CASE NOTE

Adequate Care for a Serious Medical Need: *Kosilek v. Spencer* Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria

I. INTRODUCTION

Michelle Kosilek, a transsexual[1] prisoner under control of the Massachusetts Department of Corrections (DOC), is currently serving a life sentence for murdering her[2] wife.[3] Kosilek was born biologically male, but has struggled with her gender identity for years.[4] She was abused as a child by her stepfather for her desire to live as a girl.[5] While housed in a drug rehabilitation facility, Cheryl McCaul, a volunteer counselor at the facility, told Kosilek that the cure for her gender dysphoria[6] was a "good woman," and they were married soon after.[7] This cure, of course, was illusory, and Kosilek murdered McCaul after

1. "Transsexual" as it's used in the Note is meant to describe those who suffer from Gender Identity Disorder and wish to present exclusively as the "opposite" sex. "Transgender," alternatively, refers to a broad spectrum of identities in which the sex assigned to a person at birth based on biology is not "the whole story" with regard to that person's identity. This necessarily includes those who would be described medically or legally as transsexual.

2. Despite the United States District Court for the District of Massachusetts's reluctance to do so, I will be using female pronouns to describe Kosilek throughout this note.

3. Kosilek v. Spencer, No. 00–12455–MLW, 2012 WL 3799660, at *1 (D. Mass. Sept. 4, 2012).

4. *Id.* at *17.

5. *Id.*

6. Gender dysphoria, in this Note and as used by the court in *Kosilek*, refers to the specific experience of "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth." THE WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 5 (7th ed. 2012); *see* Kosilek, 2012 WL 3799660, at *1.

7. *Kosilek*, 2012 WL 3799660, at *17.

McCaul became angry upon finding Kosilek wearing her clothing.[8] While in prison awaiting trial, Kosilek applied for treatment for her Gender Identity Disorder (GID)[9]—eventually braving a lengthy lawsuit in order to receive hormones.[10] While the eventual prescription of hormones, as well as the ability to live as a woman in prison, helped to ease Kosilek's suffering, her doctors recognized that sex reassignment surgery was the only way for her to gain the peace of mind she needed.[11]

This case is unique in two ways. First, Kosilek sought an "unprecedented" injunction granting her access to sex reassignment surgery.[12] Second, unlike most Eighth Amendment medical claims, Kosilek sought treatment recommended by her doctors as the only suitable course of medical care.[13] The United States District Court for the District of Massachusetts *held* that (1) refusal to provide sex reassignment surgery, in line with reasonable medical recommendations, to a prisoner suffering from severe gender dysphoria is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment and (2) the court can issue an injunction granting that surgery when it looks as though the Department of Corrections will continue to deny it. *Kosilek v. Spencer*, No. CA 00-12455-MLW, 2012 WL 3799660 (D. Mass. Sept. 4, 2012).

II. BACKGROUND

The Eighth Amendment to the United States Constitution provides protection against "cruel and unusual punishment[]."[14] While historical accounts disagree regarding the intent behind the Eighth Amendment, the primary concern of the Amendment's drafters was most likely to prevent torture.[15] Accordingly, the prohibition was generally applied by

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8. *Id.*

9. "Gender Identity Disorder" is a medical diagnosis, contained in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), and consists of three required components for diagnosis: (1) evidence of persistent desire to be, or insistence that one is, of the other sex; (2) persistent discomfort about one's assigned sex; and (3) evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning. A diagnosis will not be made if (1) the individual has a concurrent physical intersex condition or (2) the cross-gender identification is a desire for perceived social advantages. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 2003).

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

11. *Kosilek*, 2012 WL 3799660, at *37 ("All of the doctors who testified at trial, except for Dr. Schmidt, provided evidence that sex reassignment surgery for Kosilek is both medically necessary and the only adequate treatment for [her] severe gender identity disorder.").

12. *Id.* at *1.

13. *Id.*

14. U.S. CONST. amend. VIII.

15. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

courts to "punishments which inflict[ed] torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering."[16] Over time, however, American jurisprudence came to hold that "the Amendment proscribes more than just physically barbarous" treatment.[17] Courts must evaluate all penal measures against "contemporary standards of decency."[18] Any measure that inflicts serious pain without penological justification is considered "unnecessary and wanton" and violates the Eighth Amendment.[19]

Prison confinement conditions can often inflict pain or suffering and are, consequently, subject to judicial scrutiny.[20] Prison officials have a duty to "ensure that inmates receive adequate food, clothing, shelter, and medical care."[21] Within reason, officials are also tasked with providing for the safety of inmates.[22] An inmate, however, must show more than just restrictive or harsh conditions in order to demonstrate he or she was subject to cruel and unusual punishment.[23] Courts consider two issues when deciding if prison conditions violate the Eighth Amendment: first, whether the condition is cruel and unusual, causing a deprivation of a basic human need;[24] and second, whether the treatment can rightfully be considered "punishment"—that is, whether "prison official[s] [had] a 'sufficiently culpable state of mind.'"[25] A plaintiff will prevail only when both of these criteria are met.[26]

A. Is the Treatment Cruel and Unusual?

To succeed on an Eighth Amendment claim relating to prison conditions, an inmate must first prove that the conditions to which he or she was subject were inhumane.[27] The determination of what constitutes

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16. O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).
17. *Estelle*, 429 U.S. at 102.
18. *Id.* at 102-03.
19. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
20. *See id.* at 346-47.
21. Farmer v. Brennan, 511 U.S. 825, 832 (1994).
22. *Id.*
23. *See Rhodes*, 452 U.S. at 347 ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").
24. *Farmer*, 511 U.S. at 834 (citing *Rhodes*, 452 U.S. at 347).
25. *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991)).
26. *Id.*
27. *See Wilson*, 501 U.S. at 298 ("Our holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?), and we did not consider the subjective component (Did the officials act with a sufficiently culpable state of mind?).").

inhumane treatment is not a static test.[28] Instead, the Eighth Amendment protects against the violation of the "evolving standards of decency that mark the progress of a maturing society."[29] The United States Supreme Court justified this responsibility by noting that prisons deprive inmates of their ability to protect themselves, provide for their own housing, food, or medical care, and limit their access to outside aid; consequently, the Court said, institutions are not then "free to let the state of nature take its course."[30] These standards of decency result in a slightly different analysis depending on what harm is at issue and if that harm has already occurred.

General conditions of confinement in prison constitute a violation of the Eighth Amendment only when there is a sufficiently serious deprivation of a basic human need.[31] In *Rhodes v. Chapman*, plaintiffs brought a suit objecting to what they considered to be overcrowding at their maximum security prison.[32] The two plaintiffs objected to "double celling," where they were housed in the same sixty-three-square-foot cell; however, the Court noted that they were not denied food, medical care, common area space, and were not subject to disproportionate violence due to the increase in population.[33] Noting that the Constitution does not mandate comfortable prisons, the Court held that the "double celling" at issue was not a serious deprivation.[34] Since *Rhodes*, the Court has recognized that individual discomforts may combine to establish an unnecessary infliction of pain; however, prison conditions are not a "seamless web" for Eighth Amendment purposes.[35] In *Wilson v. Seiter*, the Supreme Court held that while a number of conditions that would not establish an Eighth Amendment violation alone could do so in combination, the combination must result in "the deprivation of a single, identifiable human need."[36] When challenging basic prison conditions, then, inmates must meet a fairly high bar by showing that they have been subject to inhumane treatment through the deprivation of a specific, basic human need.[37] For example, serious lack of adequate space due to overcrowding, inadequate heating or cooling, lack of adequate food, lack

28. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
29. *Id.* at 101.
30. *Farmer*, 511 U.S. at 832-33.
31. *Wilson*, 501 U.S. at 304.
32. 452 U.S. 337, 339-40 (1981).
33. *Id.* at 348.
34. *Id.* at 348-49.
35. *Wilson*, 501 U.S. at 304-05.
36. *Id.* at 304.
37. *Id.*

of adequate medical care, or lack of personal safety are basic human needs.[38]

Medical care, then, must be provided by prisons.[39] An inmate wishing to establish an Eighth Amendment claim related to medical care must establish that he or she has a serious medical need.[40] The United States Court of Appeals for the First Circuit held that a medical need is serious when the necessity for treatment is mandated by a physician or is obvious enough that even a lay person would recognize the need for treatment.[41] For example, one can infer that presently untreated hepatitis C is a serious medical need if it results in continuing liver damage and a possibility of death.[42] A number of circuit courts, such as the Fourth Circuit, have recognized that the need for medical care to treat physical ailments is legally indistinguishable from the need for medical treatment for psychological ailments.[43] In *Torraco v. Maloney*, the First Circuit held that a serious medical need existed where the inmate in question had previously attempted suicide, assaulted a guard, and overdosed on pills.[44] If an inmate establishes a serious medical need, the analysis will then move to the Eighth Amendment's state of mind requirement.[45] Adequate medical care is a basic human need, then, when it is established that an inmate has a serious, discernible mental or physical disorder.[46]

B. Is the Treatment Punishment?

A sufficiently serious deprivation of a basic human need is not the only showing required to establish a violation of the Eighth Amendment.[47] Courts determining that the first piece has been met must determine if the inmate's treatment may rightfully be deemed "punishment."[48] In cases dealing with conditions of confinement,

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38. *See, e.g.*, *Rhodes*, 452 U.S. at 352-63 (Brennan, J., concurring) (discussing each of these types of deprivations as factors to consider when looking at allegations concerning inadequate prison conditions).

39. *See* Estelle v. Gamble, 420 U.S. 97, 103-04 (1976).

40. *Id.* at 104-05.

41. Gaudreault v. Mun. of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990).

42. *See* Erickson v. Pardus, 551 U.S. 89, 89-91 (2007).

43. *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.").

44. Torraco v. Maloney, 923 F.2d 231, 235 n.4 (1st Cir. 1991).

45. *See Estelle*, 420 U.S. at 103-06.

46. *See Torraco*, 923 F.2d at 234.

47. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834-35 (1994) (analyzing "deliberate indifference" following the determination that the risk of harm had been substantial).

48. *E.g.*, *id.* at 838 ("[A]n 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

including medical care, courts measure punishment using a standard of "deliberate indifference" to an inmate's needs.[49] The deliberate indifference standard can be broken into two parts: (1) an objective part, asking whether the official was indifferent to the needs of the prisoner; and (2) a subjective part, asking if the indifference was deliberate.[50]

The first part of this test—indifference—concerns a balancing of interests dealing with the adequacy of care as well as the reasoning for a denial of care.[51] An official is not indifferent to the needs of a prisoner if he or she tries to provide adequate care, or if he or she makes a reasonable determination that prison environs do not allow for the remedy requested.[52] In *Torraco v. Maloney*, the First Circuit held that officials were not deliberately indifferent to an inmate's needs when he received substance abuse counseling and regular sessions with a psychologist.[53] The work of prison officials failed when Torraco took his own life; however, the court noted that officials had been receptive to Torraco's concerns at every turn and were only negligent insofar as psychiatric treatment was not ordered and Torraco was not placed on suicide watch.[54]

One consequence of incarceration is that prisoners are not entitled to the medical care of their choice.[55] In *United States v. DeCologero*, the First Circuit dismissed the claim that a prisoner with a back condition was entitled to the same care he would have received if he were not incarcerated.[56] Mandating that prisoners are entitled to the same conditions they receive outside of prison would create an "administrative nightmare" and would run counter to the need for punishment and general deterrence.[57] In addition, courts listen to the medical community

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condemned as the infliction of punishment," and thus is not a violation of the Eighth Amendment).

49. *Id.* at 834.

50. *See id.* at 837-39.

51. Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011). *Battista* concerns civil internment; however, while the standard is more friendly to the plaintiff, the interests involved in criminal prisons are the same).

52. *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976) (holding that an inmate's claim for indifference of the prison's doctor was not cognizable because he had been seen by medical personnel seventeen times in three months and could only object to the failure to take an x-ray).

53. Torraco v. Maloney, 923 F.2d 231, 235 (1st Cir. 1991).

54. *Id.* at 235 ("We find that rather than manifesting deliberate indifference to Torraco's need for mental health attention, [the] undisputed evidence shows a thoughtful concern on defendants' part for Torraco's mental well-being."). The lack of a psychiatrist and the failure to put Torraco on suicide watch were not "so inadequate as to shock the conscience." *Id.* (quoting Sires v. Berman, 834 F.2d 9, 13 (1st Cit. 1987).

55. *See* United States v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987).

56. *Id.*

57. *Id.* at 42-43.

for decisions regarding the adequacy of treatment. The First Circuit held, for instance, that adequate medical care is "of a quality acceptable within prudent professional standards."[58] Given the choice between multiple adequate treatment avenues, courts will also defer to prison officials when they make reasonable decisions related to the constraints placed upon them by the prison environment.[59] Cost constraints alone, however, are generally not considered a valid excuse for denying a prisoner adequate medical care.[60] Courts will avoid granting professional deference when the reasons for denying treatment are proven to be pretextual.[61]

The second part of this test—deliberateness—concerns whether the official in question "'*consciously* disregar[ded]' a substantial risk of serious harm."[62] Courts look to a prison official's subjective state of mind to decide if this prong is satisfied.[63] A prison official must have actual knowledge of the risk.[64] Mere negligence is not enough to satisfy the standard.[65] However, a prisoner does not necessarily have to prove she personally notified prison officials of her safety concerns to establish their knowledge.[66] Instead, a court may determine that the official knew of the risk because it was obvious.[67] Consequently, medical malpractice does not violate the Eighth Amendment merely because the victim was incarcerated.[68] This approach is designed to ensure Eighth Amendment scrutiny is only used against those who inflict punishment and not those officials who did not intend to cause harm.[69]

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58. *Id.* at 43.

59. *See id.* at 42 (noting that the First Circuit sees no need to "debate the fine points of [the prisoner's] medical care").

60. Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); *see also* Wilson v. Seiter, 501 U.S. 294, 302 (1991) ("Nor, we might note, is there any indication that other officials have sought to use [a cost defense] to avoid the holding of *Estelle v. Gamble*").

61. *See, e.g.*, Battista v. Clarke, 645 F.3d 449, 455 (1st Cir. 2011).

62. Farmer v. Brennan, 511 U.S. 825, 839 (1994) (quoting MODEL PENAL CODE § 2.02(2)(c)). The Model Penal Code and the Court, here, discuss "recklessness" as a standard for the subjective component of the Eighth Amendment test. The "deliberate" standard, then, concerns a state-of-mind which must rise to the level of recklessness. *Id.* at 838-39.

63. *Id.*

64. *See id.* at 842-43.

65. *See* Estelle v. Gamble, 429 U.S. 97, 105–06 (1976) ("[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'").

66. *See Farmer*, 511 U.S. at 839-42.

67. *Id.* at 841-42.

68. *Estelle*, 429 U.S. at 106.

69. *See id.* at 105-06.

C. Obtaining Relief

An inmate can obtain injunctive relief to prevent harm from actually occurring if he or she can show that the disregard will continue.[70] An injunction is acceptable where an inmate can not only satisfy the standard of an Eighth Amendment claim but can also show that the disregard has continued through litigation and will likely continue into the future.[71] Courts have broad discretion to decide whether an injunction is appropriate.[72] An inmate should also try to obtain relief through the appropriate administrative avenues before bringing his or her claim to court.[73] Courts, then, are also granted fairly broad discretion to decline to issue an injunction.[74] Furthermore, that injunction, once issued, must still be narrowly tailored.[75]

D. Judicial Treatment of Prisoners with Gender Identity Disorder

Inmates with GID have particular difficulty obtaining adequate medical care through the prison system.[76] Courts have been reluctant to order prisons to provide hormone treatment to inmates.[77] This is changing. In *Fields v. Smith*, the United States Court of Appeals for the Seventh Circuit held that a Wisconsin law explicitly denying hormone therapy and sex reassignment surgery to inmates was unconstitutional.[78] The First Circuit granted the plaintiff in *Battista v. Clarke* access to hormone treatment despite alleged official concerns about safety.[79] The United States Tax Court noted in 2010 that seven of the United States circuit courts have held gender identity disorder to be a "serious medical need."[80] It seems that courts are shifting from deference to prison

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70. *Farmer*, 511 U.S. at 845-46.
71. *Id.* at 846.
72. *Id.* at 846-47.
73. *Id.* at 847.
74. *See id.* at 846-47.
75. 18 U.S.C. § 3626(a)(2) (1997) ("Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.").
76. *See* Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 545-46 (2000).
77. *E.g.*, Battista v. Clarke, 645 F.3d 449, 454 (1st Cir. 2011) (discussing early resistance to providing hormone therapy in Massachusetts prisons).
78. Fields v. Smith, 653 F.3d 550, 559 (2011).
79. *Battista*, 645 F.3d at 455-56.
80. O'Donnabhain v. Comm'r, 134 T.C. 34, 62 (U.S. Tax Ct. 2010).

officials' judgment to a focus on the general medical community's recommendations.[81]

III. COURT'S DECISION

In the noted case, the United States District Court for the District of Massachusetts followed the standard Eighth Amendment analysis for medical claims to conclude that the Massachusetts Department of Corrections Commissioner could not deny inmates sex reassignment surgery when it is a serious medical need.[82] The court presented five criteria that Michelle Kosilek established to prevail in her claim.[83] First, she had a serious medical need; second, there is no adequate treatment outside of sex reassignment surgery; third, the Massachusetts Department of Corrections knew that Kosilek had a serious medical need; fourth, the Massachusetts Department of Corrections did not have a legitimate penological reason for denying surgery; and fifth, "the defendant's unconstitutional conduct [would] continue in the future."[84]

As to the first requirement, the court held that Kosilek had a serious medical need.[85] Kosilek had a history of suicide threats and serious struggle with her gender identity disorder.[86] Noting the extensive circuit history regarding gender identity disorder and the Eighth Amendment, the court stated that the courts and the medical community have reached a clear consensus on the serious nature of gender identity disorder.[87] Combining Kosilek's personal struggle and the general consensus on gender identity disorder, the court concluded that Kosilek has sufficiently established that she has a serious medical need for Eighth Amendment purposes.[88]

The court then turned to the question of whether sex reassignment surgery is the only adequate treatment.[89] The court held that sex reassignment surgery was the only adequate treatment for Kosilek's

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81. *Kosilek v. Maloney*, an earlier suit filed by the plaintiff in the noted case balanced Kosilek's need for hormone therapy against safety concerns included in WPATH's Standards of Care, a widely used guide by medical providers when treating transsexual patients. 221 F. Supp. 2d 156, 166 (D. Mass. 2002).

82. Kosilek v. Spencer, No. 00–12455–MLW, 2012 WL 3799660, at *9 (D. Mass. Sept. 4, 2012).

83. *Id.* at *33-53.

84. *Id.* at *33.

85. *Id.*

86. *Id.*

87. *Id.* at *34.

88. *Id.*

89. *Id.* at *35.

gender identity disorder.[90] The court determined that sex reassignment surgery was necessary by considering the doctors' testimony at trial, all but one of whom testified that sex reassignment surgery was necessary in some cases, including Kosilek's case.[91] While Kosilek was not entitled to ideal care, the Massachusetts DOC's suggestion to keep Kosilek on hormone therapy and psychotherapy, when outside factors (such as prison and cost) were omitted, was considered inadequate care by all but one of the doctors at trial.[92] The court noted that the only doctor who disagreed with the adequacy of psychotherapy and hormone treatment acknowledged that his recommended course of action was aimed at managing symptoms instead of creating a permanent solution.[93] The court concluded that the doctor's opposition to sex reassignment surgery in all cases, in contrast to the professional standards relied upon by most doctors, meant that he did not count as a reasonable, "prudent professional";[94] therefore, his recommendations were not credible.[95] Kosilek, then, "satisfied the objective prong of the deliberate indifference test."[96]

Having determined that Kosilek was denied adequate medical care for a serious medical need, the court turned to the question of deliberateness on the part of the Massachusetts DOC.[97] While there was some question about which prison official should be examined for subjective intent, the court noted that both the Commissioner of the Massachusetts DOC and the doctor in charge of Kosilek's medical care were aware of the serious harm.[98] The defendant—the Commissioner of the Massachusetts DOC—knew that Kosilek was at high risk of serious harm if she did not receive sex reassignment surgery, because the doctor in charge of Kosilek's care expressed to the Commissioner the possibility of suicide and self-harm if Kosilek did not receive sex reassignment surgery.[99] Furthermore, the court issued an opinion regarding Kosilek's medical care in the past, establishing that the DOC should not deny hormone therapy treatment, and both the doctor and commissioner read that opinion.[100] Consequently, the court had little trouble concluding that

90. *Id.* at *41.
91. *Id.* at *37.
92. *Id.* at *31-34.
93. *Id.* at *38.
94. *Id.* at *39.
95. *See id.* at *39-41.
96. *Id.* at *41.
97. *Id.*
98. *Id.*
99. *Id.* at *42.
100. *Id.*

the DOC had actual knowledge that Kosilek was at risk of serious harm.[101]

The court then concluded that the security concerns stated by the DOC were pretextual and did not justify denying Kosilek's surgery.[102] The defendant had not denied treatment because of good faith, reasonable security concerns, or for any other legitimate penological purpose; rather, he had denied treatment because of the concern about political and public outrage.[103] The court based its decision on inferences about the behavior of the DOC, including the Commissioner's past opposition to sex reassignment surgery and hormone therapy, departure from regular procedure in determining security concerns, and his implausible claims that Kosilek was a flight risk.[104] The court furthermore rejected the DOC's claim that the denial of surgery was based on legitimate cost concerns.[105] The surgery's cost, the court held, is not an acceptable reason to deny necessary treatment.[106] Even if cost were a legitimate reason, the court said that the denial of care here was due to a fear of community and political outrage, based on media reports surrounding the case.[107] All of the DOC's reasons for denying the surgery, then, were pretextual and the subjective prong of the Eighth Amendment had been met.[108]

Finally, the Court recognized that a narrowly tailored injunction was proper because the defendant's unconstitutional conduct would continue in the future.[109] Noting that the court had been, in the past, reluctant to issue an injunction for fear of usurping prison officials, the court noted that the DOC presented a pattern of pretextual reasons for unconstitutional actions and was not likely to change its behavior absent a court order.[110] The court ordered that Kosilek receive sex reassignment surgery while refusing to order any other specific action by the DOC in order to maintain standards of judicial restraint.[111]

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101. *See id.* at *41-42.
102. *Id.* at *49.
103. *Id.*
104. *Id.* at *47-49.
105. *Id.* at *50.
106. *Id.*
107. *Id.* at *49-50.
108. *Id.* at *51.
109. *Id.*
110. *Id.* at *52-53.
111. *Id.* at *53-54.

IV. ANALYSIS

The court's opinion in the noted case relies heavily on precedent and factual analysis. The result is pragmatically an expansion of where the courts are willing to go: providing sex reassignment surgery for inmates is essentially unprecedented, except in situations where inmates have resorted to self-castration.[112] The court's decision from a legal standpoint, however, does not really break new ground. If one accepts that the Eighth Amendment is a proper remedy for those that are denied care for mental health issues, then allowing courts to ensure adequate treatment for Gender Identity Disorder is perfectly reasonable.[113] Concern for safety in prisons is important, but safety concerns can be addressed without denying treatment for inmates.

The controversy, then, is not strictly legal. As stated by the Seventh Circuit in *Fields v. Smith*, if the legislature passed a law mandating that "cancer must be treated only with therapy and pain killers [in prison], [a] court would have no trouble concluding that the law was unconstitutional."[114] It seems likely, too, that the public, by and large, understands the need to avoid inmate suffering. In fact, it seems reasonable to posit that even the expansion to treatment for mental disorders in prison enjoys widespread support among the public. Kosilek is not a particularly sympathetic character to begin with—she is a convicted murderer—but as Judge Wolf points out in the noted case, "It is despised criminals, like Kosilek, who are most likely to need the protection of the Eighth Amendment and its enforcement by the courts."[115] This is exactly the result that a reasonable and honest reading of Eighth Amendment precedent demands.

There is a concern going forward, though. Kosilek's ability to control her body and gender is entirely dependent on the mental health community's continued involvement in decisions regarding gender transitioning. The medical community can often include mental health professionals who experience the gender binary rigidly, especially those psychologists who do not have extensive training with gender issues. In

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112. *See* Rosenblum, *supra* note 76, at 543.

113. *See* Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) (justifying an extension of Eighth Amendment analysis from covering only physical ailments to also covering mental disorders). Given that mental health needs must be treated and that Gender Identity Disorder is considered a mental health need, the need for adequate treatment for that need is not particularly controversial.

114. 653 F.3d 550, 556 (7th Cir. 2011).

115. *Kosilek*, 2012 WL 3799660, at *8.

Dean Spade's article *Resisting Medicine, Re/Modeling Gender*, he deals with his own experience in trying to obtain treatment:

> "When did you first know you were different?" the counselor at the L.A. Free Clinic asked. "Well," I said, "I knew I was poor and on welfare, and that was different from lots of kids at school, and I had a single mom, which was really uncommon there, and we weren't Christian, which is terribly noticeable in the South. Then later I knew I was a foster child, and in high school, I knew I was a feminist and that caused me all kinds of trouble, so I guess I always knew I was different." His facial expression tells me this isn't what he wanted to hear, but why should I engage a narrative in which my gender performance has been my most important difference in my life? It hasn't, and I can't separate it from the class, race, and parentage variables through which it was mediated. Does this mean I'm not real enough for surgery?"[116]

As demonstrated by Spade's experience, even psychiatrists trained to deal with these issues hold particularized beliefs about the importance of binary gender categorizations. Spade senses that the psychiatrist is unable to envision a person, suffering from gender dysphoria, perceiving any particular difference in his or her life more concretely than gender.[117] The gender binary, however, is inconsistent with "fundamental biological and psychological realities," and the "phenomenon of transsexuality has yielded to a transgendered movement, made up of diverse transgendered identities."[118] Gender often cannot be considered the first and most important identity signifier in a person's life; however, the bare fact that poverty or race is felt more immediately does not mean that treatment for gender dysphoria is not necessary. Psychiatrists relying on the DSM-IV are trained to look for desire to be "the other sex" with "significant distress."[119] A limited amount of time with an individual, especially one who wishes to ease gender-related distress while still experiencing other "differences" more immediately, may cause a psychiatrist to come to the conclusion that the desire is not strong enough. Constraints on time and resources make the separation of patient and doctor all the more problematic in the prison environment. Psychiatrists dealing with persons who have not committed a crime have difficulty understanding the nuances of identities that fall outside the traditional gender binary. It is then evident that psychiatrists given less time and resources to treat

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116. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 19-20 (2003).

117. *See id.*

118. Rosenblum, *supra* note 76, at 503.

119. AM. PSYCHIATRIC ASS'N, *supra* note 9, at 581.

each individual patient will come to quicker conclusions, resulting in a patient's further inability to receive treatment. Categorizing transgendered prisoners in a strictly medical context tends to erase identities and forces them into a gender binary they already reject in order to receive adequate care.

Darren Rosenblum suggests that transgendered people can challenge these authorities to deal with the broader implications of their existence, while simultaneously employing a medical discourse to their advantage.[120] This suggestion, of course, gets to the heart of the problem expressed by Dean Spade's experience: when seeking relief through hormones or surgery, transgendered people who do not fit the classic medical "transsexual" mold must give up professional assistance with the complexities of their transition in the interest of convincing medical providers that they fit a diagnosis.[121] Again, this concern is amplified in prison, where administrators, despite court guidance, are likely to remain hostile to providing sex reassignment surgery.

The true concern that arises from the noted case, then, is not where the DOC is going to house Kosilek, or the ridiculous notion that male prisoners who otherwise have no trouble with their gender identity will try to transition in order to transfer to a women's prison. The final significant concern is how to truly provide for the health and safety of transgendered inmates. This is possible if the most involved mental health professionals begin to listen to these concerns and back away from the idea that a nontraditional gender identity is an illness[122] that can only be understood and handled with heavy regulation by mental health professionals. In fact, reports now say that the new edition of the *Diagnostic and Statistical Manual of Mental Disorders* recognizes the pleas of transgender advocates and will replace Gender Identity Disorder entirely, in favor of "Gender Dysphoria."[123] This, while a positive step for nonincarcerated transgendered people, may tie the hands of courts and create issues for transgendered prisoners serving extended sentences. Ultimately, a diagnosis is very useful for the purposes of legal advocacy.[124] We need to ask how to ensure that prisoners experiencing discomfort about their assigned gender receive treatment regardless of

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120. Rosenblum, *supra* note 76, at 537-38.

121. *See* Spade, *supra* note 116, at 19-20.

122. *See* Rosenblum, *supra* note 76, at 538 ("[T]he reality of gender diversity prevents the fair classification of any gender identity as per se diseased.").

123. Camille Beredjick, *DSM-V To Rename Gender Identity Disorder 'Gender Dysphoria,'* ADVOCATE.COM (July 23, 2012, 7:00 PM), http://www.advocate.com/print/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria.

124. *Id.*

the medical status of "Gender Identity Disorder" outside prison walls, because the Eighth Amendment may no longer apply.

Ryan Dischinger*

 J.D. candidate 2014; B.A. 2011, University of Louisville. The author would like to thank his family and Eleanora Adkins for their unwavering support.