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# Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?

Susan S. Bendlin

*Barry University School of Law*

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# GENDER DYSPHORIA IN THE JAILHOUSE: A CONSTITUTIONAL RIGHT TO HORMONE THERAPY?

SUSAN S. BENDLIN\*

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## I. INTRODUCTION

United States Army Private Bradley Manning made headlines in the fall of 2013 when he was convicted of espionage, fraud, and theft for divulging classified military and diplomatic information to WikiLeaks.<sup>1</sup> After the twenty-five year old was sentenced to thirty-five years in military prison, he made instantly made headlines again by announcing that he wanted to live as a woman in prison. Divulging that he has Gender Identity Disorder,<sup>2</sup> Manning said that he had suffered

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\* Associate Professor, Barry University School of Law. Former Dean of Students at Emory University School of Law, Duke University School of Law, and Barry University School of Law.

<sup>1</sup> In subsequent parts of this Article, the female pronoun “she” is used to describe Manning. This stylistic decision was based on the Associated Press’ announcement that “it will use Pvt. Chelsea E. Manning and female pronouns for the soldier, in accordance with her wishes to live as a woman.” This comports with the transgender guidance in the AP Stylebook. See Associated Press, *Bradley Manning Explains Gender Change*, POLITICO (Aug. 26, 2013), <http://www.politico.com/story/2013/08/bradley-chelsea-manning-gender-change-95928.html#ixzz2dI63RMBE>; see also Paul Farhi, *Media Wrestles with How to Refer to Manning*, WASH. POST (Aug. 22, 2013), [http://articles.washingtonpost.com/2013-08-22/lifestyle/41435592\\_1\\_bradley-manning-manning-s-david-coombs](http://articles.washingtonpost.com/2013-08-22/lifestyle/41435592_1_bradley-manning-manning-s-david-coombs).

<sup>2</sup> Gender Identity Disorder is renamed Gender Dysphoria in the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) which was released in May 2013 at the annual meeting of the American Psychiatric Association. THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (Am. Psychiatric Ass’n ed., 5th ed. 2013)

for years in the wrong body and that he would henceforth be recognized as a female, Chelsea Manning.<sup>3</sup> The Army, however, has stated that it does not provide gender reassignment surgery or hormone therapy.<sup>4</sup> The Army further responded that Manning would be incarcerated with males, would dress the same as all the male inmates, and would be called Bradley, not Chelsea.<sup>5</sup> Manning's attorney announced at the time that he might file suit to obtain hormone therapy treatment for his client.<sup>6</sup> Manning has also petitioned President Obama for a pardon.<sup>7</sup>

This Article explores whether incarcerated inmates with Gender Dysphoria, such as Manning, have a constitutional right to receive medical treatment to effectuate gender transfer, and if so, whether they are likely to succeed in suing to obtain treatment if it is not provided by prison officials.<sup>8</sup> One remedy is to bring a suit in federal court for injunctive relief under 42 U.S.C. §1983 (2006).<sup>9</sup> The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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[hereinafter DSM-V]. This Article uses the term Gender Dysphoria except when the cited sources have used the term Gender Identity Disorder (GID) or transsexualism. To avoid confusion and to be faithful to the original sources, this Article employs the terminology used in those sources.

<sup>3</sup> Aaron Blake & Julie Tate, *Bradley Manning Comes Out as Transgender: "I Am Female"*, WASH. POST (Aug. 22, 2013), [http://articles.washingtonpost.com/2013-08-22/world/41435413\\_1\\_army-intelligence-analyst-bradley-manning-hormone-therapy](http://articles.washingtonpost.com/2013-08-22/world/41435413_1_army-intelligence-analyst-bradley-manning-hormone-therapy); Richard A. Serrano, *Manning Announces Plan to Live as Woman in Prison: Ex-Military Intel Analyst Asks to be Called Chelsea*, ORLANDO SENTINEL, Aug. 23, 2013, at A6, available at LexisNexis.

<sup>4</sup> Serrano, *supra* note 3, at A6.

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

<sup>6</sup> See Associated Press, *supra* note 1 (stating that Manning and his attorney knew the Army might not provide hormone treatment, but hoped the military prison at Fort Leavenworth, Kansas would allow it since Manning had been diagnosed with gender-identity disorder by an Army psychiatrist who testified at his trial).

<sup>7</sup> Richard A. Serrano, *Manning Asks President for a Pardon and Freedom: Says Files Leaked "Out of Concern for my Country"*, ORLANDO SENTINEL, Sept. 5, 2013, at A10, available at LexisNexis.

<sup>8</sup> For purposes of analyzing Eighth Amendment considerations as they apply to incarcerated transgender persons, this Article addresses situations where the state has allegedly violated an inmate's constitutional rights, but does not focus on any particular prison regulations or operating procedures. Regulations pertaining to incarceration in a military prison may differ from civilian Department of Corrections rules, just as state penitentiaries can be different from federal prisons.

<sup>9</sup> The analysis is essentially the same regardless of whether an inmate sues a state prison official for deprivation of his or her Eighth Amendment right under 42 U.S.C. § 1983 (2006) or whether an inmate in a federal penitentiary sues a federal official in a *Bivens*-style suit. Compare 42 U.S.C. § 1983 (2006), with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>10</sup>

The specific constitutional right implicated in prison cases is the Eighth Amendment prohibition against cruel and unusual punishment.<sup>11</sup> In cases involving the conditions of confinement and the need for medical care, the inmate alleges that he has been deprived of his constitutional rights by the prison officials' failure to provide for his fundamental needs such as food, shelter, clothing, safety, and medical care.<sup>12</sup> The Supreme Court stated in a 1976 decision involving an incarcerated prisoner<sup>13</sup> that when the State has actively restrained a person and deprived him of the ability to care for himself, the State has a constitutional duty of care or protection.<sup>14</sup> It is the act of taking custody of a person that triggers the state's duty to provide basic care for him.<sup>15</sup>

This Article examines current jurisprudence on the subject of providing hormone therapy and other sex reassignment medical treatment to incarcerated prisoners with Gender Dysphoria. Part II discusses the two-pronged constitutional test for determining whether the state has violated a transgender inmate's Eighth Amendment right to receive adequate medical care. Subpart II(A) looks at the objective prong of the test, that is, whether a prisoner with Gender Dysphoria has a "serious medical need". Serious medical need is discussed in two subsections: (1) whether the medical profession regards Gender Dysphoria as an illness, and (2) whether courts treat it as a serious medical need. Subpart II(B) addresses the subjective prong of the Eighth Amendment test and describes what "deliberate indifference" means in the context of inmates who seek medical treatment.

Part III addresses some reactions to Private Manning's request for Gender Dysphoria treatment as well as various viewpoints on whether prisoners ought to receive medical care at taxpayers' expense.

Part IV is the Conclusion, which argues that the right thing to do is to provide hormone therapy or other medical treatment to transgender inmates who meet the constitutional test. It would be cruel and unusual punishment for society to leave these inmates untreated—to let them suffer horribly for years on end—when the state has incarcerated them (although rightly so) and thus rendered them unable to provide for their own medical needs.

## II. THE TEST FOR DETERMINING WHETHER THE INMATE'S EIGHTH AMENDMENT RIGHT WAS VIOLATED

Evaluating a prisoner's Eighth Amendment claim involves two inquiries: an objective component as to whether the inmate displays a "serious medical need," and a subjective component as to whether the prison officials were "deliberately

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<sup>10</sup> 42 U.S.C. §1983 (2006).

<sup>11</sup> U.S. CONST. amend. VIII.

<sup>12</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

<sup>13</sup> *Estelle v. Gamble*, 429 U.S. 97, 97 (1976).

<sup>14</sup> *Id.* at 104.

<sup>15</sup> *Id.* at 103.

indifferent” to that need.<sup>16</sup> Quoting the Second Circuit, a federal district court recently articulated the test in a case involving an inmate with Gender Dysphoria: “The objective ‘medical need’ element measures the severity of the alleged deprivation, while the subjective ‘deliberate indifference’ element ensures that the defendant prison official acted with a sufficiently culpable state of mind.”<sup>17</sup>

*A. The Objective Part of the Test: Whether a Transgender Inmate Demonstrates a Serious Need for Medical Care*

To decide whether a prisoner has an Eighth Amendment right to receive medical treatment for gender reassignment, prison officials must determine whether such medical care is necessary. That determination hinges on whether treatment of Gender Dysphoria is a serious medical need.<sup>18</sup> If medical treatment is optional or elective, then the state has no duty to provide such care.<sup>19</sup>

1. Does the Medical Profession View Gender Dysphoria as Presenting a “Serious Medical Need”?

Gender Dysphoria is described as the feeling of being trapped in the wrong body; for example, Private Manning said that for most of his life, he had felt like a woman imprisoned in a man’s body.<sup>20</sup> The American Psychiatric Association’s new edition of the diagnostic manual describes the symptoms of Gender Dysphoria as “[a] marked incongruence between one’s experienced/expressed gender and assigned gender, of at least [six] 6 months duration, as manifested by [two] 2 or more . . . indicators.”<sup>21</sup> The indicators include “a strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender,” “a strong desire for the primary and/or secondary sex characteristics of the other gender,” “a strong desire to be of the other gender,” and “a strong conviction that one has the typical feelings and reactions of the other gender.”<sup>22</sup> Additionally, Gender Dysphoria “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>23</sup>

The question is whether medical treatment for Gender Dysphoria is considered elective (similar to rhinoplasty or corrective vision surgery), necessary (similar to treatment for other diagnosed medical illnesses ranging from cancer to

<sup>16</sup> *Brooks v. Berg*, 270 F. Supp. 2d 302, 309 (N.D.N.Y. 2003), *vacated in part by* 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

<sup>17</sup> *Id.* (quoting *Smith v. Carpenter*, 316 F.3d 178, 183-84 (2d Cir. 2003)).

<sup>18</sup> *Fields v. Smith*, 712 F. Supp. 2d 830, 855 (E.D. Wis. 2010), *aff’d*, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1810 (2012).

<sup>19</sup> *Garrett v. Elko*, 120 F.3d 261 (4th Cir. 1997).

<sup>20</sup> *Bradley Manning Identifies as Transgender: Transitioning Explained*, CBS NEWS (Aug. 23, 2013, 1:36 PM), [http://www.cbsnews.com/8301-204\\_162-57599881/bradley-manning-identifies-as-transgender-transitioning-explained/](http://www.cbsnews.com/8301-204_162-57599881/bradley-manning-identifies-as-transgender-transitioning-explained/).

<sup>21</sup> DSM-V, *supra* note 2, at 452.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 453.

schizophrenia), or whether it falls into that grey area where treatment is sometimes, but not always, medically indicated.

The issue is a sensitive one because the diagnosis of Gender Dysphoria as a medical illness has a negative connotation to members of the transgender community. If, however, the condition is not recognized as an illness, then medical treatment may not be deemed necessary.<sup>24</sup> Typically, Gender Dysphoria is diagnosed as a mental illness. Another possible medical explanation—as yet unproven—is that “there are critical periods of development during fetal or neonatal life during which exposure to testosterone influences the sexual differentiation of the brain.”<sup>25</sup>

One writer noted that “[t]raditionally, transgender inmates have gained access to hormone therapy by appealing to the DSM-IV's classification of Gender Identity Disorder as a mental illness, and by establishing that prison officials' failure to provide hormone therapy constitutes deliberate indifference to a serious medical need.”<sup>26</sup> Some poignantly note that labeling Gender Identity Disorder as a mental illness is “a double-edged sword: while it allows access to hormone therapy, it does so by describing transgender individuals as somehow sick or infirm,” and “[t]his description is at odds with the transgender community's conceptualization of itself.”<sup>27</sup>

The Standards of Care published by the World Professional Association for Transgender Health (WPATH) are recognized as protocols for the treatment of Gender Identity Disorder.<sup>28</sup> Called a “triadic approach,” this widely accepted treatment plan involves three sequential steps: (1) hormone therapy, (2) a period of time living as the opposite gender, and (3) sex reassignment surgery.<sup>29</sup> Medical treatment is not always necessary or desirable, however. Not all transgender individuals are dysphoric; many do not need or seek medical attention, according to a member of the American Psychiatric Association's subcommittee on the revision of the psychiatric diagnostic manual.<sup>30</sup> One commentator on gender identity issues has explained:

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<sup>24</sup> See Camille Beredjick, *DSM-V To Rename Gender Identity Disorder “Gender Dysphoria”*, ADVOCATE.COM (Jul. 23, 2012, 8:00 PM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria> (stating that a diagnosis of Gender Identity Disorder can make the difference between obtaining insurance coverage for gender reassignment surgery and other medical procedures and not obtaining coverage).

<sup>25</sup> *Bradley Manning Identifies as Transgender: Transitioning Explained*, *supra* note 20.

<sup>26</sup> Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> Previously called The Harry Benjamin Standards of Care, this three-step treatment protocol is referenced by many courts. *See, e.g.,* O'Donnabhain v. Comm'r, 134 T.C. 34, 37 (T.C. 2010); *see also* Kosilek v. Maloney, 221 F. Supp. 2d 156, 158-59 (D. Mass. 2002). The standards can be found at [http://www.wpath.org/uploaded\\_files/140/files/IJT%20SOC,%20V7.pdf](http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf).

<sup>29</sup> *O'Donnabhain*, 134 T.C. at 38.

<sup>30</sup> *See* Beredjick, *supra* note 24.

Perhaps the most common misunderstanding is the belief that all transgender people undergo genital surgery (phalloplasty or vaginoplasty—the creation of a penis or vagina) as the primary medical treatment for changing gender. In fact, gender-confirming health care is individualized treatment that differs according to the medical needs and pre-existing conditions of individual transgender people. Some transgender people undergo no medical care related to their expression of a gender identity that differs from their birth-assigned sex. Others undergo only hormone therapy treatment or any of a number of surgical procedures.<sup>31</sup>

Medical testimony has been given at trial to the effect that “[f]or some people the disorder is so intense and so severe, . . . they simply cannot function unless they do something to correct this disorder. For other people the discomfort is less intense, and they are able to manage the condition over a lifetime.”<sup>32</sup> Thus, the need for medical treatment varies significantly from case to case, and an inmate’s request must be evaluated on an individual basis.

## 2. Gender Dysphoria: Have Courts Recognized Treatment as a “Serious Medical Need”?

When presented with prisoners’ claims of constitutional deprivation, courts have struggled to determine whether medical treatment is necessary for inmates with Gender Dysphoria.<sup>33</sup> Factors to use in assessing whether an inmate has a serious medical need include: (1) whether a reasonable doctor or patient would perceive the medical need in question as “important and worthy of comment or treatment,” (2) whether the medical condition significantly affects daily activities, and (3) whether “chronic and substantial pain” exists.<sup>34</sup> “A serious medical need is one that involves a substantial risk of serious harm if it is not treated.”<sup>35</sup>

Many courts have held that treatment for Gender Dysphoria is a “serious medical need” for purposes of the Eighth Amendment.<sup>36</sup> Specifically, the First, Fifth, Seventh, and Eighth Circuits have all concluded that Gender Dysphoria constitutes a

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<sup>31</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754 (2008) (internal citations omitted).

<sup>32</sup> *Fields v. Smith*, 712 F. Supp. 2d 830, 841-42 (E.D. Wis. 2010) (quoting the trial transcript testimony of Dr. R. Ettner).

<sup>33</sup> See, e.g., *id.* at 856-62 (providing detailed reasoning from prior cases and holding unconstitutional a Wisconsin statute prohibiting Gender Identity Disorder treatment in state prisons); see also *Konitzer v. Frank*, 711 F. Supp. 2d 874, 899-905 (E.D. Wis. 2010) (reviewing several prior cases).

<sup>34</sup> *Konitzer*, 711 F. Supp. 2d at 898; see also *Brooks v. Berg*, 270 F. Supp. 2d 302, 309 (N.D.N.Y. 2003), *vacated in part by* 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

<sup>35</sup> *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 199 (D. Mass. 2012) (“[t]ypically, it 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”); accord *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 241-42 (D. Mass. 2012).

<sup>36</sup> *Fields*, 712 F. Supp. 2d at 862.

serious medical need.<sup>37</sup> In this Section of the Article, several cases are presented to illustrate how courts have addressed the objective prong of the constitutional test.

More than twenty-five years ago, the Seventh Circuit took the position that “transsexualism” presents a serious medical need.<sup>38</sup> The inmate in that case had been living as a female since the age of fourteen and had received hormone therapy and other Gender Dysphoria treatment for nine years prior to being incarcerated.<sup>39</sup> Once imprisoned, she was denied “all medical treatment—chemical, psychiatric or otherwise—for her GID and related medical needs.”<sup>40</sup> She suffered severe withdrawal symptoms from the hormone therapy, and requested estrogen. Although the district court characterized her request as a claim for “elective medication” and dismissed her case, the Seventh Circuit disagreed, announcing that transsexualism presented a serious medical need.<sup>41</sup> The court concluded that the prisoner had stated a valid Eighth Amendment claim “which, if proven, would entitle her to some kind of medical treatment.”<sup>42</sup> The court emphasized that the inmate did not “have a right to any particular type of treatment, such as estrogen therapy...” but concluded that some type of medical treatment was necessary.<sup>43</sup>

The Seventh Circuit’s current stance is that inmates with Gender Dysphoria should receive medical treatment,<sup>44</sup> but in a rather dramatic 1997 opinion, one Seventh Circuit panel deviated from the majority view and took the opposite position.<sup>45</sup> That court stated in *Maggert v. Hanks*, “except in special circumstances that we do not at present foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria.”<sup>46</sup> The appellate court indicated that the prisoner’s suit was properly dismissed because Maggert, the inmate, had failed to submit evidence to contradict the prison psychiatrist’s opinion that Maggert did not have Gender Dysphoria and did not need estrogen.<sup>47</sup> The Seventh Circuit seized the occasion to go beyond the narrow constraints of the *Maggert* case and address what it labeled “a broader issue,” that is, “the problematic character” of “the jurisprudence of transsexualism.”<sup>48</sup>

In *Maggert*, the Seventh Circuit described Gender Dysphoria as “a serious psychiatric disorder” and said that “someone eager to undergo this mutilation [sex

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

<sup>38</sup> *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987), *cert. denied*, 484 U.S. 395 (1987).

<sup>39</sup> *Id.* at 410.

<sup>40</sup> *Id.* at 413.

<sup>41</sup> *Id.* at 411-13.

<sup>42</sup> *Id.* at 413.

<sup>43</sup> *Id.*

<sup>44</sup> *See Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010).

<sup>45</sup> *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997).

<sup>46</sup> *Id.* at 672.

<sup>47</sup> *Id.* at 671.

<sup>48</sup> *Id.*



reassignment surgery] is plainly suffering from a profound psychiatric disorder.”<sup>49</sup> This description would seem to indicate that Gender Dysphoria is a psychiatric disorder of such magnitude as to amount to a “serious medical need,” thus satisfying the objective prong of the constitutional test. The court, surprisingly, insisted however that “it does not follow that the prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to ‘cure’ a prisoner’s gender dysphoria.”<sup>50</sup> The opinion implied, then, that the reason why the court labeled “the jurisprudence of transsexualism” as “problematic” is that it disagreed with the dominant view, which is that the prison has a duty to provide curative treatment once Gender Dysphoria is diagnosed as a serious medical need.<sup>51</sup> The *Maggert* panel reached the opposite conclusion. Calling hormone therapy and surgical treatments “protracted and expensive,” the Seventh Circuit stated: “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. He is entitled only to minimum care.”<sup>52</sup> This statement leaves unanswered the question as to what other type of “minimum care” the prison could possibly provide to a transgender inmate when there are no successful “nonradical treatments” for Gender Dysphoria, as the court itself acknowledged.<sup>53</sup> Continuing, the court addressed Eighth Amendment concerns:

Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. *We do not want transsexuals committing crimes because it is the only route to obtaining a cure.*<sup>54</sup>

In its conclusion, the Seventh Circuit stated that a transgender inmate is entitled to be protected so that he is not used as “a sexual plaything.”<sup>55</sup> That conclusion is relevant to an inmate’s right to safety while incarcerated, but it does not address his right to receive needed medical care. Ultimately, that court did not provide an answer as to what “minimum” medical care a transgender inmate could or should receive.<sup>56</sup>

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<sup>49</sup> *Id.* The court made a slightly inconsistent statement: “Gender Dysphoria is not, at least not yet, generally considered a severe enough condition to warrant expensive treatment at the expense of others than the person suffering from it.” *Id.* at 672.

<sup>50</sup> *Id.* at 671 (stating also that although some cases imply that less drastic and less costly treatments exist, this court found “only one report” of a “successful nonradical treatment,” and seeming to dismiss the less radical treatment as unsuccessful and undesirable).

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

<sup>52</sup> *Id.* (internal citations omitted).

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

<sup>54</sup> *Id.* at 672 (emphasis added).

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

<sup>56</sup> Moreover, the standard as articulated by courts more recently is not “minimum care,” it is “adequate care.” Providing adequate care can mean doing more than the bare minimum to address a prisoner’s medical needs. See *Kosilek II*, 889 F. Supp. 2d 190, 207 (D. Mass. 2012).

Most recently, the Seventh Circuit has taken a clear, strong position supporting the provision of necessary medical treatment, including hormone therapy and gender-reassignment surgery, when it is prescribed for transgender prisoners.<sup>57</sup> In *Fields v. Smith*, the court refuted and discredited the earlier *Maggert* dicta about the high cost of Gender Dysphoria treatments by pointing to evidence that the cost of hormone therapy varies between \$300 and \$1,000 per inmate per year whereas a common anti-psychotic drug costs the prison more than \$2,500 per inmate per year.<sup>58</sup> Additionally, although gender-reassignment surgery costs roughly \$20,000, the Department of Corrections “paid \$37,244 for one coronary bypass surgery and \$32,897 for one kidney transplant surgery.”<sup>59</sup> Therefore, Gender Dysphoria treatment is not unusually expensive and is actually less costly than other types of medical care that many prisoners receive. The *Fields* court struck down a 2005 Wisconsin statute<sup>60</sup> that outlawed the use of state funds to provide hormone therapy and/or gender-transfer surgery to prisoners.<sup>61</sup> Concluding that the statute was unconstitutional on its face and as applied, the court stated, “[j]ust as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID.”<sup>62</sup>

Citing *Fields v. Smith*, a federal district court in Wisconsin<sup>63</sup> stated in *Konitzer v. Wall* that “several courts, including the Court of Appeals for the Seventh Circuit, have considered gender identity disorder or transsexualism a serious medical need for purposes of the Eighth Amendment.”<sup>64</sup> In an earlier suit brought by the same prisoner, *Konitzer*, the district court had reviewed extensive testimony from medical experts and had stated, “[c]onsensus exists among experts that estrogen therapy is a cornerstone of treatment for a male-to-female individual with GID, while nuances of type and dose remain controversial, or at least subject to much diversity of opinion.”<sup>65</sup> In summary, the current position of the Seventh Circuit is that Gender Dysphoria presents a serious medical need and that hormone therapy is an accepted, appropriate treatment.

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<sup>57</sup> *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1810 (2012).

<sup>58</sup> *Id.* at 555.

<sup>59</sup> *Id.*

<sup>60</sup> WIS. STAT. ANN. § 302.386(5m) (West 2010).

<sup>61</sup> *Fields*, 653 F.3d at 559.

<sup>62</sup> *Id.* at 557. “Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture.” *Id.* at 556.

<sup>63</sup> A federal district court sitting in Wisconsin is within the jurisdiction of the Seventh Circuit. UNITED STATES COURTS, GEOGRAPHIC BOUNDARIES, *available at* <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Oct. 31, 2013).

<sup>64</sup> *Konitzer v. Wall*, No. 12-cv-874-bbc, 2013 WL 2297059, at \*3 (W.D. Wis. May 24, 2013).

<sup>65</sup> *Konitzer v. Frank*, 711 F. Supp. 2d 874, 889 (E.D. Wis. 2010).

In *Battista v. Clarke*, the First Circuit also emphasized in 2011 that Gender Dysphoria presents a serious medical need.<sup>66</sup> That case involved a civil inmate who had first requested hormone therapy fifteen years earlier, but who received only a few sporadic treatments despite recommendations from health professionals.<sup>67</sup> Even after the inmate mutilated his genitals with a razor, officials refused to provide the requested hormone therapy to treat gender identity disorder.<sup>68</sup> Ruling in favor of the inmate, the First Circuit stated, “[i]t may take some education to comprehend that GID is a disorder that can be extremely dangerous, but the education seems to have taken an unduly long time in this instance, especially in light of the self-mutilation attempt.”<sup>69</sup>

The Fifth Circuit has also treated Gender Dysphoria as a serious medical need.<sup>70</sup> The court stated in 2005 that it was “assuming, without deciding, that transsexualism does present a serious medical need.”<sup>71</sup> Despite that acknowledgement, the court denied hormone therapy to the inmate in that case, Praylor, after the prison’s medical director testified that Praylor had already been evaluated and denied the treatment twice.<sup>72</sup> The denial was based partly on “the lack of medical necessity for the hormone,” but also partly on “the prison’s inability to perform a sex-change operation” and “the disruption to the all-male prison.”<sup>73</sup> The inmate had not asked for surgery, but had only requested hormone therapy and brassieres. Although the Fifth Circuit acknowledged that gender identity disorder presents a serious medical need, the panel seemed to balk at the treatment and upheld the district court’s refusal to accommodate Praylor’s request.<sup>74</sup>

Like the Fifth Circuit, the Eighth Circuit has also “assumed without deciding that [an inmate’s] gender identity disorder constitutes a serious medical need.”<sup>75</sup> However, the court held in *Long v. Nix* that the inmate had not presented a viable Eighth Amendment claim because it was his own fault that prison officials did not treat his gender identity disorder.<sup>76</sup> He repeatedly refused psychological counseling over a period of twenty years.<sup>77</sup> “Having no apparent interest in overcoming his GID,

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<sup>66</sup> *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011).

<sup>67</sup> *Id.* at 450 (explaining that Battista had served a prison sentence for rape, robbery, and kidnapping, and had afterwards been involuntarily committed to the civil facility where this claim arose).

<sup>68</sup> *Id.* at 450-51.

<sup>69</sup> *Id.* at 455.

<sup>70</sup> *Praylor v. Tex. Dep’t of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005).

<sup>71</sup> *Id.* at 1209.

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

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

<sup>74</sup> *Id.* (basing its decision on the deliberate indifference standard, discussed *infra*).

<sup>75</sup> *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996).

<sup>76</sup> *Id.* at 766.

<sup>77</sup> *Id.*

Long [the inmate] has frustrated the attempts of prison doctors to treat that disorder,” stated the court.<sup>78</sup>

A federal district court in Massachusetts held in 2012 that a transgender prisoner, Michelle Kosilek, demonstrated a serious medical need for which the Eighth Amendment requires treatment.<sup>79</sup> Kosilek had received psychotherapy, Prozac, and hormone treatment while incarcerated but continued to suffer such extreme mental distress that he tried to castrate himself and to kill himself.<sup>80</sup> The treatment he had already received did not amount to “adequate medical care,” according to the court, as that standard necessitates providing “services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”<sup>81</sup> While acknowledging that “adequate” care does not mean “ideal care or the care of his choice,”<sup>82</sup> the court held that Kosilek satisfied the objective prong of the test (proving a serious medical need) and that sex reassignment surgery would be the only adequate treatment for him.<sup>83</sup> The court granted an injunction ordering gender reassignment surgery.

Even the United States Tax Court concluded that Gender Identity Disorder “is a ‘disease’ within the meaning of section 213 [of the Internal Revenue Code] after reviewing extensive medical evidence and opinions from other courts.”<sup>84</sup> That court rejected the Commissioner’s argument that “GID is ‘not a serious psychiatric disorder’” but is simply “a social construction” or “a social phenomenon that has been ‘medicalized’.”<sup>85</sup> Instead, GID is “a serious, psychologically debilitating condition” and a “widely recognized and accepted diagnosis in the field of psychiatry,” held the court.<sup>86</sup> Finally, the tax court stated that the Commissioner’s view that “GID is not a significant psychiatric disorder is at odds with the position of every U.S. Court of Appeals that has ruled on the question of whether GID poses a serious medical need for purposes of the Eighth Amendment.”<sup>87</sup>

To the extent that the circuits differ, it is not over whether Gender Dysphoria constitutes a serious medical need, but over whether treatment is warranted in a specific case, and if so, what type of treatment should be provided. The objective prong of the test under § 1983—“serious medical need”—can typically be satisfied by the inmate. The predominant view currently is that some medical treatment for Gender Dysphoria will be necessary in almost every case after the facts are reviewed in each instance. If treatment is medically prescribed, the prisoner has a right to

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

<sup>79</sup> *Kosilek II*, 889 F. Supp. 2d 190, 229-30 (D. Mass. 2012) (using the male pronoun to describe Michelle Kosilek).

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

<sup>81</sup> *Id.* at 207.

<sup>82</sup> *Id.* at 208.

<sup>83</sup> *Id.* at 236.

<sup>84</sup> *O’Donnabhain v. Comm’r*, 134 T.C. 34, 59 (T.C. 2010).

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

<sup>86</sup> *Id.* at 60-61.

<sup>87</sup> *Id.* at 61-62.

receive that treatment while in custody, and the state has a correlative duty to provide it.

*B. The Subjective Prong: Whether Prison Officials' Actions Have Deprived the Inmate of an Eighth Amendment Right*

If prison officials do not provide medical care to an inmate, the proper standard to apply when determining whether they are guilty of a constitutional violation is the "deliberate indifference" test.<sup>88</sup> In *Farmer v. Brennan*,<sup>89</sup> the Supreme Court held that the deliberate indifference test is a subjective standard based on what the prison official knew.<sup>90</sup> The Court stated:

We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>91</sup>

The Supreme Court borrowed the standard of "subjective recklessness" as used in criminal law and adopted it as the standard for determining "deliberate indifference" in the Eighth Amendment context.<sup>92</sup> The prison official must "actually know of and disregard an objectively serious condition, medical need, or risk of harm."<sup>93</sup>

Liability will not attach if the prison administrator made a reasonable effort to fulfill the duty of providing the inmate with humane conditions of incarceration; the prison official may only be held liable under the Eighth Amendment if he fails to "take reasonable measures" to abate the known risks and prevent harm to the prisoner.<sup>94</sup> Prison administrators are not liable for failing to provide medical care if they were not aware that treatment was needed. Nor will they be held liable for failing to provide the exact treatment plan that the inmate might prefer.<sup>95</sup> The duty is to provide adequate, necessary care.<sup>96</sup>

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<sup>88</sup> *Farmer v. Brennan*, 511 U.S. 825, 825 (1994).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 837-38.

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

<sup>92</sup> *Id.* at 839-40 ("Subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment.").

<sup>93</sup> *Id.* at 837.

<sup>94</sup> *Id.* at 845 ("Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.").

<sup>95</sup> *Brooks v. Berg*, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003).

<sup>96</sup> *Farmer*, 511 U.S. at 832.

The Eleventh Circuit has stated that when medical treatment is provided, but is alleged to be inadequate, the test is whether the treatment was “so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.”<sup>97</sup> The standard is high, and proving deliberate indifference can be difficult. Thus, while most courts recognize that Gender Dysphoria presents a serious medical need, there is less uniformity as to whether prison officials have been found to be deliberately indifferent to that need. The results depend on a case-by-case assessment of the inmate’s condition.<sup>98</sup>

In 2013, the Fourth Circuit held that an inmate presented a viable deliberate indifference claim when prison officials knew of her “overwhelming urges to self-castrate” but refused to have her evaluated for potential gender transformation surgery.<sup>99</sup> Their efforts were not deemed to be “reasonable measures” even though prison officials argued that they had fulfilled their duty by providing hormone treatment and mental health counseling as well as by allowing her to dress as a woman in the correctional facility.<sup>100</sup> The court stated that “just because Appellees have provided De’lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment.”<sup>101</sup> Clarifying that the prisoner does not have a right to “the treatment of his or her choice,” the court emphasized nonetheless that the treatment had to be adequate to address the inmate’s serious medical need.<sup>102</sup> In De’lonta’s case, since other forms of treatment were provided but did not resolve the prisoner’s GID symptoms, she had a right to be evaluated for possible surgery.<sup>103</sup> Thus, because prison officials ignored her ongoing symptoms as well as her plea for surgery, De’lonta stated a viable claim that the prison officials were deliberately indifferent in that the Gender Dysphoria treatment they provided her did not constitute “reasonable measures” in a constitutional sense.<sup>104</sup> In August 2013, on remand, a federal district court judge ruled that De’lonta is entitled to be evaluated by the “gender identity specialist of her choice.”<sup>105</sup>

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<sup>97</sup> See *Howard v. Green*, No. 5:10-cv-207, 2011 WL 4969599, at \*3 (M.D. Ga. Sept. 9, 2011) (applying language from *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) in a transgender inmate case brought by *pro se* inmate Clarence Howard).

<sup>98</sup> *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 244 (D. Mass. 2012) (“Whether GID creates a serious medical need for which the Eighth Amendment requires treatment in any given case depends on the severity of the individual inmate’s disorder.”).

<sup>99</sup> *De’lonta v. Johnson*, 708 F.3d 520, 525-26 (4th Cir. 2013).

<sup>100</sup> *Id.* at 525.

<sup>101</sup> *Id.* at 526.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 526 n.4 (stating that the district court had pointed out that “absent a doctor’s recommendation, De’lonta cannot show a demonstrable need for sex reassignment surgery,” but emphasizing, “[w]e struggle to discern how De’lonta could have possibly satisfied that condition when . . . appellees have never allowed her to be evaluated by a GID specialist in the first place”).

<sup>104</sup> *Id.* at 526-27.

<sup>105</sup> *Inmate One Step Closer to Getting Virginia to Shell Out \$20k for her Sex-Change Operation*, FOX NEWS, <http://www.foxnews.com/politics/2013/08/29/inmate-one-step-closer->

Deliberate indifference does not necessarily mean that prison officials have completely ignored a prisoner's condition. "Denial, delay, or interference with prescribed health care" can constitute deliberate indifference, stated a federal district court in *Kosilek II*.<sup>106</sup> The court added, however, that prison officials are entitled to some deference in running the facility, and the "deliberate indifference test 'leaves room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources'."<sup>107</sup> Treatment can be denied if bona fide considerations of prison safety and security outweigh the benefit of providing medical care to the inmate.<sup>108</sup> However, denying treatment based on cost or on a policy of blanket denial would not be deemed reasonable.<sup>109</sup> Such a denial is not based on a penological justification and could constitute the unnecessary infliction of pain on a transgender prisoner.<sup>110</sup> The wanton infliction of unnecessary pain violates the Eighth Amendment.<sup>111</sup>

In *Kosilek II*, the court concluded that gender reassignment surgery had been improperly denied to inmate Kosilek because of a pattern of "pretense and prevarication" on the part of the Department of Corrections Commissioner.<sup>112</sup> Although the Commissioner claimed that the medical treatment was denied due to serious security considerations, the court found that the security concerns were pretextual and that the real reason was a fear of ridicule and scorn.<sup>113</sup> The Commissioner testified at a bench trial that she would rather resign than obey an order from the Supreme Court to authorize sex reassignment surgery to an inmate.<sup>114</sup> She implemented a program of denial and delay to prevent Kosilek from receiving surgery.<sup>115</sup> Therefore, the deliberate indifference test was met because the Commissioner and other prison administrators knew that Kosilek was at risk of

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to-getting-virginia-to-shell-out-20k-for-her-sex-change/?test=latestnews#ixzz2dOjk3Vte (last visited Aug. 29, 2013).

<sup>106</sup> *Kosilek II*, 889 F. Supp. 2d 190, 209 (D. Mass. 2012); see also *Rosati v. Igbino*, No. 1:12-cv-012013-RRB, 2013 WL 1790157 (E.D. Cal. Apr. 26, 2013) (stating that deliberate indifference can be shown when "prison officials deny, delay, or intentionally interfere with medical treatment").

<sup>107</sup> *Kosilek II*, 889 F. Supp. 2d at 209 (quoting *Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011)).

<sup>108</sup> *Id.* at 210.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Hudson v. McMillion*, 503 U.S. 1, 10-11 (1991).

<sup>112</sup> *Kosilek II*, 889 F. Supp. 2d at 197-98.

<sup>113</sup> *Id.* at 198.

<sup>114</sup> *Id.* at 220.

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

serious harm and possible suicide if he did not have sex reassignment surgery, yet they refused to authorize the surgical procedure.<sup>116</sup> The court continued,

[A] prison official acts with deliberate indifference and violates the Eighth Amendment if, knowing of a real risk of serious harm, she denies adequate treatment for a serious medical need for a reason that is not rooted in the duties to manage a prison safely and to provide the basic necessities of life in a civilized society for the prisoners in her custody.<sup>117</sup>

A Gender Identity disorder treatment plan must be formulated by medical professionals, not by prison administrators.<sup>118</sup> In 2010, a federal court in Wisconsin stated that “[m]ere differences of opinion among medical personnel regarding a plaintiff’s appropriate treatment do not give rise to deliberate indifference.”<sup>119</sup> Nonetheless, if a medical professional’s decision departs substantially from “accepted professional judgment, practice, or standards,” then deliberate indifference can be inferred.<sup>120</sup> In the Wisconsin case, doctors agreed that even after receiving hormone therapy, inmate Konitzer continued to have a serious medical need that was unmet, as shown by his actions of cutting open his scrotum, tying a cord around his testes, castrating himself partially, and attempting suicide twice.<sup>121</sup> The issue was whether prison officials were deliberately indifferent to his medical need when they refused to allow him the next step in the customary treatment protocol, that of “providing a real-life experience” as a member of the other gender.<sup>122</sup>

The court indicated that a reasonable jury could find that the prison officials were “deliberately indifferent” when they failed to provide Konitzer with a real-life experience as a female, but also inquired whether the refusal was justified by “prison security concerns.”<sup>123</sup> Konitzer wanted to put on make-up, wear female underwear, use facial hair remover, have female guards conduct the strip searches, and be referred to as a female while incarcerated.<sup>124</sup> The court rejected the prison administrator’s argument that prison security would be jeopardized, noting that Konitzer had not been assaulted since 2006 “even though he has possessed female undergarments in violation of [prison] rules.”<sup>125</sup> Remarking that he already looked like a female, the court stated, among other things, “Konitzer has breasts—bra or no bra.”<sup>126</sup> Thus, unconvinced that security would be jeopardized if Konitzer got

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<sup>116</sup> *Id.* at 203.

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

<sup>118</sup> *Brooks v. Berg*, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003), *vacated in part by* 289 F. Supp. 2d 286 (N.D.N.Y. 2003).

<sup>119</sup> *Konitzer v. Frank*, 711 F. Supp. 2d 874, 908 (E.D. Wis. 2010).

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

<sup>121</sup> *Id.* at 905.

<sup>122</sup> *Id.* at 906.

<sup>123</sup> *Id.* at 908.

<sup>124</sup> *Id.* at 909.

<sup>125</sup> *Id.* at 910.

<sup>126</sup> *Id.*



permission to wear make-up and a bra, the court declined to grant summary judgment to the prison officials on that issue.<sup>127</sup>

After that case was heard, prison officials and inmate Konitzer entered into a settlement agreement in 2010.<sup>128</sup> In 2012, however, Konitzer again filed suit because prison officials had failed to treat her Gender Dysphoria despite the settlement agreement wherein the state agreed to provide an independent, expert evaluation of Konitzer, continue hormone therapy, consider implementing the gender identity expert's recommendations, provide speech therapy to "feminize" Konitzer's voice, and provide depilatories and hair loss treatments.<sup>129</sup> The federal district court determined that Konitzer sufficiently alleged a "deliberate indifference claim" based on the fact that the prison officials induced her to settle "while knowing either that the adequate treatment was not going to be available or that they would not carry out their promises."<sup>130</sup> The court examined whether the refusal to provide treatment was based on reasonable professional judgment, saying "[m]edical 'need' in real life is an elastic term; security considerations also matter . . . and administrators have to balance conflicting demands."<sup>131</sup> The denial of treatment was not, however, based on legitimate penological concerns.<sup>132</sup>

Prison officials may refuse treatment in some situations without violating a prisoner's rights.<sup>133</sup> "A difference of opinion between a prisoner and medical authorities regarding proper medical treatment does not give rise to a § 1983 claim."<sup>134</sup> In a case where a prison had a policy that described specific conditions that a prisoner had to meet in order to qualify for hormone therapy, the refusal to provide hormone treatment was not "deliberate indifference" to the medical needs of an inmate, Allen [Brittney] Young, who did not meet the stated conditions.<sup>135</sup> In addition, the prison officials in the *Young* case were found not to be deliberately indifferent because they had already addressed the prisoner's repeated medical requests.<sup>136</sup> The inmate had not been ignored or left to suffer.<sup>137</sup> In fact, the prisoner's

<sup>127</sup> *Id.* at 912-13. The court deferred to prison administrators on the question of whether Konitzer could be strip searched only by female officers. Strip searches were deemed particularly important to prison security and the correctional facility might legitimately have a "management issue" if forced to ensure that only female officers searched Konitzer, so the court left that issue to the prison's shift commander to decide.

<sup>128</sup> *Konitzer v. Wall*, No. 12-cv-874-bbc, 2013 WL 2297059, at \*1 (W.D. Wis. May 24, 2013).

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

<sup>130</sup> *Id.* at \*3.

<sup>131</sup> *Kosilek II*, 889 F. Supp. 2d 190, 200 (D. Mass. 2012).

<sup>132</sup> *Konitzer*, 2013 WL 2297059, at \*3.

<sup>133</sup> *Walls-Stewart v. Warner*, No. C12-5381 RBL-JRC, 2013 WL 1755793, at \*3 (W.D. Wash. Mar. 19, 2013).

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

<sup>135</sup> *Young v. Univ. of Tex. Med. Branch Corr. Health Care*, No. 6:11cv363, 2012 WL 262983, at \*15 (E.D. Tex. Jan. 11, 2012) (quoting *Young v. Adams*, 693 F. Supp. 2d 635 (W.D. Tex. 2010) (the case in which the same prisoner had already litigated the same claim in a different federal district court)).

<sup>136</sup> *Id.* at \*12.

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

medical record from 2007 to 2011 was over 2,000 pages long<sup>138</sup> and it documented multiple medical appointments with prison doctors for a long list of reported ailments including “seizures, high blood pressure, asthma, C.O.P.D., Bi-polar, Gender Identity Disorder, sinusitis, and testicular cancer.”<sup>139</sup> The inmate later added “back problems, cavities, depression, diabetes, drug and food allergies, epilepsy, hearing problems, gum disease, head injury, heart disease...mental illness, [and] peptic ulcers” to his list of medical problems after being transferred to another prison facility.<sup>140</sup> Additionally, he persisted in telling various physicians that he was born a hermaphrodite and that he had had surgery to sew up his female parts, but several physical examinations revealed that he was a normally developed male with no evidence of surgery.<sup>141</sup> The court concluded that prison officials had not been deliberately indifferent to Young’s medical needs, and that the inmate had merely shown that he disagreed with the prison’s policies, so his case was dismissed.<sup>142</sup>

In another case where the prisoner’s request for treatment was not granted, the Fifth Circuit held that the denial of hormone therapy did not constitute “deliberate indifference.”<sup>143</sup> In its *per curiam* opinion, the appellate court did not analyze deliberate indifference in any detail, but simply cited an Eighth Circuit case to support its decision that “declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need.”<sup>144</sup>

In that Eighth Circuit case, however, the court did not actually hold that a refusal to provide hormone treatment is not deliberate indifference on the part of prison officials.<sup>145</sup> Rather, the Eighth Circuit decided that there was a genuine issue of material fact as to whether one particular inmate, Thomas White, was a transsexual.<sup>146</sup> White had been evaluated by four medical experts who did not agree on a diagnosis.<sup>147</sup> Further, the magistrate had completely ignored a prior diagnosis of transvestitism and paranoid schizophrenia.<sup>148</sup> White willingly chose to wear a mustache even though he asked for electrolysis.<sup>149</sup> On the other hand, White had

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<sup>138</sup> *Id.* at \*2.

<sup>139</sup> *Id.* at \*1.

<sup>140</sup> *Id.* at \*3.

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

<sup>142</sup> *Id.* at \*13.

<sup>143</sup> *Praylor v. Tex. Dep’t of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005).

<sup>144</sup> *Id.* (citing *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988)).

<sup>145</sup> *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (referencing in dicta the Seventh Circuit’s holding “that a prisoner has no constitutional right to estrogen, provided that some other treatment is made available to him.” (*Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987))).

<sup>146</sup> *Id.* at 326. If White were not a transsexual, there would be no need for treatment and the withholding of treatment would not be cruel and unusual punishment. *Id.* at 328.

<sup>147</sup> *Id.* at 324.

<sup>148</sup> *Id.* at 326 (stating that “transvestites are comfortable with their sex; they cross-dress as females for sexual arousal rather than sexual comfort”).

<sup>149</sup> *Id.* at 323.

attempted to castrate himself four times while in prison using various sharp objects such as the glass from his smashed television.<sup>150</sup> In light of the conflicting evidence, the warden justifiably relied on an expert's medical opinion that no medical need existed, so the refusal to provide treatment was not deliberate indifference, said the court.<sup>151</sup> The case was remanded to resolve whether White was a transsexual and whether any treatment would be needed.<sup>152</sup>

In the most severe cases where hormone therapy and counseling have been unsuccessful, as in the cases of inmates De'lonta and Kosilek, courts have held that additional treatment, i.e., surgery, must be considered.<sup>153</sup> At the other end of the spectrum, where inmates could not prove that their medical requests had been ignored or derailed, or where they had not complied with prescribed treatments, the end result is simply that those inmates were not constitutionally entitled to the medical care of their choice.<sup>154</sup> On balance, if an inmate can show that prison officials knowingly<sup>155</sup> disregarded a documented need for Gender Dysphoria treatment, then it is very likely that the deliberate indifference test can be met.

When both prongs of the test for bringing a successful § 1983 action are satisfied, it logically follows that withholding some type of Gender Dysphoria medical treatment violates an inmate's Eighth Amendment right. It is impossible to predict with certainty what the result will be in any particular case because the need for medical treatment may be hard to prove, the subjective knowledge and indifference of prison administrators may be difficult to document, and other factors such as bias against transgender individuals and misunderstandings about Gender Dysphoria may influence the outcome.

### III. PERCEPTIONS OF FAIRNESS AND STANDARDS OF CONTEMPORARY DECENCY

The Private Manning case is a hard one. Not since the American Civil Liberties Union defended the Nazis' right to march in Skokie has public sentiment been so aroused about where to draw the line between (a) supporting citizens who feel morally outraged, on the one hand, and (b) protecting constitutional rights, on the other hand.<sup>156</sup> Manning violated the trust of everyone in the entire United States when she jeopardized national security by leaking 700,000 classified military

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<sup>150</sup> *Id.* at 323-24.

<sup>151</sup> *Id.* at 327.

<sup>152</sup> *Id.* at 328.

<sup>153</sup> See, e.g., *De'lonta v. Johnson*, 708 F.3d 520, 526-27 (4th Cir. 2013); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002); *Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012).

<sup>154</sup> See *Kosilek*, 221 F. Supp. 2d 156.

<sup>155</sup> *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) ("An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage . . . [b]ut an official's failure to alleviate a significant risk that he should have perceived *but did not*, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." (emphasis added)).

<sup>156</sup> See *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

secrets.<sup>157</sup> Now Manning wants the citizens of the United States to provide transgender therapy while she serves her sentence in military prison for fraud, espionage, and theft.<sup>158</sup>

Manning has not previously received hormone therapy or other medical treatment for gender transformation.<sup>159</sup> She waited, it would appear, until the moment that taxpayers would foot the medical bill to make her request for hormone treatment. There may be justifiable reasons for having waited, but the timing raises the public ire against Manning. It is true that Manning has offered to pay for hormone replacement treatment so that taxpayers will not bear the cost even though it may very well be true that Manning is legally entitled to receive the treatment from the government while incarcerated.<sup>160</sup>

Some in the transgender community, while applauding Manning's courageous self-disclosure, have also said that the timing is not ideal for other reasons.<sup>161</sup> Manning may soon find that the "euphoric 'I'll-do-anything-it-takes' feeling will pass and depression will set in again if she can't move forward in her transition," observed one transgender writer.<sup>162</sup>

Manning certainly is not the first transgender prisoner to stir up public controversy. Kosilek, for example, whose case has been litigated for years, also aroused the ire of the press and the citizenry when he made his request for Gender Dysphoria treatment.<sup>163</sup> Kosilek was convicted in 1992 of murdering his wife after she became angry with him for wearing her clothes, and he was sentenced to life in prison without the possibility of parole.<sup>164</sup> In reference to Kosilek's request in court for gender-transfer treatment, a newspaper reporter wrote:

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<sup>157</sup> Charlie Savage & Emmarie Huetteman, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/22/us/manning-sentenced-for-leaking-government-secrets.html?pagewanted=print>.

<sup>158</sup> Emmarie Huetteman, *"I am a Female," Manning Announces, Asking Army for Hormone Therapy*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/us/bradley-manning-says-he-is-female.html>; Beth Stebner, *Army Pfc. Bradley Manning Acquitted of Aiding the Enemy, Convicted of Six Counts of Espionage*, N.Y. DAILY NEWS (July 30, 2013), <http://www.nydailynews.com/news/national/bradley-manning-acquitted-aiding-enemy-article-1> (outlining Bradley Manning's charges and convictions).

<sup>159</sup> See cases where inmates were already receiving therapy before being arrested, convicted, and incarcerated, and they sought merely to continue medically prescribed treatment. *E.g.*, *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013). By contrast, Manning had not been previously treated for Gender Dysphoria, although an Army psychiatrist testified at the trial that Manning suffered from it.

<sup>160</sup> Associated Press, *supra* note 1.

<sup>161</sup> Jeff Kunnerth, *Transgender Community Understands Bradley Manning's Decision to Reveal Sexual Identity*, ORLANDO SENTINEL (Aug. 30, 2013), [http://articles.orlandosentinel.com/2013-08-30/features/os-transgender-bradley-manning-20130830\\_1\\_bradley-manning-gender-identity-gina-duncan](http://articles.orlandosentinel.com/2013-08-30/features/os-transgender-bradley-manning-20130830_1_bradley-manning-gender-identity-gina-duncan) (quoting Maia Monet, an Orlando writer).

<sup>162</sup> *Id.*

<sup>163</sup> *Kosilek II*, 889 F. Supp. 2d 190, 214-15 (D. Mass. 2012).

<sup>164</sup> *Id.* at 213-15 (Kosilek's wife, a volunteer where he was receiving drug rehabilitation treatment, told him that "his transsexualism could be cured by 'a good woman.'" She married him, only to be garroted by him and stuffed into the trunk of their car.).

[w]hat's truly remarkable is his ability to make a complete and utter fool out of an otherwise thoughtful and respected federal jurist...(s)he's (*sic*) actually made a mockery of our entire penal system, and in the process is costing us thousands of dollars and dozens of hours of valuable court time.<sup>165</sup>

As Kosilek continued to press for more treatment after years of incarceration, a Massachusetts state senator in 2005 called for legislation to prohibit the use of tax revenue to pay for gender identity treatment for prisoners, calling the idea “unconscionable.”<sup>166</sup>

It does indeed seem unfair for convicted prisoners to receive free medical treatment from the government when innocent civilians have to pay for their own medical care. It seems downright odd and unjust that even though the general public in the United States has no right to guaranteed medical care, incarcerated criminals do.<sup>167</sup> Such was the Seventh Circuit's view in *Maggert* where the court stated that it is neither cruel nor unusual to deny medical care to a convicted criminal when he could not have afforded to get it on his own, if innocent.<sup>168</sup>

Everyone knows someone who cannot afford to go to the doctor, and not all treatment is covered by insurance.<sup>169</sup> Senior citizens sometimes choose which of their expensive prescriptions to fill, not being able to afford all of the drugs they need. Innocent, kindhearted, faithful people contract illnesses that go untreated. Others incur medical expenses that drive them into bankruptcy. Meanwhile, prison inmates receive medications, psychotherapy, and even surgery at taxpayers' expense.<sup>170</sup> The public outrage is perfectly understandable. The solution, however, is not to take away medical care from prisoners; it is to improve the availability of health care to all citizens.

Another argument against providing hormone therapy and/or gender reassignment surgery is that such treatment wrongly “*humors* a patient's *false* sense

<sup>165</sup> *Id.* at 215 (quoting Brian McGrory, *A Test Case for Change*, BOSTON GLOBE (June 13, 2000), <http://www.bostonglobe.com/metro/2000/06/13/test-case-for-change/s9jYsy33HXfJ3ajRNZYpMO/story.html>).

<sup>166</sup> *Id.* at 223 (referencing a Channel 4 Eyewitness News show).

<sup>167</sup> *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

<sup>168</sup> *See Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997); *see also supra* text accompanying note 45. The opinion went way too far by suggesting that transgender people might commit crimes just to obtain free medical treatment while imprisoned.

<sup>169</sup> As long ago as 1979, a court held that sex-reassignment surgery for a gender dysphoric patient was “imperative and necessary” for the plaintiff to “live a normal life,” and that insurance coverage could not be denied by defining the operation as “cosmetic surgery.” *Davidson v. Aetna Life & Cas. Ins. Co.*, 420 N.Y.S.2d 450, 453 (Sup. Ct. 1979) (holding insurance company responsible for all related medical expenses). This result, however, may not be reached in every case.

<sup>170</sup> *See, e.g.,* Kate Douglas, *Prison Inmates Are Constitutionally Entitled to Organ Transplants—So Now What?*, 49 ST. LOUIS U. L.J. 539 (2005) (outlining prisoners' rights to organ transplants); 60 AM. JUR. 2D *Penal and Correctional Etc.* § 99 (2013).

of gender identity.”<sup>171</sup> The conservative Christian view, as expressed by one commentator, is that by ordering medical treatment for gender dysphoria, courts are “playing God” and “are acting on the presumption that we are not all created male and female, but that we are created male, female, male who should be female, and female who should be male.”<sup>172</sup> Hormone therapy and surgery are denigrated as treatments that misguidedly “indulge a prisoner’s improper self-image;” the proper treatment simply ought to be counseling to help the transgender individual accept his physical gender, it is said.<sup>173</sup> This argument, however, disregards the fact that psychological counseling is an inadequate remedy. Even the *Maggert* court, hostile as it was to transgender treatment, expressly acknowledged that there is no successful non-radical cure (such as psychotherapy).<sup>174</sup>

Moreover, even the insurance industry (not known for willingly paying for unnecessary or unorthodox medical procedures) has treated gender reassignment surgery as appropriate and necessary for more than thirty years.<sup>175</sup> Coverage was required after the *Aetna* decision in 1979 where the court stated: “Because it appears impossible to change the mind to fit the body, the surgery is aimed at changing the body to fit the mind.”<sup>176</sup> Deeming it medically necessary, and not merely cosmetic, the court held that “the treatment and surgery involved in the sex change operation of the plaintiff is of a medical nature and is feasible and required for the health and well being of the plaintiff,” and accordingly, Aetna must cover “all medical expenses incurred by the plaintiff herein as a result of her undergoing sex-reassignment.”<sup>177</sup>

Those who object to providing sex-reassignment therapy do not like the judiciary’s response, but it is legally correct—providing adequate medical care to prisoners is simply something that must be done due to the custodial nature of incarceration.<sup>178</sup> When the state takes someone into custody and deprives him of the ability to take care of himself, the state assumes some duty to provide for his basic needs such as food, shelter, clothing, personal safety, and medical care.<sup>179</sup> This rule was established almost forty years ago in the landmark case of *Estelle v. Gamble*, where the Supreme Court stated that “[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”<sup>180</sup> Noting that denial of medical care could result in pain and suffering and

<sup>171</sup> Rena Lindevaldsen, *A State’s Obligation to Fund Hormonal Therapy and Sex-Reassignment Surgery for Prisoners with Gender Identity Disorder*, 7 LIBERTY U. L. REV. 15, 46 (2012) (emphasis added).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 47.

<sup>174</sup> *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997).

<sup>175</sup> *Davidson v. Aetna Life & Cas. Ins. Co.*, 420 N.Y.S.2d 450, 453 (Sup. Ct. 1979).

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

<sup>177</sup> *Id.* at 453.

<sup>178</sup> See 1 RIGHTS OF PRISONERS § 4:1 (4th ed. 2013).

<sup>179</sup> *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976); see *Brown v. Plata*, 131 S. Ct. 1910 (2011) (“To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing and necessary medical care.”).

<sup>180</sup> *Estelle*, 429 U.S. at 102-04.

even “a lingering death,” the Court indicated that “[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency.”<sup>181</sup> Therefore, “it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”<sup>182</sup>

“The idea that an imprisoned male murderer may ever have a right to receive female hormones and sex reassignment surgery may understandably strike some as bizarre,” wrote the federal district court in Massachusetts in *Kosilek I*.<sup>183</sup> “However,” the court continued, “Kosilek’s claims raise issues involving substantial jurisprudence concerning the application of the Eighth Amendment to inmates with serious medical needs.”<sup>184</sup> The court explained: “The Constitution does not protect this right because we are a nation that coddles criminals. Rather, we recognize and respect this right because we are, fundamentally, a decent people, and decent people do not allow other human beings in their custody to suffer needlessly from serious illness or injury.”<sup>185</sup>

Ten years later, again addressing Kosilek’s medical requests in 2012, the district court stated “it has long been established that it is *cruel* for prison officials to permit an inmate to suffer unnecessarily from a serious medical need.”<sup>186</sup> Further, the court said, “[i]t is *unusual* to treat a prisoner suffering severely from a gender identity disorder differently than the numerous inmates suffering from more familiar forms of mental illness,” and finally, “[i]t is not permissible for prisoner officials to do so just because the fact that a gender identity disorder is a major mental illness is not understood by much of the public and the required treatment for it is *unpopular*.”<sup>187</sup>

The underlying social reasons for requiring prisons to provide medical treatment were expressed years ago by Justice Blackmun:<sup>188</sup>

It is society's responsibility to protect the life and health of its prisoners. “[W]hen a sheriff or a marshal [*sic*] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act*. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.”<sup>189</sup>

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<sup>181</sup> *Id.* at 103.

<sup>182</sup> *Id.* at 104.

<sup>183</sup> *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

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

<sup>185</sup> *Id.*

<sup>186</sup> *Kosilek II*, 889 F. Supp. 2d 190, 205 (D. Mass. 2012) (emphasis added).

<sup>187</sup> *Id.*

<sup>188</sup> *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (Blackmun, J., concurring) (quoting his own dissent in *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting)).

<sup>189</sup> Address by the Chief Justice, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.).

## IV. CONCLUSION

Providing medical treatment to transgender inmates is simply the right thing to do. Eighth Amendment jurisprudence teaches that prison officials cannot sit back and ignore the severe pain that some inmates suffer. It is hard to imagine that anyone who witnessed the attempted self-castrations of inmates such as De'lonta and Konitzer would turn a blind eye to their plight. Transgender inmates who are diagnosed with Gender Dysphoria need and deserve medical treatment just as much as inmates who are diagnosed with heart disease or diabetes. Even though Gender Dysphoria cannot be diagnosed by blood tests, it is a genuine medical condition.

Having established that a diagnosed transgender inmate has a right to some medical treatment, the question, as posed in the title of this Article, is whether that inmate has a constitutional right to hormone therapy (or, in more severe cases like Kosilek's, a right to surgery). Some have argued that he/she does not, and that psychological counseling should suffice as "adequate medical treatment" for a mental illness.<sup>190</sup> However, physicians, psychologists, judges, insurance agents, and even the Tax Court have weighed the evidence and have concluded that psychotherapy and psychiatric medications are not "adequate" treatment in most cases.<sup>191</sup>

Medical professionals and jurists have expended significant energy in an effort to understand and resolve the question of how to treat transgender individuals. Transforming the body to match the individual's perceived gender identity is very controversial. Despite the controversy, the predominant view is that hormone therapy is a vitally important part of a treatment plan for some individuals with Gender Dysphoria. The current wisdom in the international medical community is that the three-step protocol is recommended: receiving hormone therapy, living for a period of time as the other gender, and then undergoing surgery if needed.<sup>192</sup> Whether Private Manning will be entitled to receive hormone replacement therapy is still unsettled, but Bradley/Chelsea should receive some medical care for Gender Dysphoria while imprisoned for the next thirty-five years.<sup>193</sup>

The right to medical treatment is the focal point of this Article, but it is important to acknowledge some other related concerns. The conditions of Private Manning's incarceration will be handled with thousands of eyes watching. Manning's announcement that she wants to live as a woman in prison raises a host of other issues that must be addressed by the Fort Leavenworth officials such as her physical safety, privacy, and attire, along with the maintenance of order and prison security.

<sup>190</sup> See *Walls-Stewart v. Warner*, No. C12-5381 RBL-JRC, 2013 WL 1755793, at \*3 (W.D. Wash. Mar. 19, 2013); see also *supra* text accompanying note 133.

<sup>191</sup> See, e.g., *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252 (D. Mass. 2012); *O'Donnabhain v. Comm'r*, 134 T.C. 34, 122 (T.C. 2010).

<sup>192</sup> Previously called the Harry Benjamin Standards of Care, this three-step treatment protocol is referenced by many courts. See e.g., *O'Donnabhain*, 134 T.C. at 37-38; *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 158-59 (D. Mass. 2002); E. Coleman et. al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165 (2011), available at <http://wpath.org/documents2/socv7.pdf>.

<sup>193</sup> The first opportunity for parole will be in 2020. Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST (Aug. 21, 2013), [http://articles.washingtonpost.com/2013-08-21/world/41431547\\_1\\_bradley-manning-david-coombs-pretrial-confinement](http://articles.washingtonpost.com/2013-08-21/world/41431547_1_bradley-manning-david-coombs-pretrial-confinement).



Having identified herself as a woman in a man's body, Manning will be at heightened risk for abuse at the hands of other prisoners. One transgender writer lamented that Manning may have made the [gender] transition even tougher than it would otherwise be, commenting that Manning "hasn't done anything but put a giant bull's-eye on her head."<sup>194</sup> The rape of a transgender inmate was what triggered the landmark litigation in *Farmer v. Brennan*, where the Supreme Court confirmed that prison officials must not be deliberately indifferent to the violent abuse of a vulnerable inmate by other prisoners.<sup>195</sup> The Prison Rape Elimination Act (PREA)<sup>196</sup> sets national standards for preventing rape in prisons. Despite the passage of the Act in 2003, rape continues to occur in prisons.<sup>197</sup> Inmates who self-identify as members of the opposite gender are very likely at heightened risk for assault.<sup>198</sup>

This increased risk of rape, abuse, and violent assault creates danger to Manning and also destabilizes the prison environment and threatens the security and order that prison administrators must maintain. Placing Manning in solitary confinement for her own protection, as is sometimes done, would not be a very satisfactory solution due to the particularly debilitating punitive effects of such isolation. In *Farmer*, the transgender inmate was isolated and confined apart from other prisoners for her safety, and the Supreme Court noted it but did not comment on whether solitary confinement was a satisfactory solution for avoiding further rapes and attacks on her.<sup>199</sup>

Manning is incarcerated in an all-male facility in accordance with standard procedures indicating that inmates are housed according to their birth-assigned gender.<sup>200</sup> Other transgenders who were born with male genitalia have been housed in male facilities.<sup>201</sup> The question has been raised as to whether the transgender

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<sup>194</sup> Kunnerth, *supra* note 161 (quoting Maia Monet, an Orlando writer).

<sup>195</sup> *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994).

<sup>196</sup> 42 U.S.C. § 15601-09 (2006).

<sup>197</sup> For more information on rape in prisons, see Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630 (2012).

<sup>198</sup> 42 U.S.C. § 15601(3) (2006) (stating that inmates with mental illness have an increased risk of being raped in prison).

<sup>199</sup> *Farmer*, 511 U.S. at 830. To the extent that isolating a transgender inmate before any attack occurs may be construed as imposing an especially harsh punishment based on his or her status as a transgender, that practice might raise legal flags. Punishment can justifiably be imposed for specific acts, but citizens may not be punished based solely on their status. For example, someone can be penalized for drunk driving but cannot be incarcerated for being an alcoholic. Similarly, one could say that a transgender could be isolated for protection if violence occurs, but placing him or her in solitary confinement based solely on a perceived vulnerability would be unjustified. On the other hand, the failure to take proactive measures to protect a particularly vulnerable prisoner (while knowing that statistics show that he faces a heightened risk if placed with the general population) could also amount to deliberate indifference to that inmate's safety. The balance is tricky.

<sup>200</sup> Susan Donaldson James, *Bradley Manning, Now Chelsea, Denied Hormones in Prison*, ABC NEWS (Aug. 22, 2013), <http://abcnews.go.com/Health/bradley-manning-now-chelsea-fights-hormone-treatment-prison/story?id=20036939>.

<sup>201</sup> See *Farmer*, 511 U.S. at 829; *Konitzer v. Frank*, 711 F. Supp. 2d 874, 886 (E.D. Wis. 2010).

inmate has a right to be incarcerated with members of his/her transferred gender.<sup>202</sup> Inmates generally have no right to request certain types of housing, and decisions on housing assignments are left to the discretion of prison officials.<sup>203</sup> In a case where a transgender inmate who still had male genitalia asked to be transferred to a female facility, the court refused, saying simply “[a] male prisoner cannot be housed in a women's prison.”<sup>204</sup> The court continued, “[e]ven though a transfer may relieve plaintiff's anxieties, clearly a violation of the women's rights would be at issue. Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose.”<sup>205</sup>

Other requests, such as the ones made by Private Manning, involve the right to live as a woman, to dress as a woman, and to be called by a female name. Although these additional concerns are not fully addressed here, these issues have been raised by transgender prisoners in other Eighth Amendment suits.<sup>206</sup> Deferring to prison officials on these questions, one court stated, “prison authorities must have the discretion to decide what clothing will be tolerated in a male prison and the court is not convinced that a denial of female clothing and cosmetics is a constitutional violation.”<sup>207</sup>

In conclusion, this Article asserts that the constitutionally correct thing to do is to protect and respect Private Manning's individual rights no matter how abhorrent her betrayal of her country was, and no matter how bizarre her medical needs may seem to members of the general public. Judicial determinations indicating that prisoners have an Eighth Amendment right to receive medical treatment for Gender Dysphoria have not been popular. Biases still exist, as evidenced by the recent remark of a CNN legal commentator who snidely said that Private Manning would get “good practice” being a female in prison, and who called the idea of Manning receiving adequate medical care while serving her sentence “beyond insanity.”<sup>208</sup>

While some may call it insanity, this Article advocates providing hormone therapy as part of a medical treatment plan for incarcerated transgender inmates who are properly diagnosed as having Gender Dysphoria and for whom such hormone treatment is prescribed. When an inmate can prove both prongs of the constitutional test, the Eighth Amendment mandates providing adequate medical care, even if such treatment baffles and enrages members of the public. If treatment is not provided, a transgender inmate may be able to obtain an injunction to compel prison officials to provide some type of medical treatment for Gender Dysphoria.<sup>209</sup> Providing medical

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<sup>202</sup> *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

<sup>203</sup> *Id.* at 353.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (internal citation omitted).

<sup>206</sup> See, e.g., *Konitzer*, 711 F. Supp. at 886.

<sup>207</sup> *Lamb*, 633 F. Supp. at 353.

<sup>208</sup> Blake, *CNN Commentator: Chelsea Manning will get “Good Practice” Being Female in Prison*, LGBT HEADLINES BLOG (Aug. 27, 2013), <http://headlinesblog.info/2013/08/27/CNN-Commentator-Chelsea-Manning-Will-Get-Good-Practice-Being-Female-in-Prison>.

<sup>209</sup> *Farmer v. Brennan*, 511 U.S. 825, 846-47 (1994) (“If the court finds the Eighth Amendment's subjective and objective requirements satisfied, it may grant appropriate injunctive relief . . . [b]ut a district court should approach issuance of injunctive orders with

treatment is just one step in securing constitutional protection against cruel and unusual punishment for these inmates.

As the Supreme Court has stated, the precepts of a decent and moral society mandate that the basic and fundamental needs of those who are imprisoned—and stripped of the ability to care for themselves—be met.<sup>210</sup> The Court has recently stated again that “[p]risoners 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>211</sup> Further, the Supreme Court emphasized, “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”<sup>212</sup> Therefore, the just thing to do is to provide Gender Dysphoria treatment to Private Manning and other transgender prisoners who need similar sex-reassignment medical care.

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the usual caution . . . and may, for example, exercise its discretion if appropriate by giving prison officials time to rectify the situation before issuing an injunction.” (internal citations omitted)).

<sup>210</sup> See 1 RIGHTS OF PRISONERS § 4:1 (4th ed. 2013).

<sup>211</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (internal citations omitted).

<sup>212</sup> *Id.*