

DUAL PRONGS FOR THE DOUBLY IMPRISONED:

TRANSSEXUAL INMATES & THE EIGHTH AMENDMENT RIGHT TO TREATMENT

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[O]f all our fundamental guarantees, the ban on ‘cruel and unusual punishments’ is one of the most difficult to translate into judicially manageable terms.²

Among the many questions arising from this somewhat perplexing situation is one of fundamental importance. Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims it to be? The answer is not easily arrived at. It would be very simple to state that the gender of an individual has always been that which society says it to be. But to so state would be to disregard the enlightenment of our times.³

Part I - Introduction

Transsexual inmates who seek treatment for their disorder must overcome factually difficult and often legally complex arguments in order to prevail an Eighth Amendment claim against cruel and unusual punishment. However, the fact that it is difficult for transsexual inmates to receive treatment does not mean that transsexual inmates are being singled out. The inability of transsexual inmates to receive “adequate” treatment is largely due to the constraints

¹ Copyright © 2007 by Matthew A Stoloff. All Rights Reserved. I would like to thank my parents and my wife for their love and support.

² *Furman v. Georgia*, 408 U.S. 238, 260 n.2 (1972) (Brennan, J. concurring).

³ *In re Anonymous*, 293 N.Y.S.2d 834, 836 (N.Y. Civ. Ct. 1968).

of the Eighth Amendment, the limits of medical knowledge, and the courts' refusal to second guess the independent judgment of medical experts.⁴

Although transgenders and transsexuals compose a small segment of society,⁵ a high percentage is incarcerated at one time or another.⁶ Recent high-profile cases involving transgender and transsexual inmates have forced the courts to examine and re-evaluate the purpose, meaning, and scope of the Eighth Amendment right to be free from cruel and unusual punishment.⁷ Since treatment for serious medical needs is required under the Eighth Amendment, and treatment for severe forms of gender identity disorder requires hormone therapy and, in some cases, sex reassignment surgeries, more courts are taking a hard look whether prisons are required to provide such treatment.⁸ Perhaps in response to the courts' willingness to expand the scope of the Eighth Amendment to provide medical care to transsexual inmates, Wisconsin enacted legislation in 2006 prohibiting the use of government funds to

⁴ See *infra* Part IV.

⁵ There is an estimated 1:37,000 males and 1:107,000 females who suffer from gender identity disorder. There is indication that these numbers may be underestimated. The Harry Benjamin International Gender Dysphoria Association, Standards of Care For Gender Identity Disorders (hereinafter "Standards of Care"), Sixth Version, 11, (Feb. 2001), at <http://www.wpath.org/Documents2/socv6.pdf> (last visited: March 15, 2007).

⁶ Although there are no national statistics available, smaller studies suggest that a large number of transgenders are incarcerated at one time or another. For instance, in a 1999 study of 392 male-to-female transgender individuals, sixty-five percent were incarcerated. In the same study, twenty-nine percent 123 female-to-male transgender individuals had been incarcerated. San Francisco Department of Public Health, at <http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.461e> (last visited: March 13, 2007). For an explanation on the difference between "transgender" and "transsexual," see *infra* Part III.

⁷ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1970); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002); *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997).

⁸ Transsexuals have also alleged Eighth Amendment violations due to conditions of confinement (*Farmer v. Brennan*, 511 U.S. 825); the right to be assigned to a prison facility designated by gender, not by sex (*Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991)); the right to be placed in the general population (*Tates v. Blanas*, 2003 U.S. Dist. LEXIS 26029 (E.D. Cal. 2003)); and the right to wear women's clothing, including earrings and garter belts (*Murray v. United States Bureau of Prisons*, 1997 U.S. App. LEXIS 1716 (6th Cir. 1997)). For an overview of the different legal issues transsexual inmates have been involved in, see generally, Christine Peek, *Comment: Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV 1211 (2004); Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 N.E.J. ON CRIM. & CIV. CON. 599 (1998); Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV 27 (1995).

provide hormone therapy or sex reassignment surgery to transsexual inmates.⁹ When a Wisconsin transsexual inmate filed a complaint against the State, a federal court granted an injunction to continue hormone therapy.¹⁰ The Wisconsin case exemplifies two extremes: either transsexual inmates should not receive medical treatment for their disorder or, alternatively, they should receive as much treatment as medically required.

Scholars and Supreme Court Justices suggest that the original interpretation of the Eighth Amendment was not to regulate the conditions of prisons, but to prohibit torture, such as “drawing and quartering or burning at the stake.”¹¹ It was not until recently that the United States Supreme Court expanded the scope of the Eighth Amendment to prison conditions.¹² The Supreme Court has defined “cruel and unusual punishment” as “the wanton and unnecessary infliction of pain.”¹³ Applying this definition to prison conditions, the Supreme Court has held that any harm to inmates that does not serve a legitimate penological interest violates the Eighth Amendment.¹⁴ The concept of “harm” is subject to interpretation within the paradigm of “evolving standards of decency”¹⁵: what was once considered by society as “not harmful” a century ago may be considered “harmful” today. Indeed, the Eighth Amendment now requires that prison authorities provide a duty of care to all inmates, such as providing adequate food, clothing, shelter, and medical care.¹⁶

⁹ ACLU and Lambda Legal Challenge Law Barring Transgender People Access to Medical Treatment in Prison (Jan. 24, 2006), at <http://www.aclu.org/lgbt/transgender/23913prs20060124.html> (last visited Apr. 13, 2007).

¹⁰ Lambda Legal, *Sundstrom v. Frank*, at <http://www.lambdalegal.org/our-work/in-court/cases/sundstrom-et-al-v-frank-et-al.html> (last visited: Apr. 13, 2007).

¹¹ Sara L. Rose, *Comment: “Cruel and Unusual Punishment” Need Not Be Cruel, Unusual, or Punishment*, 24 CAP. U.L. REV. 827, 827 (1995) (citations omitted); Justice Scalia in *Harmelin v. Michigan*, 501 U.S. 957, 692-85 (1991).

¹² *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹³ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

¹⁴ *Farmer*, 511 U.S. 833 (citing *Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part)). See also *Turner v. Safley*, 482 U.S. 78, 95 (1986) (an inmate “retains those constitutional rights that are not inconsistent with his [or her] status as a prisoner or with the legitimate penological objectives of the corrections system”).

¹⁵ *Estelle*, 429 U.S. at 102-4.

¹⁶ *Farmer v. Brennan*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

Because the Eighth Amendment now requires adequate shelter and medical care, incarceration of transsexual inmates raises new, interesting, and novel issues within the context of the Eighth Amendment. Case law is replete with transsexual inmates who have alleged that their Eighth Amendment rights were violated during their incarceration. Transsexual inmates have alleged that their health and safety are at risk when they are placed in a facility designated by sex and not by gender.¹⁷ For example, when prison authorities place a pre-operative male transsexual in a male facility, he is at risk for life-threatening conditions, including sexual assault and rape.¹⁸ Some transsexual inmates have alleged that because of these dangerous conditions, they should be placed in a facility that matches their gender, and not their sex.¹⁹ Still other transsexual inmates have alleged that they have a right to hormone therapy and sex change operations as part of the Eighth Amendment's requirement to provide adequate medical care.²⁰ This paper focuses on the transsexual inmate's difficulties in establishing an Eighth Amendment claim and the legal hurdles they must overcome in order to receive adequate medical care.

Until the late 1990s, the courts did not recognize a transsexual inmate's right to medical care for their disorder. The courts have considered many cases involving transsexual inmates who have been denied the right to medical treatment for their gender identity disorder.²¹ Recently, however, the courts have been much more open to transsexual inmates' right to

¹⁷ See *infra* Part IV.

¹⁸ See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1970); *Supre v. Ricketts*, 596 F. Supp. 1532 (D. Colo. 1984), rev'd 792 F.2d 958 (10th Cir. 1986). Indeed, transsexuals may be at higher risk for contracting sexually transmitted diseases.

¹⁹ *Crosby v. Reynolds*, , 763 F. Supp. 666 (D. Me. 1991).

²⁰ See, e.g., *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002).

²¹ See, e.g., *Maggert v. Hanks*, 131 F. 3d 670 (7th Cir. 1997); *Long v. Nix*, 86 F. 3d 761 (8th Cir. 1996); *Brown v. Zavaras*, 63 F. 3d 967 (10th Cir. 1995); *White v. Farrier*, 849 F. 2d 322 (8th Cir. 1998); *Meriwether v. Faulkner*, 821 F. 2d 408 (7th Cir. 1987); *Supre v. Ricketts*, 792 F. 2d 958 (10th Cir. 1986).

hormone therapy.²² Because the Supreme Court has recognized “evolving standards of decency,” the lower courts have begun to expand their views regarding a transsexual inmates’ right to medical care, and the right to be free from cruel and unusual punishment under the Eighth Amendment is in transition. This transition is revolutionary. But there are heavy burdens that the transsexual inmate must overcome to gain appropriate medical treatment for their disorder.

Part II of this paper will give a brief overview of transgender inmates in the U.S. prison systems. This part will examine how transgenders transition to the other side. The typical regimen required of transitioning and the psychological problems that may occur when transgender persons are denied the medically necessary treatment at some point throughout their treatment. This Part will also examine the Harry Benjamin Standards of Care which is comprised of (1) hormone therapy, (2) real life experience of living as a member of the opposite sex, and (3) sex reassignment surgery. How the courts perceive and interpret the Harry Benjamin Standards of Care in cases involving transgender inmates’ claims to medical treatment under the Eighth Amendment will also be considered. In addition, this paper will offer a brief summary of the health risks associated with the hormone therapy and sex reassignment surgeries.

Part III of this paper will provide a brief overview of the historical development of the Eighth Amendment rights entitled to all inmates. Next, the subjective and objective components of an Eighth Amendment claim will be elucidated and some leading Supreme Court cases will be discussed.

In Part IV, the subjective and objective components of Eighth Amendment claims will be analyzed within the context of transsexual inmates seeking treatment for their disorder. The

²² See, e.g., *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000); *Phillips v. Michigan Dep’t of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), aff’d 932 F.2d 969 (6th Cir. 1991). But see *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986) (transsexual inmate has no right to hormone therapy).

legal challenges transsexual inmates must overcome in order to receive adequate treatment is burdensome. However, compared to other Eighth Amendment claims brought forth by inmates with different medical conditions—both physical and mental—the burdens transsexual inmates must overcome is not entirely unique. The necessary elements to prove an Eighth Amendment claim and the reasons why transsexual inmates must meet burdensome arguments will be explained in detail.

Finally, in Part V, I will summarize this paper and conclude with some recommendations how transsexual inmates can receive more accessible treatment in prison. I will argue that if transsexual inmates' need for more effective treatment is highly dependent upon the advancement of medical science. Physicians must develop better methods of diagnosing severe gender identity disorder and develop objective criteria for treating the disorder. If this is not possible, transsexual inmates will forever be doubly incarcerated.

Part II –Transsexuals: Definition and Treatment

Before discussing the transsexual inmates in prison and their rights to medical treatment under the Eighth Amendment, it is important to understand what transsexuals are and the scope of the Eighth Amendment. This Part looks into how physicians and the courts define Gender Identity Disorder, examines the types of medical care transsexuals need, and briefly describes the health risks transsexuals may experience when administered hormone therapy and sex reassignment surgery.

A. Medical and Legal Definitions of Transsexualism.

Transsexualism, also referred to as gender dysphoria syndrome and Gender Identity Disorder, is a chronic medical condition that causes an individual to strongly believe that he or she is a member of the opposite sex.²³ This strong belief is also associated with a sense of hatred towards his or her own sexual characteristics.²⁴ Thus, a male who suffers from transsexualism and believes that he is a woman may express extreme disgust towards his genitals. This same person will usually desire to act and dress in an effeminate manner because of his belief that he is in fact a woman. Transsexualism is, in effect, a strong belief that he or she was “born in the wrong sex.”²⁵

Transsexuals should not be confused with transgendered persons, homosexual individuals, or transvestites. A transvestite is a person who acts and dresses contrary to his or her gender, but is nonetheless satisfied with his or her anatomy.²⁶ A homosexual individual is one who is satisfied with his or her anatomy and is attracted to the same sex. A transgendered person may act and dress contrary to his or her gender, but may not want to undergo sex reassignment surgery.²⁷ A transgendered person may or may not be homosexual. Transsexuals are individuals who are unsatisfied with his or her anatomy, desire to undergo a surgical procedure to change their sex, and are typically not homosexuals.²⁸

The Diagnostic and Statistical Manual of Mental Disorders, a reference textbook that medical experts rely on to assess and determine a person’s mental condition, recognized a

²³ Standards of Care, *supra* note 4, at 12.

²⁴ *Id.*

²⁵ P.T. Cohen-Kettenis and L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis, and Treatment*, 46 JOURNAL OF PSYCHOSOMATIC RESEARCH 315, 316 (1999).

²⁶ Standards of Care, *supra* note 4, at 5, 13.

²⁷ *Id.* at 5.

²⁸ *Id.*

diagnosis of transsexualism for the first time in 1980.²⁹ In 1994, the Manual abandoned the term transsexualism for Gender Identity Disorder.³⁰ A person who suffers from Gender Identity Disorder (hereinafter, “GID”) is one who is uncomfortable with his or her sex, expresses a strong identification with the other sex, and the inability to be the other sex causes significant difficulties in his or her ability to function in society.³¹ In addition, the Manual is careful to state that a person who suffers from gender identification disorder “is not concurrent with a physical intersex condition.”³² The Harry Benjamin International Gender Dysphoria Association offers three criteria for GID:

1. The desire to live and be accepted as a member of the opposite sex;
2. The transsexual identity has been present persistently for at least two years; and
3. The disorder is not a symptom of another mental disorder or a chromosomal abnormality.³³

Neither Diagnostic and Statistical Manual of Mental Disorders nor the Harry Benjamin International Gender Dysphoria Association offers an objective criteria for diagnosing GID. Although studies have indicated that there may be biological basis for GID,³⁴ and that the interaction between the brain and sex hormones play important roles in establishing gender

²⁹ *Id.* at 4.

³⁰ *Id.*; Cohen-Kettenis, *supra* note 25, at 316.

³¹ Standards of Care, *supra* note 4, at 2.

³² *Id.*, at 2, 4.

³³ *Id.*, at 4-5.

³⁴ See, Cohen-Kettenis, *supra* note 25, at 318; J.N. Zhou, M.A. Hofman, L.J.G. Gooren, and D.F. Swabb, *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 1 INTERNATIONAL JOURNAL OF TRANSGENDERISM 1 (1997), at <http://www.symposion.com/ijt/ijtc0106.htm> (last visited: March 24, 2007); Josie Glausiusz, *Transsexual Brains*, Discover, Jan. 1996.

identity,³⁵ there are no objective criteria for diagnosing GID.³⁶ Indeed, many medical experts have disagreed as to whether a particular individual is, in fact, suffering from GID.³⁷

Notwithstanding the inability to objectively diagnose GID, research has clearly shown that transsexuals suffer from emotional distress associated with negative body image and an inability to form meaningful social relationships with others.³⁸ Because they feel trapped in the wrong sex, persons suffering from GID have been known to mutilate or remove their own genitals.³⁹

As early as the late 1970s, the courts have recognized GID as a severe medical condition,⁴⁰ and the courts also acknowledge that those suffering from GID can experience psychological pain.⁴¹ The courts accept the definition of GID as given by medical experts, and use the terms GID and transsexualism interchangeably. One court defined GID as “discomfort and rejection of one’s gender based on physical characteristics and sex assigned at birth.”⁴² Another court adopted the definition of transsexualism as set forth in a medical dictionary: “a disturbance of gender identity in which the affected person has overwhelming desire to change anatomic sex stemming from the fixed conviction that he or she is a member of the opposite sex.”⁴³ Several courts have cited the Diagnostic and Statistical Manual of Mental Disorders and

³⁵ See, e.g., J.N. Zhou, *supra* note 34.

³⁶ Cohen-Kettenis, *supra* note 25, at 322.

³⁷ In the prison context, see *White v. Nix*, 849 F.2d 322, 325-326 (8th Cir. 1988).

³⁸ Larry Nuttbrock, Andrew Rosenblum, and Rosalyne Blumenstein, *Transgender Identity Affirmation and Mental Health*, 6 INTERNATIONAL JOURNAL OF TRANSGENDERISM (2002), at http://www.symposion.com/ijt/ijtvo06no04_03.htm (last visited: March 24, 2007).

³⁹ H. Greilsheimer and J.E. Groves, *Male Genital Self-Mutilation*, 36 ARCHIVES OF GENERAL PSYCHIATRY 441 (1979).

⁴⁰ *Davidson v. Aetna Life & Casualty Ins. Co.*, 420 N.Y.S.2d 450 (1979); *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980); *G.B. v. Lackner*, 145 Cal. Rptr. 555 (Cal. Ct. App. 1978).

⁴¹ See, e.g., *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

⁴² *Phillips*, 731 F.Supp. 792, 793 n.2 (W.D. Mich. 1990).

⁴³ *Barrett v. Coplan*, 292 F. Supp. 2d 281, 284 (N.H. 2003).

other medical dictionaries.⁴⁴ Judge Posner described transsexualism as a psychological disorder that stems from the “disjunction between sexual identity and sexual organs.”⁴⁵ The United States Supreme Court defines transsexualism as “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormone therapy and surgery, to bring about a permanent sex change.”⁴⁶

There is no doubt, then, that courts which accept the existence of GID must consider the methods of treatment available to transsexuals. When evaluating whether a transsexual ought to be afforded treatment under the law, the courts should consider not only the law governing the right to treatment, but also the medical experts’ diagnosis, the types of treatments medical experts recommend, as well as the risks associated with administering such treatment.

B. Medical Treatment for Gender Identity Disorder

Not all transsexuals suffer from severe forms of GID. Indeed, those who suffer from GID have “differing degrees of severity”⁴⁷ and not all transsexual require medical treatment.⁴⁸ When, however, an individual has been diagnosed with a severe form of GID, the Harry Benjamin Standards of Care recommend a triadic method of treatment: hormone therapy, life experience, and, if necessary, sex reassignment surgery.⁴⁹ Although not required by the

⁴⁴ *Kosilek*, 221 F. Supp. 2d at 163 (citing the Diagnostic and Statistical Manual of Mental Disorders); *Phillips*, 731 F. Supp. at 795, 796 n.5 (citing Merck Manual of Diagnosis and Therapy and Diagnostic and Statistical Manual of Mental Disorders); *Meriwether v. Faulkner*, 821 F.2d at 412 n.5 (citing the Merck Manual of Diagnosis and Therapy); *White v. Nix*, 849 F.2d at 325-326 (same).

⁴⁵ *Farmer v. Haas*, 990 F.2d at 320.

⁴⁶ *Farmer v. Brennan*, 511 U.S. at 828 (quoting American Medical Association, Encyclopedia of Medicine 1006 (1989)).

⁴⁷ *Kosilek*, 221 F. Supp. at 184; Standards of Care, *supra* note 4, at 2.

⁴⁸ *Kosilek*, 221 F. Supp. at 184; Standards of Care, *supra* note 4, at 11 (“Many adults with gender identity disorder find comfortable, effective ways of living that do not involve all the components of the triadic treatment sequence.”).

⁴⁹ Standards of Care, *supra* note 4, at 11.

Standards of Care, psychotherapy can aide the transitioning individual to adapt to living as another gender.⁵⁰ Psychologists and psychiatrists are important in aiding the transsexual in getting hormone therapy.⁵¹ The endocrinologist, a medical expert who specializes in diagnosing and treating hormonal disorders, enters into the picture when a psychologist or psychiatrist attests that the patient is a person who suffers from GID and desires hormone therapy.⁵² Once the transsexual person undergoes hormone therapy and a two year “life experience” behaving like the opposite gender, the final transitioning stage is sex reassignment, which is a procedure that alters the transsexual’s genitals to mimic the look and feel of the other sex.

Psychotherapy is the least radical form of treatment suggested by the Standards of Care. Psychotherapy may help patients suffering from GID learn to adapt to life by assisting them to go through a “real life experience” where he or she lives as a member of the opposite sex and take affirmative steps to behave like the gender the individual believes he or she is meant to be.⁵³ This real life experience is an important transitioning role and may involve name changes, pitch changes, and cross-dressing.⁵⁴ Although psychotherapy may play an important role in the transitioning phase and has beneficial effects,⁵⁵ the Standards of Care requires only real life experience, not psychotherapy.⁵⁶ Psychotherapy may also be the least effective form of treatment. If a patient is truly suffering from a severe form of GID, and is unable to gain access

⁵⁰ *Id.*, at 11, 20.

⁵¹ *Id.*, at 16.

⁵² *Id.*, at 16, 23-27.

⁵³ *Id.*, at 10-11, 17-18, 22-23.

⁵⁴ *Id.* at 22-23.

⁵⁵ Katherine Rachlin, *Transgender Individuals’ Experiences of Psychotherapy*, 6 INTERNATIONAL JOURNAL OF TRANSGENDERISM, at http://www.symposion.com/ijt/ijtvo06no01_03.htm (last visited: March 23, 2007).

⁵⁶ Standards of Care, *supra* note 4, at 11.

to hormone therapy or sex reassignment, suicide may be considered.⁵⁷ Studies have shown that as least twenty percent of GID patients may attempt suicide.⁵⁸

For many transsexuals, hormone therapy is an effective treatment that can cause both biological and psychological changes. A female taking androgen will experience “a deepening of the voice, clitoral enlargement, mild breast atrophy, increased facial and body hair, and male pattern baldness,” as well as “increased upper body strength, weight gain, increased social and sexual interest and arousability, and decreased hip fat.”⁵⁹ Males taking female hormones, such as estrogen and progesterone, will experience the opposite, but desired, results such as “breast growth, . . . decreased upper body strength, softening of skin, decreases in body hair, slowing or stopping the loss of scalp hair, decreased fertility and testicular size, and less frequent, less firm erections.”⁶⁰ The Standards of Care state that cross-sex hormones are medically necessary: “They improve the quality of life and limit psychiatric co-morbidity, which often accompanies lack of treatment. . . . [P]atients feel and appear more like the members of their preferred gender.”⁶¹

Despite the benefits of cross-sex hormone therapy, there are serious health risks.⁶² A literature review of adverse effects associated with male to female hormone therapy suggest higher increases in venous thrombosis, pulmonary embolism, myocardial infarction, stroke, and depression.⁶³ Likewise, female to male hormone therapy may experience such adverse effects as

⁵⁷ A. Michel, M. Annseau, J.J. Legros, et al., *The Transsexual: What About the Future?*, 17 EUR PSYCHIATRY 353, 355 (2002).

⁵⁸ *Id.*

⁵⁹ Standards of Care, *supra* note 4, at 14.

⁶⁰ *Id.*, at 14.

⁶¹ *Id.*, at 13.

⁶² H. Asscheman, L.J. Gooren, and P.L. Eklund, *Morality and Morbidity in Transsexual Patients with Cross-Gender Hormone Treatment*, 38 METABOLISM 869 (1989).

⁶³ Eva Moore, Amy Wisniewski, and Adrian Dobs, *Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects*, 88 JOURNAL OF CLINICAL ENDOCRINOLOGY & METABOLISM 3467, 3469-3470 (2003).

decreased insulin sensitivity, ovarian disease, and poor lipid profiles.⁶⁴ Notwithstanding these potential and real side effects, studies have also shown that the administration of cross-sex hormones affect emotional stability and “psychological relief.”⁶⁵

Some transsexuals with severe GID will opt for sex reassignment surgery in order to be more complete.⁶⁶ While sex reassignment surgery cannot change one’s chromosomes, it can transform the external genitalia.⁶⁷ Females transitioning to males may undergo mastectomies, have their internal reproductive organs removed, and undertake genital reconstruction.⁶⁸ Similarly, males transitioning to females may undergo electrolysis, undertake extensive facial, upper body, and hip reconstructive surgeries to attain or accentuate feminine profiles, as well as genital reconstruction.⁶⁹

The operating surgeon who performs the sex reassignment surgery proceeds only when the mental health professional and endocrinologist have closely monitored the patient’s progress and need to undergo sex reassignment.⁷⁰ The Standards of Care suggest that sex reassignment surgery is an effective form of treatment for the most severe forms of gender identity disorder and is not “‘experimental,’ ‘investigational,’ ‘elective,’ ‘cosmetic,’ or optional in any meaningful sense.”⁷¹

⁶⁴ *Id.* at 3470.

⁶⁵ Ditte Slabbekoorn, Stepahnie H.M. Van Goozen, Louis J.G. Gooren, and Peggy T. Cohen-Kettenis, *Effects of Cross-Sex Hormone Treatment on Emotionality in Transsexuals*, 5 INTERNATIONAL JOURNAL OF TRANSGENDERISM, at http://www.symposion.com/ijt/ijtvo05no03_02.htm (last visited: March 23, 2007); Michel, *supra* note 57, at 358.

⁶⁶ “The desire for [sex reassignment surgery] originates from an experienced discrepancy between one’s sex of assignment on the one hand and one’s basic sense of self as a male or female (gender identity) on the other hand.” Cohen-Kettenis, *supra* note 25, at 316.

⁶⁷ See generally Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 32 (1995).

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.* (citations omitted); Standards of Care, *supra* note 4, at 13-14, 19-22.

⁷⁰ Standards of Care, *supra* note 4, at 19.

⁷¹ *Id.*, at 18.

Based on anecdotal evidence, individuals who have successfully transitioned to their self-identified gender through sex reassignment surgeries appear to lead a more improved life.⁷²

Research has shown positive outcomes as a result of sex reassignment surgeries, such as “self-esteem, body image, socioeconomic adjustment, family life, social relationships, psychological status and satisfaction.”⁷³

Sex reassignment surgery is a radical procedure. One study that reviewed more than 100 international medical studies of post-operative transsexuals concluded that there was no evidence that sex reassignment surgery was clinically effective.⁷⁴ In contradistinction to that study, several medical articles have shown that sex reassignment is an effective treatment for gender identity disorder. In a review of the medical literature, one article points out that at least 75 percent, and as much as 90 percent, of those who underwent sex reassignment were satisfied with their transformation.⁷⁵ A higher percentage of female to male transsexuals reported increased satisfaction than their counterparts.⁷⁶ Feelings of long-term regret among those who underwent sex reassignment surgery were remarkably low—less than 2 percent.⁷⁷ Indeed, less than 2 percent of those who successfully underwent sex reassignment committed suicide.⁷⁸

⁷² See, e.g., Standards of Care, *supra* note 4.

⁷³ The Wessex Institute for Health Research and Development, “Surgical Gender Reassignment for the Male to Female Transsexual People” (Sept. 1998), at <https://www.epi.bris.ac.uk/rd> (last visited: March 20, 2007). See also Michel, *supra* note 57, at 358-359.

⁷⁴ David Batty, “Sex changes are not effective, say researchers,” Guardian Unlimited (July 30, 2004), at <http://society.guardian.co.uk/mentalhealth/story/0,8150,1272093,00.html> (last visited: March 20, 2007). But see Christine Burns, “A change for the better,” Guardian Unlimited (August 3, 2004), at <http://society.guardian.co.uk/health/story/0,,1275200,00.html> (last visited: March 20, 2007) (expressing skepticism of the findings made by the aggressive research intelligence facility).

⁷⁵ Michel, *supra* note 57, at 353-54.

⁷⁶ *Id.* at 355.

⁷⁷ *Id.*

⁷⁸ *Id.*

In yet another study, GID experts reviewed the medical literature from the 1960s through the 1990s, and concluded that sex reassignment surgery “effectively resolves the gender identity disorder transsexuals suffer from.”⁷⁹

Most studies suggest that hormone therapy and sex reassignment surgery are effective forms of treatment for individuals suffering from gender identity disorder. Before addressing the question as to whether prison officials should provide transsexual inmates hormone therapy and sex reassignment surgery, we must turn our attention to the requirements of an inmate’s medical care under the Eighth Amendment of the United States Constitution.

Part III – The Eighth Amendment

The Eighth Amendment of the U.S. Constitution states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and usual punishments inflicted.”⁸⁰ Throughout the course of time, there has been tremendous development over the concept and meaning of “cruel and unusual punishment.” This Part provides a brief background of the Eighth Amendment and the current requirements for stating a valid Eighth Amendment claim.

A. A Brief Background of The Eighth Amendment

The United States Supreme Court has noted that the principles of the Eighth Amendment can be traced as far back as the Magna Carta.⁸¹ In fact, the language of the Eighth Amendment was copied virtually word-for-word from the English Bill of Rights of 1689 at a time when

⁷⁹ Cohen-Kettenis, *supra* note 25, at 327.

⁸⁰ U.S. Const. amend. VIII.

⁸¹ *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991).

whippings, pillorings, breaking on the wheel, and disembowelments were commonplace.⁸²

Some scholars argue that the Founders only intended to prohibit “torturous or barbaric punishments” and nothing more when they ratified the Eighth Amendment.⁸³ This view appears to be consistent with the Supreme Court’s earlier opinions.⁸⁴ In the middle of the twentieth century, the Supreme Court adopted a much broader interpretation, and the concept of “cruel and unusual punishment” was no longer “limited to those practices condemned by the common law in 1789.”⁸⁵ The Court subjected cruel and unusual punishment to an “evolving standard of decency that mark the progress of a maturing society.”⁸⁶

Abandoning the view that “cruel and unusual punishment” is limited to only “torturous and barbaric” acts by the Federal Government, the Eighth Amendment is now applicable to the States through the Fourteenth Amendment⁸⁷ and proscribes “unnecessary and wanton infliction of pain”⁸⁸ upon its inmates. Therefore, if punishment is excessive, it is by definition “cruel and unusual.” The concept “cruel and unusual” is a dynamic concept that changes through the

⁸² *Id.*, at 966. “That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” Bill of Rights, 1689, 1 W & M., ch. 2 (Eng.) (modern spellings used). For a fascinating historical perspective on the origins and development of the Eighth Amendment, see Justice Scalia’s opinion in *Harmelin*; Celia Rumann, *Tortured History: Finding Our Way back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666-682 (2004); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 43-46 (2000). See also Sheldon R. Shapiro, *Annotation: Federal Constitutional Guaranty Against Cruel and Unusual Punishment—Supreme Court Cases*, 33 L. ED. 2d 932 (2006). See also *Re Kemmler*, 136 U.S. 436 (1890).

⁸³ Parr, *supra* note 82; Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969).

⁸⁴ See, e.g., *Wilkerson v. Utah*, 99 U.S. 130 (1878) (holding that execution by firing squad is not cruel or unusual punishment).

⁸⁵ *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986).

⁸⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”). See also *Gregg v. Georgia*, 428 U.S. 153, 171, 173 (1969) (The Eighth Amendment “must be capable of wider application than the mischief which gave it birth . . . must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . [and] must accord with the ‘dignity of man.’”) (internal citations omitted).

⁸⁷ *Robinson v. California*, 370 U.S. 660 (1962) (invalidating state statutes that inflict cruel and unusual punishments and overturning *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866)).

⁸⁸ *Estelle*, 429 U.S. at 103 (quoting *Gregg*, 428 U.S. at 153).

course of time.⁸⁹ In the past several decades, the Eighth Amendment has been applied to concepts related to proportionality,⁹⁰ prison conditions,⁹¹ and medical care.⁹²

In a decisive and influential case decided in 1976, the United States Supreme Court expanded the scope of the Eighth Amendment to require prison officials to provide adequate medical care to inmates.⁹³ In this case, the plaintiff-inmate had alleged that he suffered a serious back injury and prison officials provided inadequate medical treatment.⁹⁴ The Court held that there was no valid penological purpose for denying or failing to provide treatment for an inmate's serious medical needs.⁹⁵ The Court subsequently set out a two-pronged test to establish a valid Eighth Amendment claim.⁹⁶ First, the inmate would need to show that she suffered from a serious medical need.⁹⁷ Second, the inmate would need to show that prison officials refused or failed to provide adequate medical care.⁹⁸ Thus, when an inmate suffers from a serious medical

⁸⁹ *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86 (1958).

⁹⁰ The connection between the Eighth Amendment and proportionality is a relatively recent phenomenon. A classic example is *Hutto v. Davis*, 454 U.S. 370 (1982) (reversing the Fourth Circuit Court's decision to overturn a 40 year sentence for possession of small quantity of marijuana). The modern trend towards the Eighth Amendment and proportionality was first recognized in *Solem v. Helm*, 464 U.S. 277 (1983) (life sentence for writing a bad check was not proportional and therefore "cruel and unusual" within the meaning of the Eighth Amendment).

⁹¹ In 1981, the Supreme Court extended the Eighth Amendment to prison conditions denying inmates the "minimal civilized standards of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). There, the Court held that conditions of confinement may violate an inmate's right to be free from cruel and unusual punishment. *Id.* This broad interpretation of the Eighth Amendment provided inmates a flexible, legal framework to establish an Eighth Amendment claim. For example, the Court held that a non-smoking inmate who had been exposed to dangerously high levels of second hand smoke and was harmed as a result may have an Eighth Amendment claim. *Helling v. McKinney*, 509 U.S. 25 (1993). Similarly, a shirtless inmate who is handcuffed to a hitching post underneath the sun for seven hours and given minimal amounts of drinking water is a violation of the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730 (2002). The Eighth Amendment is also implicated when an inmate is at risk for assault and prison officials either disregard or fails to act to mitigate that harm. *Farmer v. Brennan*, 511 U.S. 825 (1994). The Eighth Amendment is also implicated when a prison official exercises excessive force and the inmate does not suffer serious injury. *Hudson v. McMillian*, 503 U.S. 1 (1992).

⁹² *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁹³ *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁹⁴ *Id.* at 100-102.

⁹⁵ *Id.*, at 103.

⁹⁶ *Id.*, at 104-106.

⁹⁷ *Id.*, at 105-105.

⁹⁸ *Id.*, at 106.

need and prison officials act with deliberate indifference to that medical need, the Eighth Amendment may be implicated.⁹⁹

The Supreme Court's two-pronged test has moved the lower courts to be equally liberal in its interpretation of the Eighth Amendment within the medical context. For example, the Eighth Amendment may be violated when prison officials refuse a paraplegic inmate from entering into the prison infirmary because he uses a wheelchair.¹⁰⁰ Prison officials may violate the Eighth Amendment by refusing abortion procedures to female inmates.¹⁰¹ Similarly, when an inmate contracts an infection and requires medical treatment, the Eighth Amendment may be implicated when prison officials fail to provide medical care.¹⁰² Delaying treatment may also implicate the Eighth Amendment.¹⁰³ Failure to provide treatment for a mental illness may also implicate the Eighth Amendment.¹⁰⁴

The courts are cautious not to stretch the Eighth Amendment too far. Nothing in the Eighth Amendment requires that inmates be treated with the best, state of the art treatment.¹⁰⁵ Furthermore, where there is a difference of opinion between physicians or between inmates and a physician, the courts will not second guess the physician's independent medical judgment.¹⁰⁶ Indeed, the Eighth Amendment requires only adequate treatment for serious medical needs, and

⁹⁹ The two-pronged test is much more complex than appears at first glance. There are many illnesses that cannot be readily diagnosed or agreed upon. Additionally, there can be more than one method of treatment for an illness or injury, and there is considerable debate as to which treatment is more effective. The courts rely heavily on the independent judgment of medical professionals. This is discussed in further detail in *infra* Part IV.

¹⁰⁰ *Weeks v. Chaboudy*, 984 F.2d 185 (6th Cir. 1993).

¹⁰¹ *Monmouth Co. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

¹⁰² *LaFault v. Smith*, 834 F.2d 389 (4th Cir. 1987).

¹⁰³ See, e.g., *Dean v. Coughlin*, 623 F. Supp. 392 (S.D.N.Y. 1985); *Toombs v. Bell*, 798 F.2d 297 (8th Cir. 1986).

¹⁰⁴ See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (prisons are required to provide psychiatric and psychological care for its inmates); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) ("We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.").

¹⁰⁵ See, e.g., *Taylor v. Barnett*, 105 F. Supp. 2d 483 (E.D. Va. 2000) (inmates are not entitled to state of the art drugs if basic, but equally effective, treatments are readily available).

¹⁰⁶ See *Bowring*, 551 F.2d at 48 ("We disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment.") (citation omitted). See also *infra* note 137 and accompanying text.

in many cases, inmates may have difficulty proving that she has a serious medical condition that requires treatment and that prison officials act with deliberate indifference with regard to that need.

B. Proving a Valid Eighth Amendment Claim Within the Medical Context: A Primer

To prove a valid Eighth Amendment claim against cruel and unusual punishment in the medical context, an inmate has to satisfy a two-pronged test.¹⁰⁷ The inmate must first prove, objectively, that she suffers from a serious medical need that requires treatment.¹⁰⁸ Second, she must prove, subjectively, that prison officials were deliberately indifferent to that medical need. Deliberate indifference may be proved by showing that the prison officials were aware of the medical need and disregarded it or otherwise failed to respond adequately.¹⁰⁹

For example, an inmate exposed to high levels of second-hand smoke may have a claim for relief under the Eighth Amendment.¹¹⁰ First, an inmate-plaintiff must prove, objectively, that “he himself is being exposed to unreasonably high levels of [second hand smoke],” which “requires a court to assess whether society considers the risk that a prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.”¹¹¹ Secondly, the inmate must prove, subjectively, that “prison officials were deliberately indifferent to his plight as a non-smoker placed in a smoking environment.”¹¹² This prong

¹⁰⁷ See, e.g., *Helling*, 509 U.S. at 35-36; *Estelle*, 429 U.S. at 104-106.

¹⁰⁸ *Id.*

¹⁰⁹ The plaintiff “must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle*, 429 U.S. at 106. Proof must be shown that the prison official knew of and disregarded “an excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 836-837. The prison official must be “both [] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . draws the inference.” *Id.*

¹¹⁰ *Helling*, 509 U.S. at 28, 35 (1993).

¹¹¹ *Id.*, at 35-36.

¹¹² *Id.*

requires an inmate to show that defendants knew of the serious harm associated with second hand smoke and failed to prevent or reduce the likelihood of the harm.¹¹³

As in the above example, an inmate must satisfy a two prong test if she was denied appropriate medical treatment. First, the inmate must allege that she had a serious medical need that required treatment and, secondly, that prison officials were deliberately indifferent to that need.¹¹⁴ A serious medical need may be defined as a need that is “so obvious that a lay person would recognize the necessity for a doctor’s attention” or “where denial or delay causes an inmate to suffer a life-long handicap or permanent loss.”¹¹⁵

Thus, consider an inmate with a dislocated jaw.¹¹⁶ The inmate suffers from lockjaw, an inability to keep his jaw in one place, difficulty with eating, and pain on the side of the face. The inmate has a serious injury that would be obvious to any lay person. Therefore, the objective component of an Eighth Amendment claim is satisfied. When an oral surgeon refuses to take X-rays or examine the inmate, thereby delaying treatment, the subjective component of an Eighth Amendment may be satisfied.

If inmates who suffer from severe forms of GID subsequently suffer from emotional harm and are at some risk of suicide, failure to respond to the inmate’s medical needs for hormone therapy and sex reassignment surgery may implicate an Eighth Amendment.

Part IV – GID Treatment in Prison and the Eighth Amendment

As we have learned, the medical literature informs us that GID may be a serious medical disorder that must be treated. We have also learned that the Eighth Amendment requires that

¹¹³ *Id.*

¹¹⁴ *Estelle*, 429 U.S. at 104-106.

¹¹⁵ *Monmouth Couty Corr. Inst. Inmates v. Lanzaro*, 834 F. 2d 326, 347 (3d Cir. 1987).

¹¹⁶ This example is taken from *Holton v. Fraitellone*, 1997 U.S. Dist. LEXIS 8431 (S.D. N.Y. 1997).

inmates be provided adequate medical care for their serious medical needs. Despite repeated requests for hormone therapy and sex reassignment surgery, prison officials refuse or fail to provide these forms of treatment.¹¹⁷ Consequently, inmates suffering from severe GID have engaged in acts of self-mutilation, self-castration, and suicide attempts.¹¹⁸

At face value, it would appear relatively simple for a transsexual inmate to establish a two-prong test to establish that the prison's failure to provide these treatments violate the Eighth Amendment. Thus, an inmate who alleges that she suffers from GID and seeks treatment for her condition would be required to prove that she suffers from such a condition and that failure to treat her condition would cause her harm. She would need to show, objectively, that she suffers from GID, and that this condition is a serious medical need within the meaning of the Eighth Amendment. She would also need to show, subjectively, that prison officials were aware of the need for medical care or of the facts from which this need could be inferred and failed to take affirmative action as to provide adequate medical care to treat the condition.

A court may, for example, agree that refusal to continue hormone therapy she had been receiving prior to incarceration may constitute deliberate indifference.¹¹⁹ Similarly, a prison official may act with deliberate indifference if he fails to respond to an inmate's repeated request for GID treatment.¹²⁰ A blanket policy denying transsexuals access to medical treatment may

¹¹⁷ See, e.g., *Kosilek v. Maloney*, 221 F. Supp. 2d at 159 (D. Mass. 2002); *Cuoco v. Moritsugu*, 222 F.2d 99, 106 (2d Cir. 2000); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether*, 821 F.2d at 410 (7th Cir. 1987); *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001).

¹¹⁸ See, e.g., *Supre v. Ricketts*, 792 F.2d at 960 (engaged in mutilation of sex organs); *Barrett*, 292 F. Supp. at 284 (threatening to mutilate her genitals); *White v. Farrier*, 849 F.2d 322, 323 (8th Cir. 1988) (threatening to commit suicide and castrate himself); *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (same); *Kosilek*, 221 F. Supp. at 98 (same).

¹¹⁹ *Wolfe v. Horn*, 130 F. Supp 2d 648, 643 (E.D. Pa. 2001).

¹²⁰ *Cuoco v. Moritsugu*, 222 F.2d 99 (2d. Cir. 2000).

also implicate the Eighth Amendment.¹²¹ However, these scenarios oversimplify the issues and overlook several potential arguments the transsexual inmate must overcome.

A. The inmate fails to satisfy the objective component of an Eighth Amendment claim.

Establishing the objective component of an Eighth Amendment claim is relatively straightforward and usually does not present problems. All an inmate needs to do is simply show that he or she suffers from a serious illness, condition, or injury; and that this requires medical treatment. However, where the illness, condition, or injury, is not obvious, or is otherwise difficult to diagnose, an inmate may not be able to satisfy the objective component. In the same vein, where the illness, condition, or injury is apparent, but is not as serious as to require medical assistance, the objective component of an Eighth Amendment may not be satisfied. With regard to GID in an Eighth Amendment claim, the transgender inmate faces two possible arguments that may be raised by the defendants.

1. There is no objective criterion for diagnosing Gender Identity Disorder.

A serious medical need is “one that is so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.”¹²² Thus, a pregnant female inmate who may not be “showing” nonetheless has a serious medical need when she is in pain, bleeding, passing clots, and unable to conduct her usual activities of daily living.¹²³ In less obvious, or more complicated, cases, physicians may disagree as to diagnosis and the appropriate course of treatment. Where

¹²¹ See, e.g., *Brooks v. Berg*, 270 F. Supp. 2d 302, 305 (N.D.N.Y. 2003) (blanket policy prohibiting treatment for gender identity disorder implicates the Eighth Amendment).

¹²² *Pool v. Sebastian County*, 418 F.3d 934, 944 (8th Cir. 2005) (quoting *Johnson v. Busby*, 953 F.2d 349, 351 (8th Cir. 1992)).

¹²³ *Id.*

there is no objective criterion for a diagnosis of a psychological disorder, an inmate's medical need may not be so serious as to require treatment.

The courts have held that inmates are entitled to psychiatric treatment.¹²⁴ But since GID is difficult to diagnose, it is understandable that medical experts will disagree whether a particular inmate might have this condition. As noted above, there is no objective criterion for diagnosing GID. Therefore, in cases where there are disagreements among physicians as to whether an inmate suffers from gender identity disorder, deliberate indifference will be difficult to prove. For example, medical experts questioned whether an inmate—who alleged that he was trapped in a woman's body, but sported a mustache—was in fact suffering from GID.¹²⁵ In this case, three experts agreed that the inmate suffered from GID, but a fourth did not.¹²⁶ The court held that whether the inmate was in fact a transsexual was a question of fact that required further inquiry.¹²⁷ Similarly, when an inmate insists that she suffers from GID, requests hormone therapy and sex reassignment, but refuses to speak with a mental health expert, there will be concern as to whether the inmate is genuinely a transsexual.¹²⁸

The courts have considered cases whereby inmates claimed to have suffered from certain psychological illnesses.¹²⁹ However, where there is no evidence or obvious symptoms to suggest that an inmate suffers from a psychological disorder requiring treatment, the courts will not

¹²⁴ Inmates have a right to psychiatric care. See, e.g., *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (“We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.”). A number of courts have cited *Bowring* with approval. See, e.g., *Horn v. Madison County Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994)); *Smith v. Jenkins, et al.*, 919 F.2d 90, 93 (8th Cir. 1990); *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir. 1990).

¹²⁵ *White v. Nix*, 849 F.2d 322 (8th Cir. 1988).

¹²⁶ *Id.* at 324-325.

¹²⁷ *Id.* at 328.

¹²⁸ *Long v. Nix*, 86 F.2d 761 (8th Cir. 1996).

¹²⁹ See, e.g., *Ciarpaglini v. Kallas*, 2005 U.S. Dist. LEXIS 25560 (W.D. WI. 2005) (inmate suffering from bipolar, panic disorder, and attention-deficit hyperactivity disorder); *R.T. v. Gross*, 298 F. Supp. 2d 289 (N.D. N.Y. 2003) (inmate with either bipolar disorder or antisocial personality disorder); *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990) (inmate with schizophrenia and suicidal tendencies)

second-guess the independent judgment of medical physicians.¹³⁰ The transsexual inmate will be unable to prove the objective component of the Eighth Amendment claim if physicians find no evidence of GID.

2. Gender Identity Disorder is not a serious medical need.

The Eighth Amendment is not implicated when medical experts exercise their independent medical judgment.¹³¹ Thus, even if an inmate has been diagnosed with a psychological disorder, it may not rise to the level of necessary proactive treatment. Therefore, even if an inmate suffers from GID, a physician may not believe that it is so serious a medical need that requires treatment. Although most—if not all—courts agree that GID is a serious medical condition¹³² that should be treated like other psychiatric disorders,¹³³ the courts will not second-guess the independent judgment of medical physicians.¹³⁴ Given that there are varying degrees of severity of GID, a court will not second guess physicians who refuse to treat inmates suffering from GID.

The courts' deference to medical experts in transsexual inmate cases is not unique. The courts have held that physicians who deny inmates certain pharmaceuticals or surgical treatment

¹³⁰ *Bowring*, 51 F.2d at 48 (“[W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment.”); *Thomas v. Pate, et al.*, 493 F.2d 151 (7th Cir. 1974) (“Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prison-patient.”); *Boring v. Kozakiewicz*, 833 F.2d 468, 473 (3d Cir. 1987) (“Courts will not ‘second-guess the propriety or adequacy of a particular course of treatment [which] remains a question of sound professional judgment.’”) (citing *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)).

¹³¹ *Estelle*, 429 U.S. at 107; *White v. Farrier*, 849 F.2d at 327; *Supre*, 792 F.2d at 960-64. See also *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (“Whether and how pain associated with medical treatment should be mitigated is for doctors to decide free from judicial interference . . .”).

¹³² See, e.g., *Kosilek*, 221 F. Supp. 2d at 161; *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *Maggert*, 131 F.3d 670, 671 (7th Cir. 1997); *Barrett*, 292 F. Supp at 284; *Brown*, 63 F.3d 967, 969 (10th Cir. 1995); *White v. Farrier*, 849 F.2d 322, 325-26 (8th Cir. 1998); *Faulkner*, 821 F.2d 408, 412 n.5 (7th Cir. 1987); *Brooks v. Berg*, 270 F. Supp. 2d 302, 304 (N.D.N.Y. 2003); *Wolfe v. Horn*, 130 F. Supp.2d 648, 652 (E.D. Pa. 2001); *White v. Nix*, 849 F.2d 322 (8th Cir. 1998).

¹³³ See, e.g., *Meriwether*, 821 F.2d at 413; *Maggert*, 131 F.3d at 671.

¹³⁴ See *infra* note 138.

do not necessary give rise to an Eighth Amendment claim. For example, where an inmate suffered withdrawal symptoms related to his addiction of barbiturates, the Eighth Amendment was not implicated when a physician refused the inmate's request for Thorazine to alleviate the withdrawal symptoms.¹³⁵ In addition, homeopathic alternatives to surgery that are not "substantial departures" from accepted medical judgment does not give rise to Eighth Amendment claims.¹³⁶

Except in cases where a physician has no training in a particular area of medicine,¹³⁷ the courts are reluctant to second-guess the independent judgment of medical physicians.¹³⁸ If the courts accept the medical judgment entered into the record that a given inmate's GID is not so serious as to require treatment, the objective component of an Eighth Amendment claim cannot be satisfied.

B. The inmate fails to satisfy the subjective component of an Eighth Amendment claim.

In most cases, it will be relatively easy for an inmate to show that he or she suffers from a serious form of GID. The objective component of the Eighth Amendment claim is generally not an issue. However, proving the subjective component of an Eighth Amendment claim is far

¹³⁵ *Mathis v. Pratt*, 375 F. Supp. 301 (N.D. Ill. 1974).

¹³⁶ See, e.g., *Hollon v. Prison Health Services, et al.*, 2006 U.S. Dist. LEXIS 78674 (S.D. In. 2006) (prison policy requiring conservative treatment of hernias that does not interfere with daily living does not implicate Eighth Amendment). See also *Covington v. Kalonick*, 1984 U.S. Dist. LEXIS 23792 (S.D. N.Y. 1984) (inmate with facial scars disagrees with his plastic surgery about treatment).

¹³⁷ See *Smith*, 919 F.2d at 93 (a case involving inmate alleging Eighth Amendment violations and the court expressed concern that inmate's physician had no training in mental health).

¹³⁸ *Bowring*, 51 F.2d at 48 ("[W]e disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment. Along with all other aspects of health care, this remains a question of sound professional judgment."); *Thomas v. Pate, et al.*, 493 F.2d 151 (7th Cir. 1974) ("Courts will not attempt to second-guess licensed physicians as to the propriety of a particular courts of medical treatment for a given prison-patient."); *Boring v. Kozakiewicz*, 833 F.2d 468, 473 (3d Cir. 1987) ("Courts will not 'second-guess the propriety or adequacy of a particular course of treatment [which] remains a question of sound professional judgment.'") (citing *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979)).

more problematic, particularly for inmates with mental illnesses.¹³⁹ The subjective component requires a showing that prison officials acted with deliberate indifference with regard to the inmate's serious medical needs. Specifically, the inmate would need to show that prison officials knew of the inmate's illness or condition and acted or failed to act in such a way as to treat that illness or condition adequately. Thus, when an inmate is refused hormone therapy and the withdrawal symptoms of hormone therapy severely affect the inmate's physical and emotional states, prison officials may be acting with deliberate indifference.¹⁴⁰ When, however, prison officials concede that they knew of the illness and offered treatment, the inmate may still show deliberate indifference by proving that the treatment received was inadequate. In this situation, transsexual inmates must be able to prove that the treatment is in fact adequate and not controversial. The inmate cannot, however, request the most effective form of treatment available to her.

1. There is no constitutional right to a specific treatment.

Although failure to provide any treatment for a serious medical need violates the Eighth Amendment, the courts have held that neither hormone therapy nor sex reassignment surgeries are constitutionally mandated, and nor inmates do have a right to a particular type of treatment.¹⁴¹ Thus, so long as the treatment is adequate, the Eighth Amendment is not

¹³⁹ See generally Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U.L. REV. 487 (2004).

¹⁴⁰ *Phillips*, 731 F. Supp. at 800-01 (W.D. Mich. 1990).

¹⁴¹ *Supre*, 792 F.2d at 963 (“We are . . . unable to conclude that federal law requires prison officials to administer female hormones to a transsexual inmate”); *Meriwether*, 821 F.2d at 413 (Transsexual inmates do “not have a right to any particular type of treatment, such as estrogen therapy . . .”); *Maggert*, 131 F.3d at 671 (Prison officials are not legally obligated to “authorize the hormonal and surgical procedures that in most cases at least would be necessary to ‘cure’ a prisoner’s gender dysphoria”); *Lamb*, 633 F. Supp at 353 (same).

implicated.¹⁴² Because not every refusal of medical treatment constitutes a violation of the Eighth Amendment, one must try to determine what is minimally necessary to treat the illness.¹⁴³

In denying a transsexual inmate the right to estrogen, the Seventh Circuit Court held that an inmate

does not have a right to any particular type of treatment, such as estrogen therapy Given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of these options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment.¹⁴⁴

Consistent with the view that hormone therapy and sex reassignment surgeries are not constitutionally mandated, the courts have equally held that there is no constitutional right of inmates to receive methadone¹⁴⁵ or a recommended leg brace.¹⁴⁶ Similarly, where there were alternatives to teeth extraction and an inmate could not prove that teeth extraction was not a medically appropriate treatment, a court held that deliberate indifference could not be shown unless there were other, non-medical considerations, such as costs.¹⁴⁷ Likewise, when an inmate claimed that the drug Ansaid controlled his pain better than Naprosyn, the court held that the prescribing physician did not act with deliberate indifference because Naprosyn has a better

¹⁴² See, e.g., *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (“So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.”).

¹⁴³ “It is a matter of determining the civilized minimum of public concern for the health of prisoners, which depends on the particular circumstances of the individual prisoner.” *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999).

¹⁴⁴ *Meriwether*, 821 F.2d at 413. See also Judge Posner comment in *Maggert*, 131 F.3d at 672 (“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.”).

¹⁴⁵ *Holly v. Rapone et al.*, 476 F. Supp. 226 (E.D. Pa. 1979).

¹⁴⁶ *Floyd v. Anderson*, 2005 U.S. Dist. LEXIS 21219 (D. Minn. 2005).

¹⁴⁷ *Brooks v. Andrews*, 2006 U.S. Dist. LEXIS 38439 (E.D. Cal. 2006).

safety record and both drugs were equally effective.¹⁴⁸ Given that both drugs were equally effective, there was no constitutional right to Ansaïd.

Since the Eighth Amendment does not require that prison officials provide the best and most appropriate course of treatment,¹⁴⁹ there is nothing to suggest that transsexual inmates have a right to a specific treatment to treat their disorder. On the other hand, if there is no other known course of treatment available, transsexual inmates may receive hormone therapy or sex reassignment surgery to treat their disorder, and the choice of treatment would depend on which treatment was minimally necessary to treat the disorder.

2. Failure to provide an equally effective course of treatment does not implicate the Eighth Amendment.

An inmate may be able to prove deliberate indifference if prison officials or medical physicians insist on easier, but less effective forms of, treatment. The courts have held that where an inmate suffers from a serious medical need, “easier but less efficacious course of treatment” can constitute deliberate indifference.¹⁵⁰ Thus, an inmate with a serious medical need may show deliberate indifference if a physician opts to perform easier and cheaper ways of treating the illness, condition, or injury. For example, an inmate with a cavity may be able to show deliberate indifference if there are less invasive methods other than the recommended tooth extraction.¹⁵¹ Similarly, an inmate whose ear was cut off may prove deliberate indifference when operating surgeons refuse to reattach the ear because sewing the stump was an easier and

¹⁴⁸ *Blaisdell v. Tanner*, 2002 U.S. Dist. LEXIS 5776 (D. Minn. 2002).

¹⁴⁹ “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 person. He is entitled to only minimum care.” *Maggert*, 131 F.3d at 671-72 (citing *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (other citations omitted)).

¹⁵⁰ *Waldrop v. Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989).

¹⁵¹ *Chance v. Armstrong*, 143 F.3d 698 (2d Cir. 1998).

less efficacious course of treatment.¹⁵² However, deliberate indifference will not be found where a physician prescribes chiropractic care instead of pharmaceuticals because the former may be an equally effective course of treatment accepted by medical standards.¹⁵³

Where physicians prescribe equally effective treatment for GID, such as hormone therapy instead of sex reassignment, no deliberate indifference will be found. Thus, no deliberate indifference was found when a male-to-female transsexual inmate was prescribed androgens (male hormones) instead of estrogen (female hormones).¹⁵⁴ Similarly, a court may not find deliberate indifference when prison officials deny a transsexual inmate's request for sex-reassignment surgery because hormone therapy was an equally effective form of treatment.¹⁵⁵

3. Treatment for Gender Identity Disorder is controversial.

Although an inmate does not have the right to receive as good medical care as she would have received outside of prison,¹⁵⁶ the Standards of Care provide that hormone therapy and sex reassignment surgery is neither elective nor experimental. Nonetheless, the courts have held that hormone therapy was medically controversial and prison officials were not required to provide medically controversial treatment.¹⁵⁷ When medical experts examine an inmate who claims to suffer from GID and refuses to administer estrogen therapy because of the dangers associated with it, this may not implicate the Eighth Amendment.¹⁵⁸

¹⁵² *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974).

¹⁵³ *Randall v. Wynick*, 642 F.2d 304 (8th Cir. 1981).

¹⁵⁴ *Supre*, 792 F.2d at 960.

¹⁵⁵ See *Kosilek*, 221 F. Supp. at 194-95.

¹⁵⁶ "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 person. He is entitled to only minimum care." *Maggert*, 131 F.3d at 671-72 (citing *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (other citations omitted)).

¹⁵⁷ *Farmer v. Hass*, 990 F.2d at 321; *White*, 849 F.2d at 327-28; *Meriwether*, 821 F. 2d at 414; *Long v. Nix*, 877 F. Supp. at 1364.

¹⁵⁸ *Supre*, 792 F.2d at 413.

The refusal to provide certain treatment because there are high risks involved is not limited to GID inmates. For example, a court has held that the Eighth Amendment was not implicated when an inmate who is at a high risk for rejecting a corneal transplant was refused the transplant.¹⁵⁹ In that case, the inmate suffered from a drooping eyelid, cornea scarring, and other eye and facial complications, caused by a viral infection.¹⁶⁰ The inmate was unsuccessfully treated through surgery and sought a second cornea transplant.¹⁶¹ After several consultations, a dispute over how the surgical procedure should be performed emerged.¹⁶² Thereafter, two cornea transplant experts examined the inmate and concluded that the inmate was a high risk patient and recommended against surgical treatment.¹⁶³ The court held that since the inmate was a high risk inmate and that surgical treatment could worsen the eye, the Eighth Amendment was not implicated.¹⁶⁴ Other courts have decided similarly.¹⁶⁵

Notwithstanding the recommendations set forth in the Standards of Care, there will be prison officials and mental health experts who will argue that hormone therapy and sex reassignment surgery are in fact controversial treatments. As noted above, there are serious health risks associated with cross-sex hormone therapy, such as insulin sensitivity, ovarian disease, venous thrombosis, pulmonary embolism, myocardial infarction, stroke, and depression.¹⁶⁶ Therefore, in weighing deliberate indifference, courts will consider whether the treatment is controversial; and if it does, the Eighth Amendment will not be implicated.

¹⁵⁹ *Hodge v. Coughlin*, 1994 U.S. Dist. LEXIS 13409 (S.D. N.Y. 1994).

¹⁶⁰ *Id.* at *2-*4.

¹⁶¹ *Id.* at *11-21.

¹⁶² *Id.* at *23.

¹⁶³ *Id.* at *24-27.

¹⁶⁴ *Id.* at *31, *40.

¹⁶⁵ See, e.g., *Cordes v. Lockhart*, 1994 U.S. App. LEXIS 36197 (8th Cir. 1994) (no deliberate indifference when surgery was postponed due to high risk of health complications); *Horton v. Ward*, 123 Fed. Appx. 368 (10th Cir. 2005) (inmate at risk for infection).

¹⁶⁶ Eva Moore, *supra* note 63, at 3469-3470.

C. Even if an inmate raises a valid Eighth Amendment claim, failure to provide hormone therapy does not necessarily implicate the Eighth Amendment.

Assuming, *arguendo*, that a transsexual inmate suffering from GID has satisfied both prongs to make out a valid Eighth Amendment claim, the inmate will not necessarily prevail. There are two possible legal hurdles that the transsexual inmate may face—neither of which can be anticipated due to the fact that different judges have their own viewpoints regarding the limits of the Eighth Amendment.

1. The Eighth Amendment requires treatment for serious medical needs only.

Some courts may adopt the view that the Eighth Amendment does not require any form of treatment for GID because GID is not “necessarily a serious medical need for which the Eighth Amendment requires treatment.”¹⁶⁷ By adhering to a more narrow view of the Eighth Amendment, a court may find deliberate indifference for refusal or failure to provide treatment only if the inmate’s condition was one that would cause “death, degeneration or extreme pain.”

¹⁶⁸ At least one court held that administration of cross-sex hormones served only cosmetic purposes.¹⁶⁹ It would, then, be difficult for a court to find deliberate indifference if it did not believe that GID was a serious medical disorder requiring treatment. Although courts will not second guess medical expert testimony that GID is a serious medical need that requires treatment, a court may characterize hormone therapy and sex reassignment surgery as a cosmetic procedure

¹⁶⁷ *Kosilek*, 221 F. Supp. 2d at 184; *Maggert*, 131 F.3d at 672 (“We conclude that . . . the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria”).

¹⁶⁸ *Copeland v. Warden*, 2002 Conn. Super. LEXIS 3905, at 12. For a more detailed discussion on this topic, see Laura D. Smolowe, *Rejecting the Cosmetic Label to Revive the Eighth Amendment*, 23 YALE L. & POL’Y REV. 357 (2005).

¹⁶⁹ *Meriwether*, 821 F.2d at 411 (“Administration of cross-sex hormones was for cosmetic purposes and failure to provide cosmetic procedures “could not, as a matter of law, constitute deliberate indifference to a serious medical need.”).

for which the Eighth Amendment does not require. This view is at odds with civil courts that have rejected the view that sex reassignment is cosmetic in nature.¹⁷⁰

2. The higher courts have not decided whether the Eight Amendment requires treatment for Gender Identity Disorder.

Perhaps in an exercise of “ducking” the issue altogether, a court may be unwilling to decide one way or the other that the Eighth Amendment requires hormone therapy to treat GID. For example, when a transsexual inmate argued an Eighth Amendment violation arising out of the Department of Corrections’ failure to provide hormone therapy, a Texas court denied the inmate’s request for an injunction to order the prison to provide hormone therapy because the Fifth Circuit Court had not yet decided whether refusal to provide hormone treatment violated the Eighth Amendment.¹⁷¹ Here, in this situation, a transsexual inmate alleging an Eighth Amendment claim may find herself in a difficult situation and will need to appeal. In the meanwhile, adequate treatment may not be provided and psychological damage may or may not result.

Part V – Conclusion

The courts’ interpretation of the Eighth Amendment has evolved significantly since the U.S. Constitution was drafted. Cruel and unusual punishment under the Eighth Amendment has been defined as the “wanton infliction of pain,” and because society’s standards has evolved

¹⁷⁰ *J.D. v. Lackner*, 80 Cal. App. 3d at 96 (“We do not believe, by the wildest stretch of the imagination that such surgery can reasonably and logically be characterized as cosmetic”); *Davidson*, 420 N.Y.S.2d at 453 (sex reassignment surgery is not cosmetic surgery); *Doe v. Dep’t of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977) (same). There does appear to be a difference of opinion among the courts with regard to “cosmetic” procedures for transsexuals. In civil cases involving non-inmate transsexuals who sought sex reassignment surgery, the courts have ordered Medicaid pay for the cost of such surgeries because these surgeries were necessary to the transsexual’s health and psychological well being. See all cases cited *id.*

¹⁷¹ *Praylor v. Texas Dep’t of Crim. Jus.*, 430 F.3d 1208 (2005).

since the drafting of the U.S. Constitution, there is no valid penological purpose for the denial or delay of treatment for serious medical needs. Prisons, therefore, are prohibited denying or delaying medical treatment to those inmates with serious medical needs. Thus, inmates with physical injuries and chronic mental illnesses ought to be provided with adequate medical care.¹⁷² Since GID has been classified as a mental illness, prisons should be required to provide adequate care to treat inmates suffering from GID. The courts do not dispute that GID is a disorder. However, where there are factual disputes, the courts cannot reject the inmate's diagnosis as offered by medical experts. A diagnosis of GID may be difficult to make. The courts must also consider the risks associated with treatment for GID. Nothing in the Eighth Amendment requires that prison officials provide controversial treatment that could result in further injury or death. Finally, the courts must reflect as to the scope of the Eighth Amendment in order to determine whether *a specific* treatment or *any* treatment for GID is required.

One commentator argued that "Medical care in prisons should reflect the contemporary views that hormone therapy and sex reassignment represent the appropriate treatments for transsexualism . . ." ¹⁷³ This view overlooks the fact that there may be a difference of opinion between medical experts regarding diagnosis and prognosis. It may be true that denying or delaying to provide any treatment implicates the Eighth Amendment,¹⁷⁴ but the courts have repeatedly refused to second guess the independent judgment of medical experts. Furthermore, nothing in the Eighth Amendment requires that an inmate be given as good care as those not

¹⁷² John V. Jacobi, *Prison Health Public Health: Obligations and Opportunities*, 31 AM. J. L. and MED. 447, 471-474 (2005).

¹⁷³ Barnes, *supra* note 7, at 646.

¹⁷⁴ *Meriwether*, 821 F.2d at 414; *Estelle*, 429 U.S. at 103.

incarcerated.¹⁷⁵ Thus, the courts have much to consider when determining whether prisons should be required to offer inmates treatment for GID.

Furthermore, commentators who argue that the prison's failure to provide the appropriate treatment constitutes deliberate indifference overlook the fact the medical complexities involved in diagnosing GID and developing an appropriate prognosis. There has been much academic debate regarding the right of transsexual inmates to receive appropriate treatment under the Eighth Amendment.¹⁷⁶ Yet, none have addressed the complexities in making a diagnosis of GID, the independent judgment of medical experts, the various, equally effective treatments that may be offered to the transsexual inmate, and the risks associated with these treatments. Some commentators are troubled by the courts' wide deference to medical experts.¹⁷⁷ This concern is not warranted. Medical expert opinion is both necessary and essential to development a just outcome, and if there is disagreement among experts, that must be expected.

The courts correctly acknowledge that GID is a psychological disorder. In order to determine whether the Eighth Amendment requires that prison officials provide effective treatment for GID, parallels must be drawn between the Eighth Amendment requirements for medical care and the medically accepted minimum requirements to treat GID. This has not been done. Until one draws these parallels, transsexual inmates are unlikely to receive better care that they are currently receiving today.

¹⁷⁵ *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

¹⁷⁶ See, e.g., Bradley A. Sultan, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195 (2003); Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51 (1999); Barnes, *supra* note 8.

¹⁷⁷ Keller, *supra* note 176, at 66-67 ("The unwillingness to look behind the veil of stated medical opinion in these cases also creates a crisis of authority for the courts.").