A PRISONER'S RIGHT TO TRANSSEXUAL THERAPIES: A LOOK AT *BROOKS V. BERG*

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I. INTRODUCTION

In the recent civil case of *Brooks v. Berg*, the District Court for the Northern District of New York held that a convicted murderer had the right to seek medical treatment for Gender Identity Disorder (GID) while serving a fifty-year prison term.[1] On its face, the 2003 decision outrages the sensibilities of the average tax-paying citizen who may ask, "Why should I have to pay for a murderer's sex change?" The argument made by Plaintiff Mark Brooks a/k/a Jessica Lewis[2] is that the Eighth Amendment protects prisoners from the infliction of "cruel and unusual punishments."[3] The court favored Lewis' position that she was unlawfully denied adequate medical services by the superintendent and assistant deputy superintendent of the correctional facility.[4]

This note argues that the human rights and constitutional rights of prisoners do not entitle them to government-funded gender reassignment surgery (GRS).[5] Under the current health insurance model, the convicted should not be entitled to receive GRS when the majority of non-convicted cannot afford GRS. Prisoners *do* deserve basic medical care and the right to psychiatric counseling, but providing an

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[1] Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003); John Caher, *State Must Treat Inmate Who Wants Sex Change: U.S. Judge Orders Testing for Appropriate Action*, NAT'L L. J., July 21, 2003, at P6. In this Note, I refer to transgender, transsexuals, and those suffering from GID interchangeably to refer to people who strongly identify with the opposite sex and often times wish to undergo hormone therapy and surgery to alter their appearance to conform with that of the opposite sex. GID and gender dysphoria are also used interchangeably. *See infra* Part III for further discussion of GID.

[2] For the remainder of this Note, I will refer to the Plaintiff as Ms. Jessica Lewis and use female pronouns to refer to her. She has legally changed her name to Jessica Lewis, and I think her wish to be treated as a female should be respected. "There are many many different ways to be in this world. There are many many different ways to be transgender or gender non-conforming in this world. And, in the end, what counts is a person's self-identification." JODY MARKSAMER & DYLAN VADE, TRANSGENDER LAW CENTER, *TRANSGENDER 101*, *at* http://www.transgenderlawcenter.org/tranny/pdfs/Transgender%20101.pdf (last visited Oct. 24, 2004).

[3] "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. CONST. amend. VIII (emphasis added).

[4] *Brooks*, 270 F. Supp. 2d at 308-09.

[5] *See infra* Part III for a discussion of gender reassignment surgery.

arguably non-essential medical procedure[6] is well beyond the duty of the government. While GRS is an important and necessary procedure for transsexuals in the general population who have undergone counseling and other treatment options, those who are imprisoned should not be provided access to the surgery, especially since these procedures are not readily available to the indigent in America and are rarely covered by health insurance providers.[7]

Part II of this note analyzes Jessica Lewis' case against prison officials and the conclusions that were reached. In Part III, GID is defined clinically, biologically, and in the context of gender as a social construct. Part IV analyzes the state of prison healthcare and what standard of care is required under the gambit of the Eighth Amendment's "cruel and unusual" clause, and provides an introduction to theories of punishment in order to link the treatment of the criminal to his or her punishment. Part V looks at other cases in which prisoners were denied access to GID diagnosis and treatment, examines the factors that went into providing Lewis access to a medical diagnosis, and asks questions that need to be answered in order for transgendered prisoners to be adequately treated.

II. JESSICA LEWIS

Ms. Lewis is a gender-identified woman in her thirties serving a fifty-year sentence at the Clinton Correctional Facility in Dannemora, New York, for two counts of second-degree murder, robbery in the first degree, and criminal use of a firearm in the first degree.[8] She and her accomplice, Michael Mebert, were convicted in 1993 for those incidents stemming from a robbery and shooting of a motorist in Putnam County.[9]

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[6] *See infra* Part III. I am not suggesting that GID is not the right choice for many transgender individuals. I am arguing that inmates should not benefit from surgeries that are arguably not necessary to keep them alive.

[7] *See* Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88 (2002) (discussing health insurance discrimination against providing benefits to the transgendered).

[8] People v. Brooks, 599 N.Y.S.2d 1025 (App. Div. 1993).

[9] *Id.* Lewis gave inculpatory statements to police when questioned about the incident, then a felony complaint was filed against her. *Id.* Her accomplice, Michael Mebert, was convicted of two counts of murder in the second degree, robbery in the first degree, and criminal use of a firearm in the first degree for the 1989 robbery-murder in Putnam County of motorist Dean Lockshiss. People v. Mebert, 599 N.Y.S.2d 938 (App. Div. 1993). The brutality and senselessness of the crime committed by Mark Brooks and Michael Mebert cannot be ignored, although the crime itself is irrelevant to Lewis' right to medical treatment while incarcerated. On the night of July 5, 1989, Dean Lockshiss, a twenty-year-old student at Hofstra University, was driving home from a summer job. Terry Corcoran, *Southeast Student's Killer Wants Sex Change*, THE JOURNAL NEWS, July 18, 2003, *available at* http://www.nyjournalnews.com/newsroom/071803/a0118sexchange.html. He noticed a car at the side of the road with its hood up and hazard lights on, so he stopped his car and tried to assist the motorists with the disabled car. *Id.* Brooks and Mebert were lying in wait to rob and kill Dean Lockshiss. *Id.* They stole $4 from him then shot him twice. *Id.* Putnam County District Attorney Kevin L. Wright, who prosecuted Brooks and Mebert said about Lockshiss, "This is someone who tried to help two young men on a road . . . . They [Brooks and Mebert] pretended their car was broken down and used that ruse to rob a young college student of $4; then each took a turn shooting him. If that's not a thrill killing, I don't know what is." *Id.*

See infra Part IV for discussion on theories of punishment as they relate to how Lewis should be

Jessica Lewis was born and remains biologically male, however she strongly identifies with females and wishes to be biologically female.[10] Lewis knew from a young age that she had female traits and while incarcerated she first became aware of the medical condition called GID.[11] She studied materials about GID and became convinced that she was a transsexual by 1998.[12] This realization prompted her struggle to be acknowledged by the correctional facility and given proper medical diagnosis and treatment.[13]

Her civil lawsuit against the assistant deputy superintendent of Clinton Correction Facility, the superintendent of Clinton Correctional Facility, members of the staff of Inmate Grievance, and members of the staff of the Mental Health Satellite Unit was a reflection of Lewis' frustration with the system.[14] On several occasions, Lewis wrote to the Inmate Grievance Department and the Assessment Program and Preparation Unit (APPU)[15] asking for the appropriate medical attention for GID, but her letters went unanswered.[16] After her efforts were ignored for two years, Lewis brought suit in federal court against the aforementioned Defendants pursuant to 42 U.S.C. § 1983, Civil Action for Deprivation of Rights, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[17]

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treated.

[10] *Brooks*, 270 F. Supp. 2d at 304.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] The APPU was described by the court in *Brooks*:

> The Second Circuit has described the APPU as follows: The APPU . . . offers a 'diagnostic and treatment program' to help victim-prone or fearful individuals develop inner strength and coping skills so as to be able to move back into the general population. The unit has a variety of programs available to inmates, including an academic program, psychological counseling, and three vocational shops.

Brooks, 270 F. Supp. 2d at 304, note 2 (quoting Hall v. Unknown Named Agents of New York State Dep't for Correctional Services for APPU at Clinton Prison, 825 F.2d 642, 644 (2d Cir. 1987)).

[16] *Brooks*, 270 F. Supp. 2d at 304.

[17] 42 U.S.C. § 1983 (2004).

Lewis' first cause of action was for being denied necessary medical treatment in violation of the Eighth Amendment.[18] Her second cause of action alleged that her due process rights were violated by the prison officials who mishandled her grievances.[19]

In their defense, the prison officials submitted to the court the Department of Correctional Services (DOCS) policy entitled "Estrogen Therapy for Gender Dysphoria:"[20] The court read from the policy in its opinion:

> The New York State Department of Correctional Services continues treating inmates for Gender Dysphoria identified prior to incarceration. Under this policy, inmates who can prove that they received hormone therapy prior to incarceration may be eligible for continued hormone therapy. The policy further states that during incarceration transsexual surgical operations are not honored.[21]

The prison officials maintained that they were following the DOCS guidelines by not providing Lewis with diagnosis or treatment for gender dysphoria.[22] The judge however found that:

> This blanket denial of medical treatment is contrary to a decided body of case law. Prisons must provide inmates with serious medical needs some treatment based on sound medical judgment. There is no exception to this rule for serious medical needs that are first diagnosed in prison. Prison officials are thus obliged to determine whether Plaintiff has a serious medical need and, if so, to provide him with at least some treatment.[23]

The judge found that certain prison officials, the assistant deputy superintendent and the superintendent, could be held accountable for medical treatment being withheld from Lewis.[24] Following *Walsh v. Franco*,[25] the *Brook*s

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[18] *Brooks*, 270 F. Supp. 2d at 304.

[19] *Id.* at 304-05.

[20] *Id.* at 305 (citing DOCS Health Services Policy Manual § 1.31).

[21] *Id.* A similar policy has been implemented by the U.S. Bureau of Prisons:

> It is the policy of the Bureau of Prisons to maintain the transsexual inmate at the level of change existing upon admission to the Bureau. Should responsible medical staff determine that either progressive or regressive treatment changes are indicated, these changes must be approved by the [Bureau of Prisons] Medical Director prior to implementation. The use of hormones to maintain sexual secondary characteristics may be continued at approximately the same levels as prior to incarceration, but such use must be approved by the Medical Director.

NATIONAL CENTER FOR LESBIAN RIGHTS, TRANSSEXUAL PRISONERS, *at* http://www.transgenderlaw.org/resources/prisoners.htm (last visited Oct. 24, 2004).

[22] *Brooks*, 270 F. Supp. 2d at 311.

[23] *Id.* at 312.

[24] *Id.* at 313.

[25] 849 F.2d 66, 69-70 (2d Cir. 1988). In *Walsh*, a bench warrant was issued for the arrest of a restaurant owner who had not shown up for his hearing on unpaid parking tickets. *Id.* at 67. Although Mr. Walsh had obtained an amendment to the city ordinances to allow for his service vehicles to park on the road behind the restaurant, parking tickets were issued to him anyway, and he was expected to appear in court. *Id.* He never appeared because notice of the hearing was sent to the wrong address. *Id.* Mr. Walsh was picked up by the police, handcuffed, and strip searched. *Id.* The court held that strip

court reasoned that "defendants who act pursuant to a facially invalid policy are not entitled to qualified immunity."[26] The court went on to find the DOCS policy both arbitrary and unconstitutional.[27] "Surely inmates with diabetes, schizophrenia, or any other serious medical need are not denied treatment simply because their conditions were not diagnosed prior to incarceration."[28]

The decision was a victory for many transgender prisoners because the court had taken a look at Gender Identity Disorder and concluded that it was a problem serious enough to merit medical treatment.[29] Subsequent to the *Brooks* decision of July 15, 2003, the Defendants submitted a memorandum to the Court stating that they conceded that Lewis should be entitled to medical diagnosis and treatment for GID.[30] In *Brooks II*,[31] the Court, in the "interest of judicial economy," decided to vacate its denial of summary judgment in *Brooks*, and allow Defendants, Berg and Senkowski, the Assistant Deputy Superintendent and Superintendent of Clinton Correction Facility, to resubmit another motion for summary judgment that addressed the fact that their policy regarding transsexual prisoners had changed.[32]

III. GENDER IDENTITY DISORDER

Gender Identity Disorder[33] is a rare condition which affects both children and adults.[34] Adult symptoms include the "[d]esire to live as a person of the opposite sex, [d]esire to be rid of their own genitals, [d]ressing and behaving in a manner typical of the opposite sex, [w]ithdrawal from social interaction and activity, [f]eelings of isolation, depression and anxiety."[35] The condition is considered to be

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searching for a misdemeanor without suspicion that the suspect was armed or carrying contraband was unconstitutional and therefore the government actors were not able to claim protection under qualified immunity. *Id.* at 67-70.

Cf. Cuoco v. Mortisugu, 222 F.3d 99, 107 (2d Cir. 2000) (discussing a statutory exemption creating qualified immunity for members of the Public Health Service). *See infra* Part V for further discussion of *Cuoco*.

[26] *Brooks*, 270 F. Supp. 2d at 311-312.

[27] *Id.* at 312.

[28] *Id.*

[29] *Id.*

[30] *See* Brooks v. Berg, No. 00-CV-1433, 2003 U.S. Dist. LEXIS 19240, at *2, 3 (N.D.N.Y. Oct. 29, 2003) [hereinafter "*Brooks II*"].

[31] *Brooks II*, 2003 U.S. Dist. LEXIS 19240.

[32] *Brooks II*, 2003 U.S. Dist. LEXIS 19240, at *7, 8.

[33] Some people object to gender dysphoria being referred to as a disorder. I have chosen to use the term here because the trial court in *Brooks* used the term to describe Ms. Lewis' probable diagnosis. *See infra* Part III(A) for further discussion.

[34] WebMD, *Your Guide to Gender Identity Disorder*, *at* http://my.webmd.com/content/article/60/67145.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348} (last visited Oct. 24, 2004).

See THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (6th ver. Feb. 2001), *at* http://www.hbigda.org/socv6.cfm (last visited on Oct. 24, 2004). "The earliest estimates of prevalence for transsexualism in adults were 1 in 37,000 males and 1 in 107,000 females. The most recent prevalence information from the Netherlands for the transsexual end of the gender identity disorder spectrum is 1 in 11,900 males and 1 in 30,400 females." *Id.*

[35] WebMD, *Your Guide to Gender Identity Disorder*, *supra* note 34.

psychological in nature.[36] Therefore, proper diagnosis is made by a trained psychiatrist or psychologist.[37] Treatment for this condition includes counseling and possibly hormone treatment or in extreme cases gender reassignment surgery.[38]

The Supreme Court recognized a transsexual in *Farmer v. Brennan* 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 hormonal therapy and surgery, to bring about a permanent sex change."[39] In *Farmer*, the petitioner Dee Farmer was incarcerated in a federal prison for credit card fraud.[40] Although Farmer was born a male, she had undertaken estrogen therapy and surgery to become more feminine in appearance, and had received silicone breast implants and undergone an unsuccessful "black market" testicle-removal surgery by the time she was a teenager.[41] At her trial for credit card fraud in 1986, she appeared in court dressed as a woman.[42] After being found guilty and sentenced to twenty years, she was placed in a federal prison among male inmates according to the standard practice of federal prisons which

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[36] Transvestism remains listed as a mental disorder in the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) (1987), although in that same edition, homosexuality was removed from the list of mental disorders. Vern V. Bullough, *Transgenderism and the Concept of Gender*, INT'L J. OF TRANSGENDERISM, Special Issue on What is Transgender?, *available at* http://symposion.com/ijt/gilbert/bullough.htm (last visited Oct. 24, 2004). The removal of homosexuality as a mental disorder and not transvestism has been attributed to the political clout of the homosexual population compared to that of the transvestite population. *Id.*

A study on the history of lobbying by homosexuals, which is beyond the scope of this note, might shed light on the phenomenon of why homosexuals have acquired more rights and recognition than the transgendered.

[37] *Id.* A psychiatrist is a medical doctor who specializes in mental health, while a psychologist is a trained professional with a master's degree and/or a doctoral degree in psychology. *Id.*

[38] *Id.* The following characterization of transsexuals is found in the MERCK, MANUAL OF DIAGNOSIS AND THERAPY 1434 (14th ed. 1982) and was quoted in Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987). *See infra* note 186 and accompanying text for in-depth discussion of *Meriwether*.

> In true male transsexuals the condition begins in early childhood with indulgence in girls' games, fantasies of being female, repugnance at the physical changes that attend puberty, and thereafter a quest for a feminine gender identity. Many transsexuals are adept at acquiring the skills that enable them to adopt a feminine gender identity. Some patients are satisfied with being given help to achieve a more feminine appearance, together with employment and an identity card that enables them to work and live in society as women. Others are not content with changing their social identity but can be helped to achieve a more stable adjustment with small doses of feminizing hormones. Many transsexuals request feminizing operations in spite of the sacrifices entailed. The decision for surgery sometimes raises grave social and ethical problems. Since some follow-up studies have provided evidence that some true transsexuals achieve more happy and productive lives with the aid of surgery, it is justified in carefully selected men. After surgery, the patients need assistance with movement, gesture, and voice production. Some homosexual men, usually with serious personality problems, request reallocation surgery. The results in these patients are unsatisfactory from both a medical and social viewpoint.

Id.

[39] Farmer v. Brennan, 511 U.S. 825, 829 (1994) (quoting THE AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).

[40] *Id.* at 829.

[41] *Id.*

[42] *Id.*

involves housing pre-operative transsexuals with others of their biological sex.[43] In her years as an inmate she was held both with the male population and by herself in isolation.[44]

After being transferred to a federal penitentiary for disciplinary reasons and being housed among the general male population, Farmer alleges that she was beaten and raped by a fellow inmate.[45] She filed suit against prison officials for violating her Eighth Amendment right to be protected against "cruel and unusual punishment."[46] A prison official is deemed to have violated an inmate's Eighth Amendment rights by his "'deliberate indifference' to a substantial risk of serious harm to an inmate."[47] The petitioner argued for an objective standard to test for "deliberate indifference;" however, the Supreme Court held that knowledge by the prison officials was necessary to show "deliberate indifference."[48] Justice Souter wrote:

> The Eighth Amendment does not outlaw cruel and unusual "conditions;" it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. . . . But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the

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[43] *Id.* at 829, 830. The practice of housing pre-operative transsexuals with the general population of their biological sex presents serious safety issues for male-to-female (MTF) transsexuals. "Of course, as the cases have already established, he [referring to Tasha Maggert, an incarcerated MTF transsexual] is entitled to be protected, by assignment to protective custody or otherwise, from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities." Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997). The problem with this policy is that actual knowledge that a MTF transsexual with female secondary sexual characteristics is going to be sexually abused by male inmates is difficult to prove, although most people take this proposition to be a given. *See infra* Part V for further discussion of *Maggert*; *see also* Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). "Dominant inmates seek to rape inmates who are young, less-streetwise, effeminate, or gay. . . . One study estimated that slightly less than a quarter of all inmates have been raped." *Id.* at 523-524.

[44] *Farmer*, 511 U.S. at 830. In order to protect transsexual women (still biologically male) from being abused by male inmates in prison, they are often kept in isolation or "administrative segregation." NATIONAL CENTER FOR LESBIAN RIGHTS, TRANSSEXUAL PRISONERS, *supra* note 21. "[H]owever, administrative segregation also results in exclusion from recreation, educational and occupational opportunities, and associational rights." *Id.*

[45] Farmer v. Brennan, 511 U.S. 825, 830. Sexual assault is prevalent in prisons not only as an act against transsexuals but also as an act against heterosexual prisoners. An estimated 140,000 prisoners in the United States are sexually assaulted every year. Neely Tucker, *Reform Plan Targets Prison Rape: Congress Unanimously Approves Study, Efforts to Stop Assaults*, WASHINGTON POST, July 26, 2003, at A10. In the past, prisons have not provided victims of sexual assault many options for recourse against their abusers. In 2003, Congress enacted the Prison Rape Elimination Act, which will provide $60 million annually to combat prison rape. *Id. See also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999); Christopher D. Man & John P. Cronan, *Criminal Law: Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127 (Fall 2001/Winter 2002).

[46] *Farmer*, 511 U.S. at 830.

[47] *Id.* at 832.

[48] *Id.* at 837-38.

infliction of punishment.[49]

The Supreme Court's ruling, while not a complete victory for Farmer, was a semi-victory because it allowed for an objective test to be applied which would permit the factfinder to decide on the issue of "deliberate indifference."[50] Under the Court's objective test, in order to show "deliberate indifference" it is not necessary for prison officials to have failed to act upon *actual knowledge* that harm would befall an inmate.[51] Instead, it is sufficient that prison officials failed to act when they knew of a substantial risk of serious harm to an inmate.[52] The Court further explained that a factfinder can infer that a prison official knew of a substantial risk of serious harm by the fact that the risk was obvious.[53] After the Court's decision in *Farmer*, few prison officials have successfully made the argument than they did not have knowledge of a specific risk to an inmate.

The problems faced by incarcerated transsexuals as well as those in the general population are numerous. Transsexuals in the general population face employment discrimination, legal discrimination, and health insurance discrimination. In order to best understand the dilemma faced by transsexuals, it is necessary to understand who they are and how they identify themselves.

A. The Construction of Gender

"Gender" was first coined by Dr. John Money to describe sex roles while he was researching at John Hopkins University in 1955.[54] He later used the term "gender identity" while conducting gender research to describe "the total perception of the individual about his or her own gender, including a basic personal identity as a man or woman, boy or girl."[55] In 1974, Dr. N.W. Fisk was the first to coin the diagnosis of "gender dysphoria."[56] Until that time, there was thought to be only two distinct categories of people: male and female.[57] Dr. Carl W. Bushong's work with transsexuals led him to conclude that gender is a "matrix—a possible

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[49] *Id.*

[50] *Id.* at 842.

[51] *Id.*

[52] *Farmer*, 511 U.S. at 842.

[53] *Id.*

[54] Carl W. Bushong, *What is Gender and Who is Transgendered?*, at http: //www.transgendercare.com/guidance/what _is_gender.htm (last visited Oct. 24, 2004). Dr. John Money is a professor emeritus of psychiatry and behavior sciences, associate professor emeritus of pediatrics, and psychologist at Johns Hopkins University. *See* http://jhed.jhmi/edu/jhed/indez.cfm?fuseaction=SearchAction&fname=john&1name=money (last visited Oct. 24, 2004).

[55] Bullough, *supra* note 36.

[56] Bullough, *supra* note 54.

[57] *Id.* To simply call those people who do not fit neatly into the gender boxes of male and female non-conformists implies that they deliberately violated the norms of society. Because this may not be the case, most sexual scientists now use the term 'cross gender' or increasingly 'transgender' to avoid this judgment. Bullough, *supra* note 36. *See also* Rosenblum, *supra* note 43. Rosenblum refers to the rigid male and female distinction as gender binarism. *Id.* at 503.

mix of male and female development within the same individual."[58] Under his theory, a person is not simply male or female but a mixture of characteristics of both.[59] "One way to picture gender is as a gender galaxy—a space with an infinite number of gender points that can move and that are not hierarchically ordered."[60] This vision provides for unlimited types of people with varied gender characteristics that transcend the conventional notions of male and female. These people are generally referred to as transgendered, a category which covers many individuals, including those oriented to the same or opposite sex, those who cross dress and those who do not, and those who undergo surgery to have the physical attributes of the opposite sex.[61]

B. The Biological Basis of Transgenderism

A combined study published in *Nature* in 1995, conducted by scientists at the Graduate School of Neurosciences at the Netherlands Institute for Brain Research and the Department of Endocrinology at Free University Hospital, was the first to find that transsexuality can be linked to a sex difference in the human brain.[62] The researchers followed the brain functions of six male-to-female transsexuals over an eleven year period.[63] Using their knowledge of the brain function of rats, the researchers wanted to find a part of the human brain that was sexually dimorphic, but not affected by sexual orientation.[64] With the knowledge that "the volume of the central subdivision of the bed nucleus of the stria terminalis (BSTc), a brain area essential for sexual behavior, is larger in men than in women," researchers were able to observe that the six male-to-female transsexuals contained a female-sized BSTc.[65] The study also showed that neither the sexual orientation of the six subjects nor sex hormones taken in adulthood affected the size of their BSTc.[66] The researchers hypothesize that gender identity disorder may develop due to an altered interaction between the development of the human brain and sex hormones.[67] While this study is by no means conclusive, it certainly supports the notion that GID is not something abnormal or unnatural; rather, GID is just an alternative means of development.[68]

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[58] Bushong, *supra* note 54.

[59] *Id.*

[60] MARKSAMER & VADE, *supra* note 2.

[61] Bullough, *supra* note 36. A "gay queen and ultra butch lesbian" would both be considered transgender. *Id.*

[62] J.-N. Zhou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, *at* http://www.transgendercare.com/medical/hormonal/brain_sex_diff.htm (last visited Oct. 24, 2004).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Zhou et al., *supra* note 62. GID, like homosexuality, should no longer be thought of as a "disorder" or "disease." Scientific research has the potential to change society's conception of the transgendered.

1. Treatment Options: Counseling, Estrogen Therapy, Surgery, and No Treatment

The Harry Benjamin International Gender Dysphoria Association publishes the "Standards of Care for Gender Identity Disorders" (SOC), a manual that is widely used by clinicians, transsexuals, and their families to understand the condition and its treatments.[69] According to the SOC, GID is diagnosed when an individual meets certain requirements outlined by the International Classification of Diseases-10 (ICD-10) or the Diagnostic and Statistical Manual of Mental Disorders —Fourth Edition (DSM-IV).

> To qualify as a mental disorder, a behavioral pattern must result in a significant adaptive disadvantage to the person or cause personal mental suffering. The DSM-IV and ICD-10 have defined hundreds of mental disorders which vary in onset, durations, pathogenesis, functional disability, and treatability. The designation of gender identity disorders as mental disorders is not a license for stigmatization, or for the deprivation of gender patients' civil rights. The use of a formal diagnosis is often important in offering relief, providing health insurance coverage, and guiding research to provide more effective future treatments.[70]

The SOC acknowledges five elements of clinical work necessary for the diagnosis and treatment for those suffering from GID.[71] They include diagnostic assessment, psychotherapy, real-life experience, hormone therapy, and surgical therapy.[72] "The general goal of psychotherapeutic, endocrine, or surgical therapy for persons with gender identity disorders is lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment."[73]

After diagnosis by a trained psychiatrist or psychologist,[74] it is recommended that those suffering from gender dysphoria seek counseling to treat the problems associated with GID, such as depression, anxiety, and low self-esteem.[75] Receiving the appropriate medical attention may be difficult for many due to the lack of mental health providers who are trained to work with clients on gender

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[69] THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, *supra* note 34.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] As one academic explains, diagnosis is intended to help the client with coping skills:

> Being Transgender is not in itself pathological or indicative of a need for psychiatric treatment. However, Transgender individuals do experience a number of unique stressors and are no different from the rest of the population in their potential to experience emotional problems and other concerns which may lead then to seek psychotherapy.

Katherine Rachlin, *Transgender Individuals' Experiences of Psychotherapy*, 6 INT'L J. TRANSGENDERISM, Jan.-March 2002, *at* http://www.symposion.com/ijt/ijtvo06no01_03.htm (last visited Oct. 24, 2004).

[75] WebMD, *Your Guide to Gender Identity Disorder*, *supra* note 34.

identity issues.[76] However, because the surgery is nonreversible, it is necessary for those individuals who wish to undergo gender reassignment surgery (GRS) to first receive extensive psychotherapy to ensure they are appropriate candidates.[77] The psychotherapist must then write a letter to a surgeon authorizing genital surgery.[78] An additional letter from another mental health professional is also usually required.[79] The psychotherapist is placed in the difficult role of being both a "gatekeeper" to GRS and a therapist.[80]

After a patient receives approval from a psychotherapist to undergo GRS, male to female (MTF) transsexuals are able to receive estrogen therapy to develop the secondary sexual characteristics of a woman.[81] Medical protocols dictate that the person live as the gender of orientation for two or three years before the last state of the transformation is performed.[82] This involves working, being a student, and changing one's name while continuing therapy.[83] During this time, the patient may elect to undergo non-genital surgeries such as electrolysis to remove facial hair.[84] The last step, GRS, involves a series of procedures to remove part of the testes and penis and to construct female genitalia.[85]

Female to male (FTM) transsexuals are less common than MTF transsexuals.[86] Their surgery presents more problems than that of MTF transsexuals due to the inherent difficulties in constructing a functioning penis-like structure.[87] FTM transsexuals first undergo a mastectomy to remove breast tissue and then the chest area is restructured to resemble that of a male.[88] Then, the uterus and the ovaries must be removed, and finally a penis is constructed from nerves and blood vessels from the clitoris or from nerves and blood vessels from

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[76] *See* Rachlin, *supra* note 74.

[77] *Id.*

[78] THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, *supra* note 34.

[79] *Id.*

[80] Rachlin, *supra* note 74.

[81] Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997).

> Biologic males treated with cross-sex hormones can realistically expect treatment to result in: breast growth, some redistribution of body fat to approximate a female body habitus, decreased upper body strength, softening of the skin, decrease in body hair, slowing or stopping the loss of scalp hair, decreased fertility and testicular size, and less frequent, less firm erections.

THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, *supra* note 34.

[82] *Id.*

[83] *Id.*

[84] CLEVELAND CLINIC, SEX (GENDER) REASSIGNMENT SURGERY, *at* http://www.clevelandclinic.org/health/health-info/docs/2500/2584.asp?index=9145 (last visited Nov. 21, 2003).

[85] *Id.* These surgeries involve turning the penile tissue inside out to construct a vagina-like structure, removal of the testes, and the construction of a labia-like structure from the scrotum tissue. *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

other parts of the body.[89] FTM transsexuals may also opt for a prosthetic penis.[90]

Gender Reassignment Surgery is not affordable to the average person. Besides the personal costs to the patient of time and patience, the medical bills can easily exceed $100,000.[91] This exorbitant cost leaves the therapy and surgery out of reach to many transsexuals.[92] The situation is exacerbated by the fact that most health insurance providers do not cover GRS.[93] Many transsexuals must go without medical treatment or opt for black market surgeries and hormones. In 1996, Minnesota was the only state that allowed Medicaid to pay for the procedure.[94] Chief Judge Posner summarizes this best by writing: "A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person."[95]

It should be noted that defining adequate health care by what is covered by health insurance plans and Medicaid is insufficient, due to the inherent problems with capitalistic health insurance systems.[96] However, the courts must look somewhere to define what is due to the prisoners and what should be paid for by the taxpayers. The health insurance system is the only logical place where courts may look for guidance in deciding which procedures may or may not be afforded to inmates.

2. Right of the Transgender Individual to Healthcare and Medical Insurance

The Americans with Disabilities Act of 1990 (ADA) demonstrated how Congress categorizes transgender individuals. The definitions section of the Act refers to transsexuals and those with GID in the same grouping as pedophiles, exhibitionists, and voyeurs:

> § 12211. Definitions
> (b) Certain conditions. Under this Act, the term "disability" shall not include — (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders....[97]

The Act not only withholds disability benefits from transsexuals, but also categorizes them amongst sexual deviants. This attitude is also indicative of the

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89 Cleveland Clinic, *supra* note 84. GRS for FTM transsexuals is often a procedure where a penis-like structure is constructed, referred to as a phalloplasty. *Id.*

90 *Id.*

91 *Maggert*, 131 F.3d at 672.

92 *Id.*

93 *Id. See also* Hong, *supra* note 7.

94 *Maggert*, 131 F.3d at 672 (citing Joyce Price, *Minnesota Using Medicaid Funding to Pay for Sex-Change Operation*, WASHINGTON TIMES, Feb. 4, 1996, at A4).

95 *Id.* at 671.

96 *See* Hong, *supra* note 7. "When a person's income, rather than her established medical need, determines the quantity or quality of care she receives, society is confronted with troubling ethical questions of what type of medical delivery system it provides for its citizens." *Id.* at 88.

97 American with Disabilities Act of 1990, 42 U.S.C. § 12211 (2003).

manner in which health insurance companies view transsexuals. Kari E. Hong wrote an Article in the *Columbia Journal of Gender and Law* describing how the ADA exclusion clause works against transsexuals by failing to provide them with protection against bias from employers, health care providers, and health insurance companies.[98] "As a practical matter, individuals are being denied protection for political, rather than medical reasons. Implicating deeper questions of the moral nature of our society, Congress has failed to learn from history that medicine should not be used to create a social caste of lepers and prostitutes."[99]

The Medicaid Act was promulgated in 1965 to provide health care to the "categorically needy."[100] States who cooperate in the plan must provide health insurance to all families who cannot afford the high cost of medical care.[101] Both the state and the federal government pay for the cost of administering Medicaid.[102] Medicaid only covers what is deemed "medically necessary," although this term is not defined in the statute.[103] Individual states are left to decide which procedures can be categorized as medically necessary.[104] The Supreme Court has interpreted the language of the Medicaid Act as conferring "broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act."[105] "Although some cases hold that states cannot categorically exclude sex-change operations from Medicaid coverage, many state Medicaid statutes contain a blanket exclusion. . . and we imagine that as a practical matter it is extremely difficult to obtain Medicaid reimbursement for such a procedure."[106]

In *Smith v. Rasmussen*, John Smith was a FTM transsexual who was in the process of undertaking the transition from a female physical appearance to a male physical appearance.[107] He had already undergone breast reduction and contouring as well as hormonal treatment and psychotherapy.[108] Smith was awaiting the final stage of his transformation, phalloplasty—the creation of a penis-like structure from the vagina.[109] Smith, who was eligible for Medicaid, sought the approval of

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98 Hong, *supra* note 7.

99 *Id.* at 124.

100 Atkins v. Rivera, 477 U.S. 154, 156-57 (1986). *See* 42 U.S.C. §§ 1396 (2004) *et. seq.* for the Medicaid Act.

101 *See Atkins*, 477 U.S. at 156-57.

102 *Id.* at 156-57.

103 Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1756 at note 73 (2002) ("'Medical necessity' is not defined in the Medicaid statute or accompanying regulations. It is often based primarily on physician determinations regarding the necessity of a certain procedure and sometimes guided by state regulations for particularly common procedures.").

104 42 U.S.C. § 1396a(a)(17) (2003).

105 Beal v. Doe, 432 U.S. 438, 444 (1977).

106 *Maggert*, 131 F.3d at 672. The Court lists the following state statutes as containing clauses which exclude Medicaid coverage for GRS: Ill. Admin. Code tit. 89, § 140.6(1); 55 Pa. Code § 1163.59(a)(1); Alaska Admin. Code tit. 7, § 43.385(a)(1). *Id.*

107 Smith v. Rasmussen, 249 F.3d 755, 756-57 (8th Cir. 2001).

108 *Id.* at 757.

109 *Id. See also infra* Part III(B) for discussion of FTM transformations.

the Iowa Department of Human Services to ensure he would be reimbursed for the cost of the surgery.[110] He was told that the surgery was not covered under Medicaid.[111] The only treatments for GID covered by Medicaid were psychotherapy and medication.[112] Smith sued the Iowa Department of Human Services, alleging it had incorrectly denied him coverage under the Medicaid Act for GRS.[113] The suit brought under 42 U.S.C. § 1983 alleged that reasonable standards were not used when the Iowa Department of Human Services determined that GRS was not a medical necessity for the plaintiff.[114] Although Smith's physician concluded that the surgery was a medical necessity for Smith, the Eighth Circuit Court determined that Iowa followed the Medicaid regulations and acted according to reasonable standards.[115] As a result, Smith was denied reimbursement for the GRS.[116]

Arguments have been made for reform of the Medicaid Act so that transgender individuals may be covered for GRS under Medicaid.[117] One commentator suggests that the Medicaid concept of "medical necessity" can be expanded in order to cover procedures that improve a patient's emotional, physical, and financial futures.[118] In this sense, GRS would no longer be viewed as a disorder that *required* medical treatment for Medicaid purposes, but instead GRS would be considered as a means for transsexuals to improve their lives and reap the benefits associated with being legally considered the gender of their choice.[119]

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110 *Smith*, 249 F.3d at 757.

111 *Id.*

112 *Id.*

113 *Id.* at 758.

114 *Id.*

115 *Id.* at 762.

116 *Smith*, 249 F.3d at 761-62.

117 *See* Dasti, *supra* note 103.

118 *Id.* at 1772.

119 Transsexuals who have not undergone GRS are often denied marriage and inheritance rights. In most court cases and transcripts, transsexual prisoners who have not undergone GRS are designated according to their "biological" sex.

> [T]he legal system should respond in one of two ways: Either it can move away from an exclusive focus on genital configuration when entertaining challenges to sex designation; or it can acknowledge the legal and social components of the procedure's "necessity" and increase access to sex-reassignment treatments—at least in part by more liberal disbursement of Medicaid funds—without forcing transsexuals to pathologize something as basic as their very identification. Government authorities cannot have it both ways—that is, they cannot say that sex-reassignment surgery is only available for those suffering from a "gender identity disorder" while simultaneously requiring transgender people to undergo the surgery to enjoy basic, fundamental rights.

Dasti, *supra* note 103, at 1774.

IV. PROVIDING HEALTHCARE TO PRISONERS

Prison healthcare has vastly improved since the late 1960s when prisoners were often treated by fellow inmates or unlicensed physicians.[120] The ensuing prison healthcare reforms can be largely attributed to the 1976 Supreme Court decision *Estelle v. Gamble*.[121]

Gamble involved an inmate of the Texas Department of Corrections, J. W. Gamble, who had injured his back while completing a prison work assignment.[122] A bale of cotton had fallen on Gamble while he was unloading a truck.[123] At first, he did not realize the severity of his injury, so he continued working for four hours until he became stiff and was sent to the prison medical facility for monitoring.[124] At the prison infirmary, Gamble was checked for a hernia by a medical assistant, then sent back to his cell.[125] The pain became so excruciating that he had to be given pain killers from the prison nurse, and he was sent to be examined by a doctor.[126] For over three months Gamble was intermittently given medication for his back strain and his existing high blood pressure.[127] However, during a great majority of this time he was expected to continue his prison work assignments, which involved manual labor.[128] He refused to do the physical work which was demanded of him due to his back pains.[129] Gamble later filed a §1983 complaint alleging that he was denied adequate medical care. He was placed in solitary confinement as punishment for his refusal to complete work assignments.[130]

The Gamble Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[131] For the first time, the Court had given prisoners a Constitutional right to medical care based upon Eighth Amendment principles.

> The [Eighth] Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . .," *Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968),* against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth

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120 Douglas E. McDonald, *Medical Care in Prisons*, 26 CRIME & JUST. 427, 428 (1999). McDonald refers to the 1972 Supreme Court decision in *Newman v. State*, 12 Crim. L. Rptr. 2113 (M.D. Ala. 1972) in which it was brought to light that prisoners in Alabama were often extracting teeth, dispensing drugs, operating X-ray equipment, and performing minor surgery. *Id.* at 431. The Superintendent of the Tucker Prison Farm noted that a "convict doctor" who was untrained in medicine or nursing was administering primary care to most of the prison's inmates. *Id.* at 431.

121 Estelle v. Gamble, 429 U.S. 98 (1976).

122 *Id.*

123 *Id.* at 99.

124 *Id.*

125 *Id.*

126 *Gamble*, 429 U.S. at 99.

127 *Id.* at 99-102.

128 *Id.* at 100-01.

129 *Id.*

130 *Id.* at 101-02.

131 *Gamble*, 429 U.S. at 104 (citations omitted).

> Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society". . . .[132]

As a result of *Gamble*, prisoners are the only people in America with a constitutional right to receive government funded healthcare.[133]

Sweeping reforms in the 1970s also raised the level of health care provided to prisoners.[134] For instance, the American Public Health Association issued the first guidelines for prison health care in 1976, and many other associations issued similar standards in the following years.[135] However, the problems of how much care prisoners deserve and what constitutes "serious medical need" under *Gamble* still remain.

> There is no settled, precise metric to guide a court in its estimation of the seriousness of a prisoner's medical condition. In many cases, however, we have set forth factors that should guide the analysis. Thus, in *Chance v. Armstrong*, we referred to a non-exhaustive list of such factors, including: (1) whether a reasonable doctor or patient would perceive the medical need in question as "important and worthy of comment or treatment," (2) whether the medical condition significantly affects daily activities, and (3) "the existence of chronic and substantial pain."[136]

In *Brock*, this objective test was used to show that inmate Vincent Brock had a valid claim that his facial keloid, which resulted from his face being severely lacerated by a fellow inmate, was not properly treated by prison officials.[137] A motion for summary judgment by the defendants (prison officials) was rejected on the grounds that Brock's testimony and an affidavit by a doctor who examined Brock showed that his pain was somewhere "between 'annoying' and 'extreme.'"[138]

After the court decided that there was enough evidence to show that Brock's ailment might be considered a "serious medical need" according to the *Gamble* test,[139] the court then determined whether or not prison officials acted with "deliberate indifference."[140] A subjective test must be applied here to show actual knowledge.[141]

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[132] *Id.* at 102 (citations omitted).

[133] Michael C. Friedman, Note, *Special Project: Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 923 (1992).

[134] *See* McDonald, *supra* note 120.

[135] *Id.* at 437-38.

[136] Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003) (quoting Chance v. Armstrong, 143 F.3d at 702 (citing and quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992))).

[137] *Brock*, 315 F.3d at 162. Keloids are abnormal growths of fibrous tissue that can result from skin injuries and can be painful and disfiguring. *Id.*

[138] *Id.* at 163.

[139] *Gamble*, 429 U.S. at 104.

[140] *Brock*, 315 F.3d at 162.

[141] *Farmer*, 511 U.S. at 837.

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[142]

This prong of the *Gamble* test is much harder for the plaintiff to prove.[143]

In *Brock*, the court found after applying this test that there was enough knowledge on the part of the Chief Medical Officer of the DOCS, Dr. Lester Wright, who had promulgated the DOCS policy on keloids, to deny his motion for summary judgment.[144] Although Dr. Wright did not deal directly with Brock, he arguably had enough knowledge of keloids to know that they might inflict pain and require care as substantive ailments, and not as cosmetic ailments.[145] "[S]ummary judgment may not be granted in favor of Wright, since unconstitutional acts would then have occurred as the result of a policy promulgated by Wright."[146]

The question of how much healthcare should be provided to prisoners is often at odds with the theory of punishment. To understand prison healthcare, it is necessary to have a cursory knowledge of the theories of punishment. Scholars continue to argue and write lengthy articles about why society should punish.[147] The debate has been on-going for as long as the justice system has existed. Today, the reasons for punishment include the wide-ranging ideas of retribution, deterrence, incapacitation, and rehabilitation.[148]

Many think of punishment as a way of exacting retribution for a person's bad acts. Hammurabi's Code exemplifies this notion of "an eye for an eye" punishment.[149] Others argue that punishment is a means of deterring people from committing crimes. For instance, one of the justifications for the death penalty is that it will deter people from planning and executing murders. Still others believe

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[142] *Id.* The court goes on to write: "The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.' An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation." *Id.* at 837-38.

[143] *See e.g.* Wilson v. Seiter, 501 U.S. 294 (1991) (the Supreme Court decision holding that a prisoner must show deliberate indifference in order to have an Eighth Amendment claim against prison officials); *see also* Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002) (holding that the plaintiff had not fulfilled the subjective part of the *Gamble* test).

[144] *Brock*, 315 F.3d at 165.

[145] *Id.* at 165-66.

[146] *Id.* at 166.

[147] Philosophers such as Immanuel Kant and Karl Marx have written extensively on the theories of punishment. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (A.M. Kelley 1974).

[148] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 101-02 (7th ed. 2001).

[149] Hammurabi was the ruler of Babylon from 1795 to 1750 B.C.E. As ruler, he published a code of rules which provided notice to his people of what punishments would be imposed for crimes. His code is believed to be the first codification of rules ever created to provide notice to the public for consequences to their actions. *See* Charles F. Horne, *The Code of Hammurabi: Introduction*, *at* http://www.yale.edu/lawweb/avalon/medieval/hammint.htm (last visited Jan. 31, 2004).

that punishment must involve the incapacitation of criminals as a means to safeguard the rest of society. The most striking example of punishment as incapacitation occurred in the nineteenth century when Great Britain shipped over 160,000 convicts to Australia.[150] In theory, the purpose of isolating criminals was for the protection of the non-incarcerated. Some believe that incarceration serves the purpose of rehabilitating wrongdoers by first forcing them to face the fact that they committed a crime, and second, making them understand that their criminal actions have consequences. For instance, many prisons require sexual offenders to complete a treatment and counseling program before they can be considered for release into society.[151]

The Eighth Amendment safeguard against "cruel and unusual punishment" does not seem to be based upon any theory of punishment. By its nature, incarceration can be thought of as cruel and unusual, wherein providing healthcare to prisoners goes against the idea of retribution. Similarly, the deterrence and incapacitation arguments are not furthered by prevention of cruel and unusual punishment. Treating a prisoner humanely does not seem to further the goal of making members of society fearful of the consequences of bad behavior. The only argument that might possibly be forwarded by proper treatment of prisoners is the idea of rehabilitating offenders. In order to ensure offenders can be returned to society as rehabilitated citizens, the government must look after them and teach them that their acts were wrong. Therefore, the rehabilitation argument does not adequately justify the application of Eighth Amendment. If the theories of punishment do not lay a proper foundation for the Eighth Amendment safeguards, then why aren't prisoners subjected to cruel and unusual punishments? Human decency controls this area of the law.

The other major factors affecting the healthcare of prisoners are the rising costs of healthcare and the fact that the general, non-incarcerated population is not guaranteed the right to healthcare under the Constitution.

> Prison medical care is consequently being pulled by two opposing tensions. One is to expand access and care, the other is to limit it. . . . The threat of lawsuits, as well as the more positive commitment by correctional managers to principles of adequate and humane care, motivate the ongoing professionalization of correctional medicine and the expansion of access to health care. At the same time, however, concerns about rapidly rising correctional health care costs animate efforts, mostly by legislatures or governors, to limit access, diminish the use of health care services, limit types of medical services to be provided to prisoners, and control health care spending generally. These opposing dynamics constitute the most

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150 *See Australia—The Penal Colony, at* http://www.upfromaustralia.com/penalcolony.html (last visited Jan. 31, 2004).

151 This poses interesting questions for those claiming they were wrongly convicted of sexual offenses. A condition of their release in certain states is that they attend sexual offender programs. Under this process, the wrongly convicted are forced to admit guilt as a condition of release back into society. This area raises interesting constitutional issues.

powerful tensions within prison health care today.[152]

There are no easy solutions to the problems posed by the opposing dynamics pulling prison healthcare in contrasting directions.

V. GENDER IDENTITY DISORDER AND PRISON HEALTHCARE

Prison healthcare policies are often unequipped to deal with prisoners seeking treatment for GID. However, as the number of prisoners with GID has grown, so has the awareness by the state that GID is a serious condition. Many state prisons have now implemented blanket policies covering the treatment of GID prisoners. For example, in *Brooks* the Department of Correctional Services policy "Estrogen Therapy for Gender Dysphoria" states: "[t]he New York State Department of Correctional Services continues treating inmates for Gender Dysphoria identified prior to incarceration."[153] The pamphlet also states that inmates may not undergo gender reassignment surgery.[154] In *Brooks*, the Court held that the distinction between conditions discovered before incarceration and conditions discovered after incarceration was arbitrary and unlawful.[155]

The response among the Courts of Appeals to §1983 complaints brought against prison officials for deliberate indifference to diagnosis and treatment for GID have varied.[156] The facts in *Kosilek v. Maloney* mirror *Brooks*, but the Massachusetts District Court concluded that Plaintiff Michelle Kosilek had not proven that she deserved treatment or diagnosis for GID.[157] Michelle Kosilek, like Jessica Lewis, considered herself to be a woman trapped inside a man's body.[158] Kosilek was born biologically male.[159] From the age of three, she claimed that she wanted to be a female.[160] Growing up, Kosilek took female hormones to develop female attributes, but after being assaulted outside of a gay bar she decided to stop taking the hormones.[161] Instead, she decided to live as a biological male and she even married a woman, Cheryl McCaul, who was her counselor at a drug rehabilitation facility.[162] On May 20, 1990, something went awry in Kosilek's marriage.[163] Cheryl Kosilek was found dead in the backseat of her car in a shopping mall parking lot.[164] In a matter of days, the police focused their

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152 McDonald, *supra* note 120, at 430.

153 Brooks v. Berg, 270 F. Supp. 2d 302, 305 (quoting DEP'T OF CORRECTIONS, OCS HEALTH SERVICES POLICY MANUAL § 1.31).

154 *Id.*

155 *Id.* at 312.

156 *See Kosilek*, 221 F. Supp. 2d at 156; Cuoco v. Maritsugu, 222 F.3d 99 (2d Cir. 2000).

157 *Kosilek*, 221 F. Supp. 2d at 161. *See generally Brooks*, 270 F. Supp. 2d at 302.

158 *Kosilek*, 221 F. Supp. 2d at 158.

159 *Id.*

160 *Id.*

161 *Id.* at 163.

162 *Id.* at 164.

163 Commonwealth v. Kosilek, 668 N.E.2d 808, 811 (1996).

164 *Id.* at 811.

investigation on Kosilek as the prime suspect.[165] She was eventually arrested, charged with first degree murder with extreme atrocity or cruelty, and sentenced to life without the possibility of parole.[166] Since being incarcerated in 1990, Kosilek, like Lewis, has tried to access proper diagnosis and treatment, however, her claims have been consistently denied by her correctional facility.[167]

Kosilek filed a §1983 complaint against the Department of Corrections and Michael Maloney in his official capacity as the Commissioner of the DOC.[168] It is unusual for an inmate to sue the Commissioner of the DOC for denial of proper medical care, but in this case Maloney made significant decisions concerning medical care afforded to Kosilek because of her lawsuit.[169] Maloney adopted a blanket policy in 2000 regarding the treatment of transsexuals in prison facilities.[170] His policy involved continuing the treatment that had been administered by doctors prior to incarceration.[171] Those transsexuals taking hormones that had not been prescribed by a doctor were not permitted to continue hormone usage.[172] Maloney's policy also denied the possibility of any inmate receiving GRS.[173] For an undiagnosed individual like Kosilek, Maloney's policy denied her access to doctors for both treatment and diagnosis of GID.[174]

The court held that Maloney had not violated Kosilek's right against "cruel and unusual punishment."[175] The court reasoned that although Maloney knew Kosilek's history of mental illness,[176] he believed that any risk involved in not treating Kosilek would be insubstantial or nonexistent.[177] The court's analysis of Kosilek's condition drastically differed: "The court concludes that Kosilek's gender identity disorder is causing him severe emotional distress. . . . [T]he court finds that absent adequate treatment, there is a significant risk that Kosilek will again attempt suicide and may, like some other inmates, succeed."[178] Maloney's actions may seem ignorant, if not malicious; however, the court was quick to point out that Maloney's actions were those of "a defendant with a legal problem" and were not done to inflict pain upon Kosilek.[179] The court took the position that it was notifying Maloney that Kosilek had a serious medical condition that required

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165 *Id.*

166 *Id.* at 810; *Kosilek*, 221 F. Supp. 2d at 158.

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

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* at 159-60.

172 *Id.*

173 *Kosilek*, 221 F. Supp. 2d at 160.

174 *Id.*

175 *Id.* at 195.

176 While incarcerated, Kosilek tried to commit suicide on two occasions and to castrate herself. *Id.* at 158. She also complained of being in severe mental anguish. *Id.*

177 *Kosilek*, 221 F. Supp. 2d at 191.

178 *Id.* at 165.

179 *Id.* at 162.

proper medical care; therefore, if he allowed Kosilek access to medical care in the future, he would not be held to have been deliberately indifferent.[180]

The *Brooks* decision has been the most liberal reading of the Eighth Amendment concerning the rights of transsexuals to medical treatment to date. Unlike *Kosilek*, the court did not rule that bad judgment on the part of prison officials could be excused. In *Brooks*, the actions of the superintendent and assistant superintendent of Lewis' jail were held to be deliberately indifferent with regard to Lewis' lack of diagnosis and treatment.[181]

The *Brooks* court expounded the deliberate indifference standard and how it should be applied to prison healthcare.[182] The Court found that decisions as to what is adequate treatment for a specific inmate should be made by a medical professional and not by the Department of Corrections.[183] Therefore, the blanket denial of access to doctors and medical personnel would be in violation of the Eighth Amendment.[184] The court referred to case law in which inmates with GID must be afforded some form of treatment.[185] In *Meriwether v. Faulkner*, the Seventh Circuit Court of Appeals concluded that a transsexual inmate has a right to some form of treatment under the Eighth Amendment.[186] The court, however, held that it was not granting the plaintiff's request to receive a specific treatment—hormone therapy, but it was saying in more general terms that the Plaintiff had a right to *some* form of treatment.[187] In *Brown v. Coombe*, the Northern District of New York also found that an inmate suffering from GID had a right to receive treatment.[188] However the court held, "a prisoner has no right to choose a specific form of medical treatment."[189]

In *Cuoco v. Moritsugu*, a pre-operative MTF transsexual was incarcerated at the Federal Correctional Facility at Otisville as a pre-trial detainee.[190] She was

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180 *Id.* at 195.

181 *Brooks*, 270 F. Supp. 2d at 302, 310.

182 *Id.* at 310.

183 *Id.*

184 *Id.*

185 *Id.*

186 Meriwether v. Faulkner, 821 F.2d at 413. The Plaintiff, Lavarita Meriwether, was a pre-operative MTF transsexual who was convicted of murder and serving a sentence of thirty-five years. *Id.* at 410. For approximately nine years prior to her conviction, she had been receiving estrogen under proper medical supervision and was chemically castrated. *Id.* After she was incarcerated, she was not allowed to continue her hormone therapy. *Id.* She was denied estrogen by the medical director at the Indiana prison and housed with male inmates. *Id.*

187 *Id.*

188 Brown v. Coombe, 1996 U.S. Dist. LEXIS 12950, *12 at note 3 (N.D.N.Y. 1996). J.P. Brown brought suit against the Commissioner of the NYS Dept. of Correctional Services along with various mental health professionals. *Id.* at *1 to *2. Brown alleged that she was ridiculed by her primary therapist, who stated within earshot of inmates and staff, "Let's get this right. You believe you (sic) a woman in a man's body who likes or prefers women sexually? Great! A lesbian trapped in a man's body, you're definitely a piece of work." *Id.* at *2. Brown brought suit, as her needs were being ignored by prison officials who adhered to the NYS DOCS regulations which denied treatment for gender dysphoria. *Id.* at *2.

189 *Id.* at *7.

190 Cuoco v. Moritsugu, 222 F.3d at 103. Her status as a pre-trial detainee did affect how the court

allowed to keep the ten estrogen pills she had on her at the time of arrest, however, the doctors working for the correctional facility refused to provide her with additional hormone pills.[191] According to the Harry Benjamin SOC, "Prisoners who are subject to rapid withdrawal of cross-sex hormones are particularly at risk for psychiatric symptoms and self-injurious behaviors."[192]

Cuoco had threatened suicide after she was denied estrogen pills, and she began to suffer from withdrawal symptoms.[193] To add insult to injury, Cuoco was kept in a cell in the hospital ward and forced to sleep naked with the lights on in the cold room.[194] She tried to complain to the warden about her treatment, but he refused to hear her complaints and said Cuoco "should act like a man the way God intended."[195] She brought a §1983 suit against six medical personnel and the warden of the prison for denying her estrogen pills.[196] The Court held that the medical personnel were given qualified immunity under the Public Health Service Act, 42 U.S.C. § 233(a)(1998).[197] Section 233(a) makes the Federal Tort Claims Act the only remedy against certain health care workers.[198] The Court found that the medical personnel were acting within the scope of their duties as medical professionals of the state (in an official capacity) when examining Cuoco.[199] Therefore, the Court held them to have qualified immunity against plaintiffs bringing tort claims.[200]

In the case of *Barrett v. Coplan*, an inmate was allowed by a judge in a preliminary review of her *pro se* and *in forma pauperis* complaint to proceed against individual prison officials who had denied her pleas for continuation of treatment for GID.[201] Plaintiff Lisa Barrett was allowed to sue the prison officials

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analyzed her situation. *Id.* at 106. The court reasoned that since she was not serving a jail term, she wasn't being *punished,* and her claim could not fall under the Eighth Amendment's "cruel and unusual punishment" clause. *Id.* at 106. Instead, the court looked at her claim under the Due Process considerations of the Fifth Amendment. *Id.* at 106.

191 *Id.*

192 THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, *supra* note 34.

193 *Cuoco*, 222 F.3d at 104.

194 *Id.*

195 *Id.*

196 *Id.* at 105.

197 42 U.S.C. § 233(a) (1998).

198 Section 233(a) states:

The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [the Federal Tort Claims Act], or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

Id.

199 *Cuoco*, 222 F.3d at 109.

200 *Id.*

201 Barrett v. Coplan, 292 F. Supp. 2d 281 (D.N.H. 2003).

See generally McDonald, *supra* note 120, at 459. "[M]any [prisoners] have learned how to file pro se

in their individual capacities.[202] However, since New Hampshire has not waived immunity for state actors in actions brought pursuant to 42 U.S.C. § 1983, the District Court of New Hampshire held that Barrett could not bring suit against prison employees in their *official capacities* as state actors.[203] This case is particularly disturbing considering the fact that Barrett had been prescribed hormones by a physician prior to incarceration and after her trial she was denied all hormone treatments.[204] It is well-documented that withdrawal from hormone therapy can be devastating to transsexuals.[205] The mistreatment of Barrett led her to numerous attempts at suicide and self-inflicted castration.[206] Her case against the individual prison officials has yet to be heard.

In the case of *Maggert v. Hanks*, Tasha Maggert brought suit alleging her prison violated her Eighth Amendment rights by refusing to give her estrogen treatment for GID.[207] Unlike *Brooks*, *Kosilek*, and *Cuoco*, Maggert was seen by a psychiatrist working on a contract basis for the prison who said she would not prescribe estrogen but rather recommended further therapy.[208] Maggert brought suit challenging the psychiatrist's opinion.[209] However, her case was dismissed because she did not present any expert testimony that she did need estrogen therapy.[210] Judge Posner for the Seventh Circuit nonetheless wrote a much-cited opinion which expounds the issues of providing transsexual prisoners with government-funded medical treatment.[211]

> Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. We do not want transsexuals committing crimes because it is the only route to obtaining a cure. . . . Gender dysphoria is not, at least not yet, generally considered a severe enough condition to warrant expensive treatment at the expense of others than the person suffering from it. That being so, making the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law.[212]

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lawsuits (or have ready access to "jailhouse lawyers" who have learned). The threat of lawsuits is therefore a real one in correctional facilities. This creates an incentive to practice "defensive" medicine, a practice which is often at war with cost-effectiveness objectives." *Id.*

202 *Barrett*, 292 F. Supp. 2d at 286-87.

203 *Id.* at 287.

204 *Id.* at 284.

205 *See infra* note 192 and accompanying text for discussion of the effects of withdrawal from hormones.

206 *Id.*

207 *Maggert*, 131 F.3d at 670.

208 *Id.* at 670-71.

209 *Id.*

210 *Id.* at 671.

211 *See Maggert*, 131 F.3d 670.

212 *Id.* at 672.

Judge Posner concluded by saying that he did not foresee any circumstance in which a prisoner suffering from gender dysphoria would be eligible for curative treatment from the Department of Corrections.[213]

Judge Posner eloquently expounded upon the issues faced by the policy makers who are left to decide the type of treatment which should be available to prisoners suffering from GID. Once again, the amount and quality of treatment allowed for prisoners was compared to that which was provided by Medicaid and private health insurers to the non-incarcerated. This may not be the most appropriate way to resolve this problem since America's health insurance system has been heavily criticized for being money-driven and not treatment-driven, but a better way, short of radical health insurance reform, does not exist to deal with these issues. At least one commentator thinks that universal health coverage for all citizens does not seem to be in America's near future after "the collapse of the Clinton administration's heath care reform effort in the mid-1990s."[214]

Some judges argue that decisions about healthcare for inmates may best be left to the attending physicians.[215] However, doctors are trained to fully treat patients for their ailments without thought to the economic concerns of healthcare. Doctors are supposed to be advocates for their patients. When doctors take the Hippocratic Oath, they recite the following: "I will use my power to help the sick to the best of my ability and judgment; I will abstain from harming or wrongdoing any man by it."[216] Under this professional code of conduct, doctors are obligated to help the sick without passing moral judgment as to whether they deserve treatment. This leaves to health insurers as well as the Department of Corrections the duty of deciding what treatment a patient morally deserves.[217] Of course their "moral" judgments are highly influenced by the cost of medical procedures and feasibility of treatment, and invariably these non-physicians are left to decide what is necessary and what course of treatment is best taken. Something is inherently wrong with a system which allows policy makers and those with economic interests to decide what is considered medical necessity.

Another issue raised by providing healthcare to transgendered prisoners is the question of "To what end?" If the purpose of punishment is for retribution then why should the quality of life of the incarcerated be improved by the government

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213 *Id.*

214 McDonald, *supra* note 120, at 473.

215 *E.g.*, *Brooks*, 270 F. Supp. 2d at 306 (arguing that "[W]hether a given treatment is medically necessary can be determined only by qualified medical professionals. Accordingly, the Court emphasizes that it is not being asked to determine precisely how Plaintiff should be treated. Instead, Plaintiff is asking the Court to force Defendants to allow him to see a doctor who is qualified to propose a course of treatment.").

216 Hippocratic Oath, *at* http://www.medexplorer.com/content.dbm?Template=hippocratic.dbm (last visited Feb. 5, 2004).

217 *See* Catherine M. Hedgeman, Note, *The Rationing of Medicine: Herdrich v. Pegram*, 10 ALB. J.L. SCI. & TECH. 305 (2000) (addressing problems with the American health insurance model and those faced by physicians who are told by health insurers what procedures they can and cannot perform).

and taxpayers?[218] GRS is a medical procedure which is said to have drastically improved the lives of transsexuals.[219] Their social situations are greatly improved, and most importantly, they feel better and comfortable about themselves. However, applying the same medical procedures to the incarcerated is totally different. Prisoners deserve the basic treatment as discussed in the Supreme Court's *Gamble* decision, but GRS seems to be something above basic medical necessity.[220]

It is rather hypocritical to lock someone behind bars for an extended period of time, then to worry about said person's quality of life, social interactions, etc. If society was truly worried about such issues, it would not imprison criminals in jail where rape and other types of assault are the norm rather than the exception.[221] Society would not cage people like animals and dictate to them when they can eat, roam the prison yard, and use the bathroom. Society chooses to do these things because of its reasons for punishment—retribution, deterrence, incapacitation, and rehabilitation. Working humanity into some of these theories of punishment is the difficult part.

While Jessica Lewis is hopefully getting the medical attention she has begged for and desperately deserved, it is important to note that many other transgendered individuals in the general population are not as fortunate as Lewis due to a medical system which does not recognize GID as a condition serious enough to merit procedures such as GRS. This note is calling for reform of prisons, health insurance policies, and prison healthcare. While the system is far from perfect, every reform can allow the system to become one step closer to providing for the needs of the masses.

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[218] *See* McDonald, *supra* note 120, at 464-65. California, in dealing with the dilemma of how much care to provide prisoners, has created a guide referred to as the "Med-Cal standard" in which the chief medical officers of California prisons set the maximum amount of care available to prisoners at the level provided by the state to people living below the poverty line. *Id.* Med-Cal is only a guideline and is not considered to be a standard, because almost any procedure could be justified using Med-Cal. *Id.*

[219] *See supra* Part III(B)(1) and accompanying text for further discussion about the positive results of treatment for GID.

[220] The Author does not wish to imply that GRS should be treated like cosmetic surgery, procedures not afforded to prisoners or paid for by health insurers. The Author wishes to draw a meaningful distinction between those who are incarcerated and those who are not.

[221] Prison itself is an inhumane place in which reforms need to occur beyond the healthcare issues of prisoners. *See supra* note 45 and accompanying text for a look at sexual assault in prisons.

VI. CONCLUSION

Transgender and GRS are largely unrecognized by the American public.[222] As a result, the needs of transgendered people go ignored, and they are suffering individually and as a group. Jessica Lewis deserved to receive psychotherapy and diagnosis for GID years ago when she first requested access to the proper specialist. Fortunately for Lewis, the DOC decided to change its policy against transsexuals after its motion for summary judgment was denied by Judge Kahn.[223] However, it is impossible to justify spending government funds in order to allow Lewis to become biologically female under the current Medicaid and American health insurance models. A person who is incarcerated should not be allowed to benefit from treatments that are inaccessible to most non-incarcerated people. Therefore, until there is a general consensus by Medicaid and private health insurance companies about coverage for GRS, there should be no Eighth Amendment right for prisoners to receive GRS. However, the pain felt by these individuals is not to be trivialized by prison officials; therefore they should be afforded psychotherapy and diagnosis for their mental well-being.

It is difficult to reconcile one's sympathy for the suffering of people with GID with the fact that some prisoners asking for medical treatment for GID, like Jessica Lewis, committed horribly gruesome acts which resulted in their convictions and imprisonment.[224] How much do they deserve to suffer by being trapped in the mental prison of their physical bodies, for their crimes? Are the two issues which seem so intertwined distinct from one another? While I have great sympathy for the plight of transsexuals in the general population in their efforts to be recognized by both law and society, I do not feel that incarcerated prisoners deserve the right to receive expensive procedures such as gender reassignment surgery which have not been deemed a "medical necessity" by most state Medicaid and health insurance models and are prohibitively expensive for most non-incarcerated citizens in America. Prisoners should not be rewarded for their crimes, and while their existence in prison should not be "cruel and unusual," it should not be better than any life they could have had outside prison walls.

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[222] There is a tremendous dichotomy in the way gays are treated as opposed to transsexuals. The gay and lesbian communities have many more rights and *are* largely recognized by the American public. Massachusetts ruled that gays and lesbians had a state constitutional right to civil unions. *See* Goodridge v. Mass. Department of Public Health, 798 NE2d 941 (2003). The court also held that the state had 180 days to rewrite state marriage laws to allow gays and lesbians to wed. *Id* at 969-70. Before Massachusetts, Vermont was the only state which allowed civil unions between gays. Baker v. State, 744 A.2d 864 (Vt. 1999). Vermont did not label these unions as marriages. CNN, *Massachusetts Court Rules Ban on Gay Marriage Unconstitutional,* Feb. 4, 2004, *available at* http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/index.html (last visited Feb. 7, 2004).

[223] *See Brooks*, 270 F. Supp. 2d at 302.

[224] It is important to remember that Lewis killed a twenty-year old in 1989. All murders are senseless, but this murder is particularly baffling because there was no motive. Lewis did not know her victim and the victim posed no threat to Lewis. *See supra* note 9 for the facts surrounding the murder of Dean Lockshiss, perpetrated by Jessica Lewis a.k.a. Mark Brooks and Michael Mebert.