two physicians and psychologists from the mental health program.<sup>118</sup> At least fifty percent of the committee, including at least one member from each group, must be in agreement.<sup>119</sup> Furthermore, the guidelines set forth eleven criteria for the committee to consider in determining whether or not sex reassignment surgery will be recommended:

(1) The patient has been diagnosed with gender dysphoria, (2) the efficacy of the current treatment for gender dysphoria, and whether other treatment should be considered, (3) whether the patient has current mental health or medical contraindications, (4) any known medical/or co-existing mental health concerns have been fully addressed and have been well-controlled for at least one year; do not pose a contraindication to SRS; and are not likely to worsen with surgery or impede surgical recovery, (5) the patient has: continuously manifested a desire to live and to be accepted as a member of the preferred sex for at least two years; lived full-time in his/her desired gender role for at least 12 months; and has received at least 12 continuous months of medically supervised hormone therapy appropriate to his/her gender goals; and there is at least two years remaining before his/her anticipated parole release date, (6) the patient is in significant distress due to lack of reasonable response to available nonsurgical

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113. Joint Notice of Settlement Agreement, *supra* note 4, at 3.

114. *Id.* at 4.

115. *Id.*

116. *Id.*

117. Ken Broder, *California Is First State with Sex-Reassignment Policy for Inmates*, ALL GOV (Oct. 22, 2015), <http://www.allgov.com/usa/ca/news/controversies/california-is-first-state-with-sex-reassignment-policy-for-inmates-151022?news=857687>.

118. CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES, *supra* at 6.

119. *Id.* at 2.

treatment of his/her gender dysphoria, (7) the patient has been provided with information to enable him/her to understand that his/her environment will be evaluated after surgery and any new environment may pose adaptive challenges, (8) the patient can be expected to successfully and safely transfer and adjust to confinement postoperatively, (9) there is no evidence suggestive of any external coercion or predation and the desire for SRS is freely given, (10) any relevant factors listed in Attachment 3, (11) and any other information available which may be relevant to their discussion or determination.<sup>120</sup>

The guidelines are comprehensive and list surgical procedures that may be authorized as well as procedures that are considered cosmetic and will not be performed.<sup>121</sup> Although California's new policy has been deemed conservative,<sup>122</sup> transgender rights advocates are hopeful that the guidelines will help ensure access for other state prisoners as well as set the stage for other states to follow.<sup>123</sup>

#### IV. CONCLUSION

As Justice Thompson noted, many perceive sex reassignment surgery as "strange or immoral"<sup>124</sup> which thus creates opposition for individuals seeking this medically necessary care. However, government, media, and other groups are beginning to listen to the transgender and medical communities. In May 2014, the U.S. Department of Human Services lifted its exclusion on public funding for transgender medical services under Medicare.<sup>125</sup> Sex reassignment procedures requested by a patient's physician are now covered by this tax-funded program.<sup>126</sup> Although this has no material effect on inmates while incarcerated, this was a groundbreaking victory for the transgender community as a whole. This

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120. CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES, *supra* at 6.at 3.

121. *Id.* at 8 (including brow lift, face lift, collagen injections, lip enhancement, facial bone reduction, voice modification surgery, and neck tightening, among many others).

122. Associated Press, *California Sets Inmate Sex Reassignment Rules*, NBC L.A. (Oct. 21, 2015, 12:39), <http://www.nbclosangeles.com/news/local/California-inmate-sex-reassignment-rules-334954001.html>; Richard Perez-Pena, *California Is First State to Adopt Sex Reassignment Surgery Policy for Prisoners*, N.Y. TIMES (Oct. 21, 2015), [http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html?\\_r=0](http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html?_r=0).

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

124. Kosileck, 774 F.3d at 87.

125. Paige St. John, In a First, *California Agrees to Pay for Transgender Inmate's Sex Reassignment*, L.A. TIMES (Aug. 10, 2015), <http://www.latimes.com/local/california/la-me-inmate-transgender-20150810-story.html>.

126. *Id.*



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largely reflects a growing understanding of gender dysphoria and the medical treatments necessary to treat it.<sup>127</sup>

California has been a leader in granting access to health care for transgender inmates, but lingering questions still remain. Will the Quine settlement and resulting CDCR guidelines make it more difficult or easier for other transgender inmates to obtain sex reassignment surgery in California and other prisons across the United States? Will states parole other inmates who request sex reassignment surgery whether or not they are eligible for parole? Facially, the new guidelines established by CDCR are a success. However, granting access to medically necessary care is much different than actually receiving that care. I am hopeful for Quine and other transgender inmates in California who have been fighting to undergo this surgery. The day that Quine successfully undergoes surgery and becomes the first inmate in the nation to win her battle for sex reassignment surgery will be a victorious one.

The settlements, paroles, and new guidelines are victories, albeit partials ones. Transgender inmates are confined all across the United States in state, federal, and private prisons. The rest of the states need to follow California and listen to the professional organizations, physicians, and psychiatrists in their prisons, as well as the broader transgender community and their allies in recognizing the dire need for this procedure behind bars.

We need more brave individuals like Norsworthy, Kosilek, and Quine to continue to bring challenges and urge their correctional departments to implement these standards and create pathways for transgender inmates to receive treatment. Prisoners have a right to adequate medical care. Denying a certain treatment because it is politically unpopular or unfamiliar is at odds with our constitutional guarantees. Sex reassignment surgery is a medical treatment for gender dysphoria, and often the last and medically necessary form of treatment. There is no denying the constitutionality of sex reassignment surgery in the United States. It is more than just a fight for necessary medical care; it is a fight for the recognition of one's sexual identity, access to proper health and safety, and, plainly, a fight to be treated as a human being.

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127. Emma Margolin, *Review Board Tosses Medicare Barrier to Sex-Reassignment Surgery*, MSNBC (May 30, 2014), <http://www.msnbc.com/msnbc/transgender-medicare-recipients-score-big-win>.