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**SEX REASSIGNMENT SURGERY & THE NEW STANDARD OF CARE:
AN ANALYSIS OF THE ROLE THE FEDERAL COURT SYSTEM, THE
STATES, SOCIETY, AND THE MEDICAL COMMUNITY SERVE IN
PAVING THE WAY FOR INCARCERATED TRANSGENDERED
PERSONS' CONSTITUTIONAL RIGHT TO A SEX CHANGE**

*Victor J. Genchi**

I. INTRODUCTION

Within the past couple of years, the United States has taken incredible bounds toward achieving equality for all citizens—particularly, the lesbian, gay, bisexual, and transgender (LGBT) community. For instance, the Supreme Court of the United States held same sex couples have a constitutional right to marry.¹ Similarly, the transgender community in particular is in the national spotlight in part because of Olympic gold medalist Caitlyn Jenner's decision to share her transition (male-to-female) with the world.² The nation's overwhelming push toward unanimous embrace and acceptance of the LGBT community³ is evidence of our ever evolving society.⁴

Similarly, the prison system in the United States is experiencing an evolution in the way it is required to care for transgender inmates.⁵ Gender dysphoria (GD) is a

* Barry University School of Law Juris Doctor Candidate, Spring 2017. I would like to recognize and extend my sincerest appreciation to all members of *Barry Law Review* for their hard work and dedication in editing this article, to Professor Terri Day for sharing her unique perspective, and to my wife Kelly Genchi and our four wonderful children—the motivation behind everything I do in life.

1. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

2. Austin Ramzy, *Caitlyn Jenner Says She'll Push for Acceptance of Transgender People*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/us/caitlyn-jenner-says-shell-push-for-tolerance-of-transgender-people.html>.

3. But see Danielle Weatherby, *From Jack to Jill: Gender Expression As Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. Rev. L. & Soc. Change 89, 128 (2015) (“While transgender individuals are becoming more prevalent in pop culture, transgender youth remain at risk, still plagued by high rates of violence.”). Additionally, see the Weatherby article for a comprehensive discussion on how gender expression—including bathroom use in public schools—should be protected speech under the First Amendment. *Id.* at 119–28.

4. See generally Alex Tribou & Keith Collins, *This Is How Fast America Changes Its Mind*, BLOOMBERG (June 26, 2015), <http://www.bloomberg.com/graphics/2015-pace-of-social-change/> (comparing the relatively rapid period of time American society and the legal system have taken in mandating a constitutional right to same-sex marriage with other civil rights milestones). For instance, only “[e]leven years after Massachusetts became the first state to allow same-sex couples to marry” in 2004, in 2015 the Supreme Court declared states cannot deny same-sex couples the right to marry. *Id.* In contrast, it took nineteen years after California struck down its ban on interracial marriage, in 1948, for the Supreme Court to rule in 1967 that states could not prohibit interracial marriage. *Id.*

5. See generally *Fields v. Smith*, 653 F.3d 550, 553, 559 (7th Cir. 2011) (holding that a Wisconsin statute preventing Department of Corrections medical staff from providing hormone therapy to prisoners diagnosed with Gender Dysmorphia (GD) constituted deliberate indifference to a serious medical need, in violation of the Eighth Amendment to the United States Constitution); *South v. Gomez*, No. CV-95-01070-DFL, 2000 WL 222611, at *1, *2 (9th Cir. Feb. 25, 2000) (concluding that state corrections officers acted with deliberate indifference by abruptly terminating the provision of female hormone therapy to a prisoner diagnosed with GD).

term used to describe a medical condition characterized by an incongruence between one's expressed gender and assigned sex at birth.⁶ Left untreated, people with GD experience anxiety, depression, suicidality, and other mental health issues.⁷ The World Professional Association for Transgender Health (WPATH) has promulgated Standards of Care (the SOC), which describe the appropriate treatment for GD.⁸ In some instances, changes in gender expression and role, hormone therapy, and psychotherapy are a sufficient treatment; however, in severe cases, sexual reassignment surgery (SRS) is the only appropriate treatment.⁹ State prison systems have not—until recently—permitted inmates with GD who meet the SOC criteria to receive SRS.¹⁰ As a result, inmates have used the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution to allege state prison officials acted with deliberate indifference to their serious medical “need” for SRS.¹¹

In congruence with transgendered prisoner's recent assertions of a medical need for SRS is the ever evolving non-originalist interpretation of the United States Constitution. Non-originalists believe the Constitution is a “living document” and judges should interpret it beyond the original intent of the Framers.¹² Particularly, the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishments is interpreted in this way.¹³ Moreover, in conformity with non-originalists' views, judges look to contemporary standards when deciding cases involving governmental processes such as treatment of prisoners' medical conditions while incarcerated.¹⁴ Contemporary standards are never fixed and will expand and contract with societal values.¹⁵ Chief Justice Warren stated:

[C]ruel and unusual . . . the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the *dignity of man*. While the State has the power to punish, the Amendment

6. Karl Bryant, *Gender Dysphoria (GD)*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/gender-dysphoria> (last visited Oct. 1, 2016).

7. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 454, 457–59 (5th ed. 2013).

8. *See generally* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th Version 2011) [hereinafter SOC].

9. *Id.* at 9–10, 54–55.

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

11. *See, e.g.*, *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 200 (D. Mass. 2012); *see also* *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1185 (N.D. Cal. 2015).

12. *See* Jack M. Balkin, *Alive and Kicking*, SLATE (Aug. 29, 2005), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/08/alive_and_kicking.single.html.

13. *See id.*

14. *See* *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

15. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect [T]he words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*¹⁶

These contemporary standards of interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause have evolved drastically over the past two centuries.¹⁷ Providing transgender prisoners with adequate medical care is now well within the Eighth Amendment's purview. For instance, in *Kosilek v. Spencer* (*Kosilek I*) and *Norsworthy v. Beard*, two separate United States district courts granted the inmates' requests for an injunction because they found SRS medically necessary and the Department of Corrections (DOC) acted with deliberate indifference when it denied SRS to WPATH qualified transgender prisoners.¹⁸ In *Kosilek I*, the earlier of the two cases, the United States Court of Appeals for the First Circuit reversed because it found the DOC's choice to provide non-surgical treatment such as hormones, electrolysis, and physiotherapy adequately treated GD.¹⁹ However, in the latter case, the California Governor released Norsworthy—a convicted murderer—on parole one day before the United States Court of Appeals for the Ninth Circuit was set to hear the case.²⁰ Following Norsworthy's release, on August 10, 2015, the State of California became the first state in the nation to agree to pay for an inmate's SRS.²¹ Inmate Shiloh Quine, who is spending life in prison for committing first-degree murder, will receive taxpayer-financed SRS.²² Post-surgery, she will be housed in a female prison.²³

Part II of this comment embarks on a demonstration of the historical progression of the Eighth Amendment's prohibition against cruel and unusual punishments case law. Next, Part III delves into the inherent problems interwoven into giving incarcerated GD sufferers SRS and how society, the states, and the medical field may have already resolved them. And finally, Part IV outlines why SRS will be a constitutionally protected right for prisoners with GD who qualify under the WPATH SOCs.

16. *Id.* at 99–101 (emphasis added).

17. See generally Daniel Yves Hall, *The Eighth Amendment, Prison Conditions and Social Context*, 58 MO. L. REV. 207, 207–08 (1993) (detailing the history of the Eighth Amendment and how societal changes influence evolving interpretation).

18. See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 237–38, 250–51 (D. Mass. 2012); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1187, 1190 (N.D. Cal. 2015).

19. See *Kosilek v. Spencer*, 774 F.3d 63, 69–70, 96 (1st Cir. 2014).

20. Associated Press, *Transgender California Inmate Seeking Sex Reassignment Surgery Freed from Prison After Parole*, FOX NEWS (Aug. 12, 2015), <http://www.foxnews.com/us/2015/08/12/transgender-california-inmate-seeking-sex-reassignment-surgery-freed-from/>.

21. St. John, *supra* note 10.

22. *Id.*

23. *Id.*

II. CRUEL AND UNUSUAL PUNISHMENT: A HISTORICAL OVERVIEW OF WHAT IS NOW THE DELIBERATE INDIFFERENCE STANDARD

A. The Amendment

At the conclusion of the Constitutional Convention in Philadelphia on September 17, 1787, the citizens of the several states took the reins of their country's future to ensure they would never again be subjected to a tyrannical aristocracy.²⁴ The Constitution originally delineated necessary principles such as separation of powers.²⁵ However, after ratification, the states demanded enumeration of individual rights.²⁶ A constitutional amendment is not easily accomplished.²⁷ However, James Madison judiciously distilled the states' proposals for individual rights into sixteen suggested amendments.²⁸ Madison introduced the proposed amendments to the First Congress in 1789.²⁹ One of the amendments to be considered was the prohibition of cruel and unusual punishments.³⁰ It was met with little resistance from the Members of Congress.³¹ However, the House of Representatives' "Mr. Smith, of South Carolina objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite."³² Mr. Samuel Livermore, of New Hampshire, said that

[t]he clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not

24. See *The Constitution*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/constitution> (last visited Mar. 15, 2016) (discussing when the United States Constitution was drafted).

25. See *id.*

26. See *id.*

27. See *Constitutional Amendment Process*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/federal-register/constitution/> (last visited Oct. 1, 2016). To prevent arbitrary changes, the process for making amendments is rather difficult. See Mary Frances Berry, *Amending the Constitution; How Hard It Is to Change*, N.Y. TIMES (Feb. 13, 1987), <http://www.nytimes.com/1987/09/13/magazine/amending-the-constitution-how-hard-it-is-to-change.html>. Thus, an amendment may be proposed only by a two-thirds vote of both Houses of Congress or by a convention called by two-thirds of the states. *Constitutional Amendment Process*, *supra* note 27. The amendment must be ratified by three-fourths of the state legislatures or three-fourths of the conventions called in each state for ratification. *Id.*

28. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 518 (4th ed. 2013).

29. See *The Constitution*, *supra* note 24.

30. See *id.*

31. See *To Agree to the Senate Amendment to the Constitutional Amendment Resolution, Which Would Alter the 8th Article*, GOVTRACK, <https://www.govtrack.us/congress/votes/1-1/h29> (last visited Oct. 1, 2016) (illustrating that the amendment passed the House by a thirty-seven to fourteen margin in House Vote Number Twenty-Nine in 1789).

32. 1 ANNALS OF CONG. 782 (1789).

to be restrained from making necessary laws by any declaration of this kind.³³

Despite Mr. Smith's objection, the Eighth Amendment's Cruel and Unusual Punishments Clause became a part of the Constitution through the adoption of the Bill of Rights.³⁴ Since 1789, however, the exact scope and meaning of this clause has been troubling for courts.³⁵ The clause's seemingly indefinite bounds expand as judicial interpretation conforms to an evolving society.³⁶

B. Judicial Development of the Deliberate Indifference Standard

Chief Justice John Marshall's pronouncement that "[i]t is emphatically the province and duty of the judicial department to say what the law is," is as true today as it was in 1803.³⁷ Therefore, the judiciary has the duty to interpret the Eighth Amendment so as to protect incarcerated persons from being subjected to cruel and unusual punishments. Early interpretation decided that "[p]unishments are cruel when they involve torture or a lingering death . . . [i]t implies . . . something *inhuman* and barbarous"³⁸ What is considered "humane" and "inhumane," however, is largely a function of public perceptions at the time the punishment was inflicted.³⁹

The doctrine of deliberate indifference developed through a series of cases brought by prisoners asserting their Eighth Amendment rights were violated by prison officials who refused to provide adequate medical care and treated them in a generally inhumane way.⁴⁰ In 1976, the Supreme Court of the United States, in *Estelle v. Gamble*, established that prisoners have the constitutional right to adequate medical care.⁴¹ Chief Justice Marshall reasoned that

33. *Id.* at 782–83.

34. *See The Constitution, supra* note 24.

35. *See Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (discussing the scope of the Eighth Amendment changes and that it has not been pinpointed by the Court).

36. *See id.* at 99 (discussing how the death penalty is still a widely accepted practice despite the fact that it has been used throughout history).

37. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *About the Supreme Court*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> (last visited Jan. 23, 2017).

38. *In re Kemmler*, 136 U.S. 436, 447 (1890) (emphasis added).

39. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The Court stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." *Id.*

40. *See Estelle v. Gamble*, 429 U.S. 97, 104 n.10 (1976) (citing *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974) (doctor's choosing the "easier and less efficacious treatment" of throwing away the prisoner's ear and stitching the stump may be attributable to "deliberate indifference . . . rather than an exercise of professional judgment"); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), *cert. denied sub nom. Thomas v. Cannon*, 419 U.S. 879 (1974) (injection of penicillin with knowledge that prisoner was allergic, and refusal of doctor to treat allergic reaction); *Jones v. Lockhart*, 484 F.2d 1192 (8th Cir. 1973) (refusal of paramedic to provide treatment); *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (prison physician refuses to administer the prescribed pain killer and renders leg surgery unsuccessful by requiring prisoner to stand despite contrary instructions of surgeon)).

41. *Id.* at 103–05.

[a]n inmate must rely on prison authorities to treat his medical needs In the worst cases, such a failure [to render medical care] may actually produce physical “torture or a lingering death” In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.⁴²

Deliberate indifference to serious medical needs of prisoners, the Court explained, is the “unnecessary and wanton infliction of pain,” which is “repugnant to the conscience of mankind” that the Eighth Amendment forbids.⁴³ This indifference may be demonstrated by “prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”⁴⁴ Therefore, not every failure to provide medical care is an Eighth Amendment violation.⁴⁵ Rather, there must be a component of intentionality behind the prison official’s actions.⁴⁶

The Supreme Court, in a series of subsequent cases, used the *Estelle* guideposts to flesh out what a prisoner is required to show to support an Eighth Amendment claim.⁴⁷ The most comprehensive articulation regarding the application of the deliberate indifference standard was expounded in *Farmer v. Brennan*.⁴⁸ In *Farmer*, the Court mandated that a prisoner is required to show a “substantial risk of serious harm” objectively exists and that prison officials acted with a sufficiently culpable state of mind, that is, “deliberate indifference” to a prisoner’s health or safety—which is equivalent to criminal recklessness.⁴⁹ Thus, deliberate indifference means subjective awareness.⁵⁰ A prison official must: (1) know the underlying facts that give rise to an inference of a substantial risk of serious harm and must actually draw

42. *Id.* at 103.

43. *Id.* at 104, 105 (quoting *Gregg*, 428 U.S. at 173; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947)).

44. *Id.* at 104–05.

45. *Estelle*, 429 U.S. at 105–06 (“[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”); *see also* *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (“[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.”).

46. *See Estelle*, 429 U.S. at 104–05.

47. *See, e.g.,* *Wilson v. Seither*, 501 U.S. 294, 298 (1991) (confirming that deliberate indifference inquiries require satisfaction of both an objective component—a “sufficiently serious” constitutional deprivation—as well as a subjective component—officials must act with a “sufficiently culpable state of mind”); *see also* *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (explaining that a prisoner may support the objective prong of the deliberate indifference inquiry by alleging and proving that he has been—or imminently will be—subjected to a substantial risk of serious harm). Furthermore, the prisoner must show that “the risk of which he complains is not one that today’s society chooses to tolerate.” *Id.* The Court further explained the subjective prong inquiry should be considered in light of the prison officials’ “current attitudes and conduct” while factoring in “arguments regarding the realities of prison administration.” *Id.* at 36, 37.

48. *See generally Farmer*, 511 U.S. at 835–39. Coincidentally, *Farmer* was a transgender inmate who, prior to her incarceration, had received breast implants and an unsuccessful, black-market testicular removal surgery. *Id.* at 829. The issue in the case was whether prison administration acted with deliberate indifference by housing *Farmer* in the general population where he was likely to be raped. *Id.* at 843.

49. *Id.* at 836.

50. *Id.* at 839–40.

that inference; and (2) must subsequently disregard the risk.⁵¹ It is not enough that a reasonable official under the circumstances would have known of the risk to the prisoner's health or safety; the official must have actually known of, and disregarded, the risk.⁵² However, despite a substantial risk of serious harm, a good faith decision by officials based on legitimate penological concerns, such as safety, *may* be a countervailing factor when deciding the appropriate course of action.⁵³

1. Application of the Deliberate Indifference Standard to Treatment of a Prisoner's Serious Medical Need

While the jurisdictional jurisprudence may differ among federal circuits, the fundamental principle pertaining to medical treatment is consistent: the Eighth Amendment applies to both physical and mental "serious medical needs."⁵⁴ For a medical need to be "serious" it must be one that "has been diagnosed . . . as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."⁵⁵ While a lay person may readily recognize pain caused by a physical injury or illness, what is less apparent is the psychological impact a mental illness has on an individual.⁵⁶ Therefore, courts routinely rely on a medical expert's diagnosis to determine whether a serious mental illness exists.⁵⁷ Once a prisoner has been diagnosed with GD, courts have found a serious medical need indeed does exist.⁵⁸ However, the circuits that have addressed the issue of providing SRS to inmates with GD have been confronted with a barrage

51. *See id.* at 837, 847.

52. *Farmer*, 511 U.S. at 837.

53. *See Helling v. McKinney*, 509 U.S. 25, 36–37 (1993) (describing factoring in "arguments regarding the realities of prison administration" in the deliberate indifference analysis); *see also Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011). In *Battista*, the court stated that

[a]ny professional judgment that *decides* an issue involving conditions of confinement must embrace security and administration, and not merely medical judgments The administrators are responsible to the state and to the public for making professional judgments of their own, encompassing institutional concerns as well as individual welfare. Nothing in the Constitution mechanically gives controlling weight to one set of professional judgments.

Id. (quoting *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir. 1993)). *But see Johnson v. California*, 543 U.S. 499, 511 (2005). In *Johnson*, the court acknowledged that

[t]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.

Id. at 511 (quoting *Spain v. Procunier*, 600 F.2d 189, 193–194 (9th Cir. 1979)).

54. *See Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

55. *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (quoting *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 208 (1st Cir. 1990)).

56. NIH Curriculum Supplement Series [Internet], National Institutes of Health (US) (2007), <https://www.ncbi.nlm.nih.gov/books/NBK20369/>.

57. *See Joanmarie Ilaria Davoli, Psychiatric Evidence on Trial*, 56 SMU L. Rev. 2191, 2195 (2003) (discussing routine legal cases in which mental health professionals consult).

58. *Kosilek*, 774 F.3d at 81.

of differing expert opinions on whether SRS is a “medically necessary treatment” for GD.⁵⁹

a. Legally Recognized Diagnosis and Treatment Criteria for People with GD

For people free from the confines of prison, discussions involving a person’s sex or gender are gradually becoming commonplace with the progression of society.⁶⁰ In the area of medical diagnosis, however, sex and gender are “highly controversial” and have evolved into a “proliferation of terms whose meanings vary over time and within and between disciplines.”⁶¹ For instance, GD has two connotations: (1) as general descriptive term that “refers to an individual’s affective/cognitive disconnect with the assigned gender”; and (2) as a diagnostic category that “refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”⁶² Although one may meet the general descriptive definition of GD, many do not fit within the diagnostic category.⁶³ People who have been diagnosed with GD may have become distressed due to the denial of “physical interventions by means of hormones and/or surgery.”⁶⁴ People with GD “before

59. See *id.* at 74–82; *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1179 (N.D. Cal. 2015). In *Kosilek*, Dr. George Brown noted that the non-surgical treatments were helping, but to maintain these improvements that SRS was appropriate and medically necessary. *Kosilek*, 774 F.3d at 74–75. Indeed, four separate experts agreed with Dr. Brown. *Id.* at 75–76. However, Dr. Schmidt, Dr. Osborne, and court-appointed expert Dr. Levine all opined that SRS was not medically necessary. *Id.* at 76–79. Each dissenting expert expressed concern over whether prisoners meet the real-life experience requirement of the SOC and stressed that SRS was an elective procedure. *Id.* at 73. In *Norsworthy*, Dr. Ettner and Dr. Gorton stressed that according to the SOC, SRS should be provided to any person with GD regardless of their institutional setting, and *Norsworthy* was needlessly suffering. *Norsworthy*, 87 F. Supp. 3d at 1177–78. Dr. Levine argued prisoners should never receive SRS and stated that “legal advocates exaggerate the suffering of [GD] . . . through a misunderstanding of its nature.” *Id.* at 1179.

60. See, e.g., Ramzy, *supra* note 2.

61. AM. PSYCHIATRIC ASS’N, *supra* note 7, at 451 (defining transgender as a broad term that describes a spectrum of individuals who persistently identify with a gender different than their natal gender).

62. *Id.*

63. See *id.* at 453.

64. *Id.* at 451–53. Medical professionals who follow the Diagnostic and Statistical Manual of Mental Disorders use the following factors when diagnosing a person with GD:

A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration, as manifested by at least two of the following:

- 1) A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics
- 2) A strong desire to be rid of one’s primary and/or secondary sex characteristics because of marked incongruence with one’s experienced/expressed gender
- 3) A strong desire for the primary and/or secondary sex characteristics of the other gender.
- 4) A strong desire to be of the other gender
- 5) A strong desire to be treated as the other gender
- 6) A strong conviction that one has the typical feelings and reactions of the other gender

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Id. at 452.

gender reassignment are at increased risk for suicidal ideation, suicide attempts, and suicides.”⁶⁵ However, even after gender reassignment, risk of suicide might persist.⁶⁶

Once diagnosed with GD, the WPATH SOCs outline the clinical approach healthcare professionals should follow to treat their patients.⁶⁷ Incorporation of cutting edge clinical care, social developments, and political climates were all factors considered by the WPATH in creation of the SOCs.⁶⁸ Furthermore, the SOCs apply in their entirety to all people diagnosed with GD regardless of their housing situation.⁶⁹ Indeed, the SOCs specifically preempt any ambiguity by stating that “[p]eople should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons.”⁷⁰ Therefore, treatment options should not be restrained merely because the patient is in prison. According to the SOCs, treatment for people diagnosed with GD does not necessarily require the provision of SRS.⁷¹ However, for people diagnosed with severe GD, SRS may be essential and even medically necessary because surgery is the only way to relieve their distress.⁷²

The SOCs set forth six eligibility conditions that must be met by patients prior to the provision of SRS:

- 1) Persistent, well-documented gender dysphoria;
- 2) Capacity to make a fully informed decision and to consent to treatment;
- 3) Age of majority in a given country;
- 4) If significant medical or mental health concerns are present, they must be well controlled;

65. *Id.* at 454. (Gender reassignment usually indicates a legal change of gender.).

66. AM. PSYCHIATRIC ASS’N, *supra* note 7, at 454.

67. *See* SOC, *supra* note 8, at 1. The WPATH is an

international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health The overall goal of the SOC is to provide clinical guidance for health professionals to assist . . . transgender . . . people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.

Id.

68. *Id.* (describing how WPATH is dedicated to fueling an evolution in health care through changes in public policy and legal reform).

69. *Id.* at 67.

70. *Id.* (explaining that “health care for [people diagnosed with GD] living in an institutional environment should mirror that which would be available to them if they were living in a noninstitutional setting”).

71. *See id.* at 8–9 (detailing that treatment for some people diagnosed with GD requires both hormone therapy and SRS as medically necessary, while for others one treatment or the other is sufficient, and still others do not need either).

72. SOC, *supra* note 8, at 54.

- 5) 12 continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual);
- 6) 12 continuous months of living in a gender role that is congruent with the patient's identity.⁷³

Additionally, the SOC conditions require two referrals from qualified mental health professionals who have independently evaluated the patient.⁷⁴ A qualified mental health professional, however, is not likely to be a part of a prison's mental health staff.⁷⁵ Accordingly, the proper procedure for prisons to follow is to retain outside consultants to treat GD prisoners.⁷⁶ Finally, once the SOC conditions for SRS have been satisfied, the SOC conditions make it clear that "[d]enial of needed changes in gender role or access to treatments, including sex reassignment surgery, on the basis of residence in an institution are *not reasonable accommodations*"⁷⁷

b. *Kosilek v. Spencer* and *Norsworthy v. Beard*, Contradictory Federal Court Decisions with the Same Underlying Message: Given the Particular Facts and Circumstances Involved, SRS May Be a Medically Necessary Treatment for GD

As the progression of medical diagnosis advances, litigants in medical disputes rely heavily upon expert testimony to prove their cases.⁷⁸ Some argue that "[l]awyers need physicians to make their arguments in court persuasive and 'true.'"⁷⁹ As an initial matter, however, in both *Kosilek I* and *Norsworthy*, the DOC and the California Department of Corrections and Rehabilitations (CDCR) did not dispute that the inmate's diagnosis of GD constitutes a serious medical need requiring adequate medical care.⁸⁰ Rather, the DOC and the CDCR argued that by providing *Kosilek* and *Norsworthy* with an alternative course of treatment such as psychotherapy, hormones, and the provision of female garb, that it indeed rendered constitutionally adequate care.⁸¹ Therefore, the issue regarding the objective prong

73. *Id.* at 106.

74. *Id.* at 27. A "qualified" mental health professional is a person who possesses, among other recommended credentials, a master's degree in clinical behavioral science, participates in continuing education pertaining to the diagnosis and treatment of GD, and maintains a cultural competence to facilitate his or her work with GD patients. *Id.* at 22.

75. *See id.* at 67–68.

76. *Id.*

77. SOC, *supra* note 8, at 68 (emphasis added).

78. *See generally* *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 225–27 (D. Mass. 2012) (noting that Plaintiff utilized numerous experts, both private and court-appointed, to prove that the DOC's refusal to provide SRS constituted an Eighth Amendment violation). *See Davoli, supra* note 57.

79. PETER D. JACOBSON, STRANGERS IN THE NIGHT: LAW AND MEDICINE IN THE MANAGED CARE ERA 28 (2002).

80. *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014); *Norsworthy v. Beard*, 87 F. Supp. 3d 1187 (N.D. Cal. 2015).

81. *Kosilek*, 774 F.3d at 76, 86; *see generally* *Norsworthy*, 87 F. Supp. 3d at 1191 (discussing CDCR's argument that SRS must be determined to be clinically necessary by an individualized review).

of the Eighth Amendment analysis was whether SRS was a medically necessary treatment for prisoners diagnosed with GD who also met the WPATH SOC criteria that deems SRS medically necessary.⁸² But judges are not medical experts and should refrain from applying their own “non-medical” opinions.⁸³ Thus, in reaching both of their decisions, the courts deciphered what constitutes medically necessary treatment with the assistance of expert testimony, which applied the SOCs to the facts and circumstances of each respective case.⁸⁴ The courts then considered whether the DOC and the CDCR acted with deliberate indifference by denying SRS.⁸⁵

i. The Legal Labyrinth: *Kosilek v. Spencer*, Procedural Twists and Turns in the First Circuit

To fully appreciate the extraordinary effort taken by the First Circuit to slow the natural progression of the legal and medical fields, it is necessary to walk through the peculiar events leading to its decision. In *Kosilek I*, the United States District Court for the District of Massachusetts was the first federal court to order prison officials to provide SRS to an inmate.⁸⁶ Judge Wolf’s lengthy opinion cited strong agreement with Kosilek’s expert witnesses’ opinions, which urged treatment should strictly comply with the SOCs, while dismissing the DOC’s expert’s alternative treatment approach as imprudent.⁸⁷ Moreover, Judge Wolf held the DOC acted with deliberate indifference by denying Kosilek’s prescribed medically necessary SRS.⁸⁸

82. See *Kosilek*, 774 F.3d at 68; see *Norsworthy*, 87 F. Supp. 3d at 1185.

83. See *Kosilek*, 774 F.3d at 88 (discussing an inference the district court in *Kosilek* used to deem the viewpoint of a physician as illegitimate).

84. See *id.* at 76–77; see *Norsworthy*, 87 F. Supp. 3d at 1177–79.

85. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 206 (D. Mass. 2012).

86. *Id.* at 196, 251 (stating that “[t]his case is unusual because a transsexual prisoner . . . seeks an unprecedented court order requiring that the . . . [DOC] provide him with [SRS] to treat his major mental illness, severe [GD]”); see also Kari Huus, *Sex-Change Surgery for Prison Inmate Granted by Judge*, NBC NEWS (Sept. 4, 2012), http://usnews.nbcnews.com/_news/2012/09/04/13660348-sex-change-surgery-for-prison-inmate-granted-by-judge.

87. *Kosilek*, 889 F. Supp. 2d at 202. Judge Wolf stated in his Order:

As the DOC doctors responsible for treating Kosilek and the experts who testified on Kosilek’s behalf credibly concluded, sex reassignment surgery is the only adequate treatment for Kosilek’s serious medical need. The DOC’s trial expert, Dr. Chester Schmidt, a psychiatrist from Johns Hopkins, proposed providing Kosilek with psychotherapy and antidepressants, rather than sex reassignment surgery. Dr. Schmidt’s recent work focuses primarily on medical billing procedures rather than treatment of gender identity disorders. Dr. Schmidt does not accept the Standards of Care . . . followed by prudent professionals. His approach to dealing with Kosilek’s condition would not be employed by prudent professionals in the community.

Id. Also, while security concerns are relevant to the Eighth Amendment analysis, here, the DOC’s security concerns were found to be mere pretext for denying SRS that was “motivated by [the DOC’s fear of] . . . public and political controversy, criticism, scorn, and ridicule.” *Id.* at 203, 209.

88. *Id.* at 237. The DOC official’s knowledge of and indifference to a qualified physician attesting to the prospect of continued risk of serious harm to Kosilek’s health if SRS was not provided led the court to conclude that “[t]he evidence on the record clearly establishes that . . . [the DOC was] aware of facts from which they could infer that a substantial risk of serious harm to Kosilek existed, and drew the inference.” *Id.* Furthermore, since denying

On appeal, the United States Court of Appeals for the First Circuit affirmed the district court's decision in its entirety.⁸⁹ The court stated:

In sum, where at least three eminently qualified doctors testify without objection, in accord with widely accepted, published standards, that Kosilek suffers from a life-threatening disorder that renders surgery medically necessary, and the factfinder is convinced by that testimony, we are at a loss to see how this court can properly overrule that finding of fact.⁹⁰

However, despite the panel's reasoned determination, the First Circuit—in a rare and disfavored move⁹¹—granted the DOC's petition for an *en banc* rehearing.⁹² Thus, the opinion affirming the grant of SRS was withdrawn, and the judgment was vacated.⁹³ For the rehearing, the full circuit patched together law from other circuits and non-Eighth Amendment jurisprudence⁹⁴ to formulate a highly contested,⁹⁵ “variable exactitude,” standard of review.⁹⁶

SRS served no penological purpose, the continued exposure to the serious risk constituted deliberate indifference. *Id.* at 247.

89. See *Kosilek v. Spencer*, 740 F.3d 733, 773 (1st Cir. 2014). While the district court's application of law was scrutinized under *de novo* review, the First Circuit gave great deference to the lower court's finding of fact applying clear error review, holding that

[t]he judge was well-placed to make the factual findings he made, and there is certainly evidentiary support for those findings. Those findings—that Kosilek has a serious medical need for the surgery, and that the DOC refuses to meet that need for pretextual reasons unsupported by legitimate penological considerations—mean that the DOC has violated Kosilek's Eighth Amendment rights. The court did not err in granting Kosilek the injunctive relief she sought.

Id. at 761–62, 772–73.

90. *Id.* at 766.

91. Hearing a case *en banc* empowers the full circuit court to overturn a decision rendered by a three-judge panel. See FED. R. APP. P. 35(a) (“An *en banc* hearing or rehearing is *not favored and ordinarily will not be ordered* unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.”) (emphasis added).

92. *Kosilek*, 740 F.3d 733 (order granting rehearing *en banc*).

93. *Id.*

94. See *Kosilek v. Spencer*, 774 F.3d 63, 84–85 (1st Cir. 2014) (utilizing case law from four different federal circuits, along with Fourth Amendment decisions, to explain that “an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal,” which require a varying level of deference to the lower court's factual findings).

95. *Id.* at 96–97 (Thompson, J., dissenting) (arguing that the majority's varying exactitude standard amounted to a sweeping *de novo* review of both fact and law that “[a]rmed [the majority] with the ability to take a fresh look at findings that clearly warranted deference . . . [it] easily steps into the trial judge's shoes—the inarguable superiority of the judge's ability to marshal facts, assess motive, and gauge credibility [were] all but forgotten”); see also Brief for Civil Procedure Scholars as Amici Curiae Supporting Petitioner at 6, *Kosilek v. O'Brien*, 2015 WL 1776459 (2015) (No. 14-1120) (following the reversal by the *en banc* court, a group of legal scholars supported Kosilek's petition to the Supreme Court of the United States for a writ of certiorari, asserting that the First Circuit violated defining principals of the clearly erroneous standard of review, required by Rule 52, by applying *de novo* review to all of the district court's findings); see FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, *must not be set aside unless clearly erroneous*, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.”) (emphasis added).

96. See *Kosilek*, 774 F.3d at 84 (reasoning that review of mixed questions of law and fact is of variable exactitude, meaning the more grounded in law the question is, the less deference is given to the district court's conclusions).

With the “degree-of-deference continuum” relegated to zero, and without witnessing live testimony, the First Circuit conducted an independent credibility assessment of the expert witnesses.⁹⁷ The circuit court relied on the trial testimony of Dr. Levine, a medical expert appointed by the district court.⁹⁸ Dr. Levine, who was the chairman of the committee that drafted the fifth version of the SOCs, testified that medical professionals can reasonably differ as to what the minimally adequate treatment for GD is.⁹⁹ Running with that opinion, the circuit court quickly disposed of the district court’s finding that the DOC’s expert’s testimony was outside the realm of prudent medical treatment.¹⁰⁰ A difference in medical opinions concerning treatment options, the circuit court reasoned, does not necessarily mean one opinion is imprudent.¹⁰¹ The circuit court held that the DOC’s choice between “one of two alternatives—both of which are reasonably commensurate with the medical standards of prudent professionals, and both of which provide Kosilek with a significant measure of relief—is a decision that does not violate the Eighth Amendment.”¹⁰²

Although there is much criticism concerning the circuit court’s decision to grant the *en banc* rehearing and the lack of deference given to the lower court’s findings, the prospect of SRS being a medically necessary treatment in prison was not legally barred. The circuit court stressed that

this case presents unique circumstances; we are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking SRS in the future. Certain facts in this particular record—including the medical providers’ non-uniform opinions regarding the necessity of SRS, Kosilek’s criminal history, and the feasibility of postoperative housing—were important factors impacting the decision.¹⁰³

Thus, with the passage of time and the proper set of facts, the First Circuit will have no choice but to evolve with the medical field as SRS becomes more “uniformly” recognized as medically necessary.

ii. Recognized SOC Rules the Day: *Norsworthy v. Beard*

Norsworthy filed her first formal request for SRS less than two weeks after the decision in *Kosilek I* was released.¹⁰⁴ She felt that “it was the first time an opportunity

97. *Id.* at 84–85, 87–89.

98. *Id.* at 87–89. Dr. Levine was later retained by the CDCR as an expert regarding inmate requests for SRS in *Norsworthy*. See *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1179 (N.D. Cal. 2015).

99. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 227 (D. Mass. 2012); *Kosilek*, 774 F.3d at 88.

100. See *Kosilek*, 774 F.3d at 87–88.

101. *Id.* at 88.

102. *Id.* at 90.

103. *Id.* at 91. Also, the court explained that correctional administrators wishing to avoid treatment cannot seek out a single professional willing to attest that some well-accepted treatment is not necessary. *Id.* at 90 n.12.

104. *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1173–74 (N.D. Cal. 2015).

was provided to transgenders that said the State had to listen to [her]” and that before then the thought of a formal request for SRS was “absurd” and “like ramming your head into a wall.”¹⁰⁵ It was. Despite being armed with numerous doctor recommendations explicitly insisting that she receive SRS as a clinical and medical necessity, Norsworthy’s requests were repeatedly denied.¹⁰⁶ Thus, she followed Kosilek’s lead by filing an Eighth Amendment claim in federal court.¹⁰⁷

In his opinion, Judge Jon Tigar of the United States District Court for the Northern District of California wastes little time before giving credence to the WPATH SOCs.¹⁰⁸ Specifically, he pounces on the opportunity to mirror the SOC treatment guidelines.¹⁰⁹ He emphasizes that in some instances adequate treatment for GD can be non-surgical, however in more severe cases, relief from GD cannot be achieved without SRS.¹¹⁰ This principal of an individualized treatment for each prisoner’s specific ailments is consistent with the SOCs as well as Eighth Amendment jurisprudence.¹¹¹ Thus, when the CDCR presented the testimony of Dr. Levine, who supported the CDCR’s blanket ban on the provision of SRS,¹¹² the court swiftly labeled Norsworthy’s repeated denials an Eighth Amendment violation.¹¹³

While the Ninth Circuit did not endorse the decision in *Kosilek*, it did adopt the First Circuit’s condemnation of an institution intentionally seeking out a medical provider for the sole purpose of overriding Norsworthy’s treating medical professional’s recommendation for SRS.¹¹⁴ The CDCR was ordered to promptly provide Norsworthy with her medically necessary SRS.¹¹⁵ The state filed an appeal, however, and the Governor of California released Norsworthy one day before the Ninth Circuit was set to hear the appeal, rendering the case moot.¹¹⁶

III. THE INHERENT PROBLEMS WITH PROVIDING SRS TO PRISONERS WITH GD AND HOW SOCIETY, THE STATES, AND THE MEDICAL FIELD MAY HAVE ALREADY RESOLVED THEM

As the above section illustrates, there are many tangential issues related to the core Eighth Amendment determination. The path in which society develops plays an integral role. Today, cultural advancements have spurred a national atmosphere of

105. *Id.* at 1174.

106. *Id.* at 1173–74, 1176.

107. *See id.* at 1173, 1180–81.

108. *Id.* at 1170–71 (highlighting that the WPATH SOCs are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association).

109. *See id.* at 1187; *see* SOC, *supra* note 8, at 60.

110. *Norsworthy*, 87 F. Supp. 3d at 1171.

111. *Id.* at 1170, 1191–92. (discussing prior cases where individualized treatments were requirements).

112. *Id.* at 1189 (discussing Dr. Levine’s negative view on SRS on those in custody).

113. *Id.* at 1193–94.

114. *Id.* at 1191–92.

115. *Id.* at 1195.

116. Associated Press, *supra* note 20; Paige St. John, *Transgender Prison Inmate Seeking Sex-Reassignment Surgery Will Be Released*, L.A. TIMES (Aug. 7, 2015), <http://www.latimes.com/local/lanow/la-me-ln-transgender-prison-inmate-seeking-sex-change-will-be-paroled-20150807-story.html>.

intolerance.¹¹⁷ Intolerance for inequality.¹¹⁸ The result has been what it has been throughout history—passionate advocates pushing the law up the steep hill of change. It is a struggle; change is hard, but with the assistance of out-of-court influences, the burden of change is lessened.

A. A Sign of the Times: Societal Influences

The culture in American society is shifting. For instance, recently a transgender high school student who was born male but identifies as a female fought against her school district for not permitting her to use the women’s locker room.¹¹⁹ The school district attempted to accommodate her by providing her with her own changing room,¹²⁰ but separate is not equal.¹²¹ Thus, rather than risk losing millions in federal grant money, the district settled the claim and now allows access to locker rooms based on gender identity.¹²²

Another example of marked societal shift is in the world of sports. The International Olympic Committee (IOC) was the first athletic body to adopt a policy of inclusion regarding transgender athletes.¹²³ The IOC’s policy specifies only those who have (1) undergone SRS; (2) had hormone treatments for at least two years; and (3) received legal recognition of their transitioned sex, can participate consistent with their gender identities.¹²⁴ Recently, transgender students have also been permitted to participate in school sports in accordance with their gender identity.¹²⁵

Finally, the most significant step society has taken toward acknowledging SRS as a medically necessary treatment is its coverage under Medicare. In May 2014, SRS was de-classified as an “experimental treatment”; therefore, requests for transition related surgeries will be evaluated on an individual basis and covered if deemed medically necessary.¹²⁶ In reaching its revolutionary decision, the Department of Health and Human Services’ Appeals Board consulted the WPATH SOCs.¹²⁷

117. See Jack Markell & Randi Weingarten, *We All Have Role in Fight Against LGBT Discrimination*, CNN (May 12, 2016), <http://www.cnn.com/2016/05/12/opinions/north-carolina-restroom-law-markell-weingarten/>.

118. See generally *id.*

119. Duaa Eldeib, *Transgender Student Who Fought District 211 Gets Locker Room Access*, CHI. TRIBUNE (Jan. 15, 2016), <http://www.chicagotribune.com/suburbs/schaumburg-hoffman-estates/news/ct-transgender-student-deadline-district-211-met-20160114-story.html>.

120. *Id.*

121. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1952) (asserting that the separate but equal doctrine has no place in the realm of public education).

122. Eldeib, *supra* note 119.

123. Cathryn B. Lucas-Carr & Vikki Krane, *What Is the T in LGBT? Supporting Transgender Athletes Through Sport Psychology*, THE SPORT PSYCHOLOGIST 532, 541 (2011), <http://www.humankinetics.com/acucustom/sitename/Documents/DocumentItem/06-Lucas-532-548.pdf>.

124. *Transsexual Athletes OK for Athens*, CNN INTERNATIONAL (May 18, 2004), <http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual/>.

125. *High School Policies for Transgender Student Athletes*, TRANSATHLETE, <http://www.transathlete.com/#!k-12/c4w2> (last visited Nov. 7, 2016).

126. DEP’T OF HEALTH AND HUMAN SERVS., DOCKET NO. A-13-87, DEPARTMENTAL APPEALS BOARD, NCD 140.3, *Transsexual Surgery* (2014).

127. *Id.* at 7, 9–10.

B. The Influence of the Medical Field

The incorporation of cultural advancement into the WPATH SOC's is just one example of how the medical field has raised the bar as to what is considered constitutionally adequate treatment for inmates diagnosed with GD.¹²⁸ Further, a recent survey conducted of 137 medical schools teaching LGBT-related topics in the required curriculum, 30.3% reported to have instruction on gender transitioning, and 34.8% reported to have instruction on SRS.¹²⁹ Moreover, medical students are advocating for more required courses to keep up with transgender people's health-care needs.¹³⁰ Consequently, medical experts versed in the WPATH SOC's will be more commonplace, and people—including those incarcerated—diagnosed with GD will be more likely to receive medically necessary SRS.

C. State Contributions

Recently, state prison systems have gotten into the habit of releasing transgender inmates who demand adequate medical care.¹³¹ This pattern of releasing inmates rather than providing them with adequate medical care cannot be permitted to continue. Each state must develop a comprehensive organizational scheme for dealing with transgender inmates. Thus, shortly after Norsworthy's release, California adopted a policy for treating inmates with GD that closely conforms to the WPATH SOC's.¹³² Moreover, the policy indicates that post-operative transgender prisoners will be housed in a prison according to their gender identity.¹³³ While California's SRS and housing policy is in no way binding on other states, it certainly makes it easier for transgender inmates to point to California when their respective

128. SOC, *supra* note 8, at 1 n.2 (“Version 7 represents a significant departure from previous versions. Changes in this version are based upon significant cultural shifts, advances in clinical knowledge, and appreciation of the many health care issues that can arise for transsexual, transgender, and gender nonconforming people beyond hormone therapy and surgery.”) (emphasis added).

129. Juno Obedin-Maliver et al., *Lesbian, Gay, Bisexual, and Transgender-Related Content in Undergraduate Medical Education*, JOURNAL OF THE AM. MED. ASS'N (Sept. 7, 2011), <http://jama.jamanetwork.com/article.aspx?articleid=1104294>.

130. Tehreem Rehman, *Physicians Must Not Lag Behind National Policy on Transgender Discrimination*, IN-TRAINING (Nov. 25, 2015), <http://in-training.org/physicians-must-not-lag-behind-national-policy-transgender-discrimination-10091>.

131. See, e.g., Deborah Sontag, *Transgender Inmate Who Sued Georgia Gets Unexpected Parole*, N.Y. TIMES (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/us/transgender-inmate-who-sued-georgia-gets-unexpected-parole.html> (“[T]ransgender inmate who sued Georgia in February for access to hormone therapy and protection against prison rape, was unexpectedly paroled on Monday after serving less than a third of a 12-year sentence”); Diane Walker, *Transgender Inmate Granted Parole*, NBC12 (Jan. 25, 2014), <http://www.nbc12.com/story/24466381/transgender-inmate-granted-parole> (“A transgender Virginia prisoner, seeking sex change surgery paid for by the state, has been granted parole . . . after serving more than three decades of a 73-year prison sentence [for bank robbery, after] ‘no one in [her] family thought they would be living, when she walked free.’”).

132. See Richard Pérez-Peña, *California Is First State to Adopt Sex Reassignment Surgery Policy for Prisoners*, N.Y. TIMES (Oct. 21, 2015), <http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html>; see SOC, *supra* note 8, at 54–68.

133. See James Queally, *San Francisco Jails to House Transgender Inmates Based on Gender Preference*, L.A. TIMES (Sept. 10, 2015), <http://www.latimes.com/local/lanow/la-me-ln-transgender-san-francisco-jails-20150910-story.html> (explaining that prison officials said that California can be a model for the nation to follow on how to safely house transgender prisoners).

state prison system denies prescribed medically necessary SRS on feasibility grounds.

IV. CONCLUSION

A brief look into the history of the Eighth Amendment's Cruel and Unusual Punishments Clause illustrates its seemingly "indefinite" bounds. Whether inmates with GD truly "suffer" the way the SOC indicates, I do not know. I am not a "qualified medical health professional." Neither are the courts. Therefore, for Eighth Amendment claims alleging SRS is medically necessary, proper application of the deliberate indifference standard depends upon medical expert testimony. As our legal and medical fields evolve over time, cultural shifts influence both. The evolving standards of society will likely render imprudent any legal or medical professional who holds a view contrary to the recognized SOCs. Thus, for inmates with GD, SRS will be the new constitutional SOCs.