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CRIMINAL LAW—KOSILEK v. MALONEY: IN PRISON WHILE IMPRISONED IN THE BODY OF THE OPPOSITE SEX: EXAMINING THE ISSUE OF "CRUEL AND UNUSUAL PUNISHMENT" PRESENTED BY AN INCARCERATED TRANSSEXUAL

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NOTES

CRIMINAL LAW — KOSILEK V. MALONEY: IN PRISON WHILE IMPRISONED IN THE BODY OF THE OPPOSITE SEX: EXAMINING THE ISSUE OF “CRUEL AND UNUSUAL PUNISHMENT” PRESENTED BY AN INCARCERATED TRANSEXUAL

INTRODUCTION

When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment. . . .

While the rationale for this principle may be simple, the issues raised by the incarceration of those experiencing intense Gender Identity Disorder (hereinafter “GID”) are not. Inmates experiencing the rare psychological condition of GID pose serious and difficult questions to those responsible for their medical care and, in certain circumstances, prison personnel may be found to have violated the constitutional prohibition of “cruel and unusual punishments” by not providing proper treatment for the inmate. The case of Kosilek v. Maloney addressed the unique issues involved with the treatment of transsexual inmates in a comprehensive way, which had not previously been done by a court. The court’s general approach and thorough analysis of the issues presented is the subject of this Note.

Kosilek was decided by a federal district court in Massachu-

2. U.S. CONST. amend. VIII.
setts and is significant in a couple of ways. First, it provides the most comprehensive analysis of Eighth Amendment jurisprudence in the context of incarcerating transsexuals. No other court at the federal level has considered this difficult issue as thoroughly as in Kosilek. Second, it provides guidance to prison administrators faced with the difficult task of incarcerating transsexuals. The opinion can be viewed as establishing a framework for prison administrators to be used in order to avoid violating the prohibition of cruel and unusual punishment. The decision is constitutionally sound given prior case law and the current understanding of GID and its potential seriousness. Therefore, the case may have additional significance outside of the First Circuit.4

Michelle Kosilek is, for the most part, an unsympathetic litigant. Kosilek is a convicted murderer currently serving a life-sentence, without the possibility of parole, in a medium-security Massachusetts prison for the murder of his former wife, Cheryl McCaul.5 Kosilek is anatomically male and suffers from GID, a rare psychological condition marked by intense and persistent desires to live life as a member of the opposite sex.6 Kosilek has been incarcerated at MCI-Norfolk since 1994 and has been in the custody of the Department of Corrections (hereinafter “DOC”) since 1993.7 During the period in which the DOC has been responsible for Kosilek, he attempted suicide twice and also attempted to castrate himself.8 Kosilek’s unique condition placed those responsible for his care, and ultimately DOC Commissioner Michael Maloney, in a difficult position.

On the one hand, the responsible officials knew that Kosilek was in need of psychiatric care, having been diagnosed by a professional with experience in treating GID.9 Therefore, under the Eighth Amendment, DOC personnel could not neglect his medical condition. The DOC also knew that if Kosilek was not treated properly the risk of suicide would be great.10 On the other hand,

7. Id. at 164.
8. Id.
9. Id. at 190.
10. Id.
the treatment options involved in treating GID were politically controversial, expensive, and potentially disruptive of prison security. Fearful of the potential political backlash and concerned with the administration of the prison, Commissioner Maloney decided not to provide the recommended course of treatment and claimed that the DOC was not constitutionally obligated to do so. In response, Kosilek brought a civil rights action to enforce his Eighth Amendment right to medical care.

Determining whether an Eighth Amendment violation occurred was a close question. Although the Eighth Amendment provides substantial protection for prison officials, as Kosilek explains, it is not impenetrable. In the end, the court found that Commissioner Maloney had not violated the Eighth Amendment because his actions in dealing with Kosilek's condition were not the result of "deliberate indifference." Despite holding in favor of the DOC, the Kosilek decision can be viewed as a warning to those responsible for the care of transsexual inmates. The decision in part provides what should, and should not, be done by prison officials when faced with the difficult situation of incarcerating persons with GID. The court's thorough examination of such a thorny legal problem is constitutionally sound as the law exists today; thus courts and prison officials should be aware of Kosilek in order to assure compliance with the Eighth Amendment and thereby avoid potential liability.

This Note addresses the various issues involved in the Kosilek decision, including whether transsexual inmates should be allowed individualized medical evaluations; whether prison policies which severely restrict access to treatment are proper; the role of political consequences in the decision process used by prison officials responsible for the medical care of prisoners; and the issue of cost as a factor of constitutional magnitude. To achieve this end, this Note

11. Id. at 162.
12. Id. at 170-71.
13. Id. at 159.
14. Id. at 191.
15. Id. at 160-61. The court expanded on what adequate care entails: "Adequate care requires treatment by qualified personnel, who provide services that are of a quality acceptable when measured by prudent professional standards in the community. Adequate care is tailored to an inmate's particular medical needs and is based on medical considerations." Id. The court also mentioned that it would not be "permissible to deny an inmate adequate medical care because it is costly. In recognition of this, prison officials at times authorize CAT scans, dialysis, and other forms of expensive medical care required to diagnose or treat familiar forms of serious illness." Id.
begins by discussing several related concepts. Part I of this Note concerns the judicial construction of the cruel and unusual clause of the Eighth Amendment and examines the deliberate indifference standard, which is used to assess whether a violation of the Amendment has occurred. This Part provides analysis of the important developments in Eighth Amendment interpretation, including the Supreme Court’s landmark decision in *Estelle v. Gamble*,\(^{16}\) and provides discussion of deliberate indifference in the medical treatment context. Part II includes a discussion of GID and provides analysis of earlier cases that involved challenges brought by incarcerated transsexuals. Part III discusses the facts of the *Kosilek* case as well as the court’s holding. Finally, Part IV explores the *Kosilek* opinion and provides analysis of the decision. The purpose of this Note is to examine the impact the *Kosilek* decision may have on future actions brought by incarcerated transsexuals.\(^{17}\) This Note proposes that the *Kosilek* approach serve as a model for future cases because it best comports with Supreme Court precedent and notions which underlie the Eighth Amendment.

I. Background

A. Judicial Interpretation of the Eighth Amendment in the Modern Era

The roots of the contemporary deliberate indifference standard, which is used to determine whether a prison official has violated a prisoner’s Eighth Amendment right to be free from cruel and unusual punishment, can be traced back to the middle part of the twentieth century. It was around this time that the essential problem regarding the scope of the Eighth Amendment began to be considered.\(^{18}\) Despite the unresolved issue regarding the applicability of the Amendment to the states,\(^{19}\) the Supreme Court case of

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\(^{16}\) 429 U.S. 97 (1976).

\(^{17}\) See *supra* note 4.

\(^{18}\) See *Robinson v. California*, 370 U.S. 660, 675 (1962) (“The command of the Eighth Amendment banning ‘cruel and unusual punishments,’ stems for the Bill of Rights of 1688. . . . And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.”) (citation omitted). During this period, the Fourteenth Amendment was “assumed” to be the principle basis for applying the Eighth Amendment to the states. See *Francis v. Resweber*, 329 U.S. 459, 462 (1947). This “assumption” would not be formally confirmed by the Supreme Court until years later.

\(^{19}\) *Francis*, 329 U.S. at 462 (The Court stated that “we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Fifth and Eight Amendments . . . would be violative of the due process clause of the
Francis v. Resweber\textsuperscript{20} made important, albeit limited, interpretations concerning the potential for liability under the Amendment.\textsuperscript{21} Two significant findings the Court made were that the Amendment prohibited “the wanton infliction of pain” and that a violation of the Amendment could not result from an “unforeseeable accident.”\textsuperscript{22} The Court interpreted the prohibition of “cruel and unusual punishment” to involve a mens rea component, and this concept would ultimately serve an important role in the construction of the Eighth Amendment. The mens rea requirement would be formally accepted by the Supreme Court twenty-nine years later in the landmark Eighth Amendment case of Estelle v. Gamble.\textsuperscript{23}

1. Estelle v. Gamble

In Estelle, the Supreme Court established a framework to guide courts in determining whether an Eighth Amendment violation occurred.\textsuperscript{24} For the first time, the Supreme Court began the difficult task of restricting the limits of the indefinite cruel and unusual clause in a meaningful way.\textsuperscript{25} The standard established by the Court incorporated the Eighth Amendment’s guiding principles, announced by earlier Supreme Court decisions,\textsuperscript{26} which viewed the Fourteenth Amendment.”); see also Larry Charles Berkson, The Concept of Cruel and Unusual Punishment 7, 14 (1975).

\begin{itemize}
\item \textsuperscript{20} 329 U.S. 459 (1947).
\item \textsuperscript{21} Francis, 329 U.S. at 463.
\item \textsuperscript{22} Id. at 463-64.
\item \textsuperscript{23} 429 U.S. 97, 104 (1976) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment.”).
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 105-06. The Court's opinion makes clear that not every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment . . . . In order to state a cognizable claim a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.
\item \textsuperscript{26} See Weems v. United States, 217 U.S. 349, 370-74 (1910). In Weems, the majority opinion stated:

Legislation, both statutory and constitutional, is enacted, it is true, from an
Amendment as progressive and concerning "evolving standards of decency that mark progress in a maturing society." The deliberate indifference standard crafted by the Court can therefore be considered an attempt to reconcile the lofty notions of "evolving standards of decency" and "dignity of man," which underlie the Eighth Amendment, with a specific legal analysis with which courts could work. The resulting method was one that assessed not only objective criteria but also the subjective motivation of the responsible prison official, against whom allegations were lodged. This combination of the objective and subjective became the basis for determining whether a valid Eighth Amendment claim exists.

By establishing that only a finding of deliberate indifference, or the "unnecessary and wanton infliction of pain," would constitute a violation of the Eighth Amendment, Estelle precluded liability for experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.

Id. at 373. See also Trop v. Dulles, 356 U.S. 86, 100-01 (1958). In Trop, the Court again recognized that the language in the Amendment does little in the way of providing precise meaning. In reversing a sentence that would have taken away the citizenship of the native born petitioner who had been convicted of wartime desertion, the Court stated that: "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 stands to assure that this power be exercised within the limits of civilized standards." Id. at 100. The Court also stated that: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 101.

27. Estelle, 429 U.S. at 102. See also Trop, 356 U.S. at 101.

28. Estelle, 429 U.S. at 106 ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.").

29. Id. at 101, 106 (acknowledging that more recent Supreme Court decisions go beyond obvious physical punishments, which would of course violate the Amendment, and requiring a showing of "deliberate indifference" in order for liability to be imposed under the Eighth Amendment).

30. Id. at 104-05. The majority stated:

We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . prescribed by the Eighth Amendment. This is true whether the indifference is manifested 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. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Id. (citation omitted).
the harm to prisoners so long as responsible prison officials acted appropriately. The deliberate indifference standard also advanced the mens rea concept mentioned in Francis to now require a culpable state of mind beyond mere neglect. Following Estelle, it has become clear that the Court has accepted the deliberate indifference standard as the proper measure of whether an Eighth Amendment violation exists in practically all aspects of prison administration.

The Estelle decision did little in terms of defining the scope of liability under the deliberate indifference standard. Estelle did, however, confirm "that the Amendment proscribes more than physically barbarous punishments." At the same time, the opinion recognized the aspiring beliefs of humanity and decency, which underlie the Amendment. The standard announced in Estelle can therefore be seen as a flexible method to be used by courts on an ad hoc basis when evaluating penal measures against the "broad idealistic concepts of dignity, civilized standards, humanity, and decency." To further understand "deliberate indifference" and its

31. See Whitley v. Albers, 475 U.S. 312, 319 (1986) ("To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in Estelle.").

32. See Francis v. Resweber, 329 U.S. 459, 463 (1947) (finding that the Eighth Amendment prohibited "the wanton infliction of pain" and that no liability would exist for an "unforeseeable accident"); see also Estelle, 429 U.S. at 105 (accepting that accidents, whether in the medical context or not, are insufficient to satisfy the mens rea component of the Eighth Amendment).

33. See Farmer v. Brennan, 511 U.S. 825, 836 (1994) (citing Hudson v. McMillian, 503 U.S. 1, 6-7 (1992)) ("[A]pplication of the deliberate indifference standard is inappropriate . . . when officials stand accused of using excessive physical force."). According to the Farmer Court:

   In such situations, where the decisions of prison officials are made "in haste, under pressure, and frequently without the luxury of a second chance," an Eighth Amendment claimant must show more than "indifference," deliberate or otherwise. The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm . . . ."

34. Estelle, 429 U.S. at 102.

35. Id.

36. Id. See also Wilson, 501 U.S. at 302. In Wilson, the Court acknowledged that determining an individual's intent depends on the circumstances. Id. (citing Whitley, 475 U.S. at 320) ("[O]ur cases say that the offending conduct must be wanton. Whitley makes clear, however, that in this context wantonness does not have a fixed meaning
potential scope of liability, it is helpful to analyze other Supreme Court cases that have applied the standard.

B. Judicial Construction of the Deliberate Indifference Standard

Further clarification of "deliberate indifference" came in 1991, when the Court applied the standard in *Wilson v. Seiter* 37 and distinguished the case from an earlier decision in *Rhodes v. Chapman*. 38 While both cases involved complaints relating to conditions of confinement, 39 in *Rhodes* the Court never thoroughly assessed the prison official's subjective motivation because the claim failed during the analysis of the objective component of deliberate indifference. 40 *Wilson* established that after a determination based on an objective injury is made, a court must then assess the constraints placed on the official in order to determine whether the appropriate level of "wantonness" is present. 41 Thus, *Wilson* 's clarification of *Rhodes* aided in the interpretation of the deliberate indifference analysis by setting out a two-step inquiry. First, under *Rhodes*, courts must consider the objective factors relating to the claim. 42 If there are insufficient objective indicia the claim fails immediately at that point. 43 However, if the claim survives analysis under the objective component, courts must consider the subjective component. 44

The most in-depth explanation of deliberate indifference came in *Farmer v. Brennan*, 45 which is also the only Supreme Court deci-

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37. 501 U.S. at 294.
40. *Rhodes*, 452 U.S. at 348 (finding claim which alleged "double ceiling" as violative of constitutional right lacking because no sufficient medical, sanitary, or dietary deprivation existed). See also *Wilson*, 501 U.S. at 298-99; *Whitley*, 475 U.S. at 319 (clarifying *Rhodes* to make certain that it was not to be understood as a departure from the subjective requirement of deliberate indifference, and reaffirming the notion that a violation of the Eighth Amendment requires a subjective component).
41. *Wilson*, 501 U.S. at 303 ("[A]ssuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, whether it can be characterized as 'wanton' depends upon the constraints facing the official." (citation omitted).
42. Id. at 298.
43. See *Rhodes*, 452 U.S. at 348.
44. *Wilson*, 501 U.S. at 300-01. Staying true to deliberate indifference, the Court stated that the subjective requirement, on the part of the prison official, partly determined whether an Eighth Amendment violation existed. Id.
45. 511 U.S. 825, 835 (1994) (admitting that deliberate indifference had never been thoroughly explained).
sion involving a transsexual litigant. Farmer augmented the deliberate indifference definition by asserting that it encompassed "more than mere negligence" but less than "acts or omissions for the very purpose of causing harm or with knowledge that harm will result." The Court added "that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." This statement suggests that deliberate indifference is closely related to the notion of recklessness; however, the Court was uncomfortable with this notion, in part because of the varying legal interpretations of the latter term. Consequently, the Court rejected a deliberate indifference definition that would be analogous to a civil law interpretation of recklessness and in the process refined deliberate indifference, expanding the concept beyond the recklessness notion found in the criminal law.

The Court's justification for this expansion of deliberate indifference, beyond the bounds of both criminal and civil law interpretations of recklessness, ultimately related to the language in the Eighth Amendment itself. At the heart of deliberate indifference is the understanding that "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual

46. Id. ("With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.").

47. Id. at 836.

48. Id. at 836-37. The Court compared the civil law definition of recklessness with the criminal law definition:

The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

Id. (citation omitted).

49. Id. at 837 (rejecting argument that liability should be found because of the obvious and unreasonable risk allegedly posed by the responsible official).

50. Id. The Farmer Court recognized the criminal law notion of recklessness to mean disregarding a risk of harm of which the person is aware. Ultimately, the Court expanded this definition by not only requiring an awareness of risk, but also by requiring the individual to draw an inference that would make the official completely aware of the risk.

51. Id. ("This [deliberate indifference] approach comports best with the text of the Amendment as our cases have interpreted it."). See also Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("[T]he source of the intent requirement is not predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual punishment.").
'punishments.' "52 In the end, Farmer unmistakably stressed the importance of establishing the requisite subjective motivation on the part of the responsible official in order for an Eighth Amendment violation to exist. 53 Farmer thus once again reaffirmed the notion that deliberate indifference cannot be found by the fact-finder without a definite determination that the responsible official acted, or "punished" the prisoner, with a culpable state of mind. 54 Notwithstanding this overall emphasis on the subjective component, the Farmer opinion also acknowledged that objective aspects of incarceration were relevant and could amount to an important societal interest. 55

The emphasis on the subjective motivation of the prison official was not a novel concept, but was nonetheless controversial. In Francis, the majority opined that the Eighth Amendment prohibited "the wanton infliction of pain." 56 In that case, the dissenting justices recognized the inherent difficulty of analyzing the actions of the individual responsible for the resulting harm in terms of motivation, deliberation, and intent. 57 The dissenters presciently identified an issue, which would be debated by future justices 58 until

52. Farmer, 511 U.S. at 837.
53. Id. at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.").
54. See id. at 837; Wilson, 501 U.S. at 300 ("If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").
55. Farmer, 511 U.S. at 837-38 ("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. The common law reflects such concerns when it imposes tort liability on a purely objective basis.").
57. Id. Referring to the attempted electrocution of the prisoner and the subjective component as it relates to the executioner, the Court stated that "[l]ack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was not failure." Id.
58. See Farmer, 511 U.S. at 851 (Blackmun, J., concurring); Estelle v. Gamble, 429 U.S. 97, 108 (1976) (Stevens, J., dissenting). Justice Blackmun stated: "I agree with Justice Stevens that inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind." Farmer, 511 U.S. at 851 (Blackmun, J., concurring). Blackmun also believed that deliberate indifference was inconsistent with the original meaning of the Amendment and stated "there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally." Id. at 856 (Blackmun, J., concurring). Using a more textual critique, Justice Thomas considered the Estelle opinion mistaken because the harm in that case had nothing to do with the sentence which individual received. Id. at 859 (Thomas, J., concurring). Thomas
settled by the majority in Estelle and reaffirmed in Farmer. Estelle, appropriate or not, requires the trier of fact to determine the intent or wantonness of the responsible prison official before imposing liability.\textsuperscript{59} Despite arguments against applying the deliberate indifference standard,\textsuperscript{60} Estelle remains controlling and prior dissenters, from Justices Thomas to Stevens, have concurred in cases requiring an assessment of the official’s subjective motivation and considered them as consistent with precedent.\textsuperscript{61}

C. \textit{The Deliberate Indifference Standard in the Medical Treatment Context}

Estelle established that it was “elementary” to recognize the “government’s obligation to provide medical care for those whom it is punishing by incarceration.”\textsuperscript{62} Therefore, in the medical care context, the decision can be seen as an acceptance of the long-standing idea that society itself bears the burden of caring for the criminal element of society.\textsuperscript{63} Estelle also affirmed that knowledge interpreted the scope of the Amendment as involving only the sentence, or “punishment” which is imposed on the individual, and not the prison conditions in which the convict eventually finds himself. \textit{Id.} (Thomas, J., concurring). \textit{See also Wilson,} 501 U.S. at 306 (White, J., concurring). Justices Marshall, Blackmun, and Stevens signed onto Justice White’s concurrence, which argued that the deliberate indifference standard is inappropriate in determining whether the conditions of prison violate the Eighth Amendment. \textit{Id.} (White, J., concurring). The justices’ main concern was that prison officials could escape liability even when they had knowledge of serious deprivations to prisoners, but were unable to remedy the deprivations because of some aspect outside their control and thus not liable because they lacked the requisite intent or wantonness. \textit{Id.} at 310 (White, J., concurring). It seems that the fundamental disagreement relates directly to interpreting the purpose of the Amendment and whether the prohibition of “cruel and unusual punishments” was intended to regulate improper behavior by prison officials or whether it serves to provide a broad protection from harm irrespective of motive, intent, or wantonness. \textit{See Farmer,} 511 U.S. at 857 (Blackmun, J., concurring). Justice Blackmun stated:

\begin{quote}
The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measures will be taken to ensure his safety . . . the Eighth Amendment [may be] violated regardless of whether there is an easily identifiable wrongdoer with poor intentions.
\end{quote}

\textit{Id.} (Blackmun, J., concurring).

\begin{flushleft}
\textsuperscript{59} \textit{Estelle,} 429 U.S. at 104-05.
\textsuperscript{60} \textit{See Michael Cameron Friedman, Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard,} 45 \textit{VAND. L. REV.} 921, 937-38 (1992) (arguing that Eighth Amendment challenges might be more appropriately analyzed under a gross negligence standard).
\textsuperscript{61} \textit{See Farmer,} 511 U.S. at 858-62 (Stevens, J., and Thomas, J., concurring) (concurrence was hesitant).
\textsuperscript{62} \textit{Estelle,} 429 U.S. at 103.
\textsuperscript{63} \textit{Id.} at 103-04. For \textit{Estelle,}
of a prisoner’s need for medical care, combined with a refusal to provide such care, would constitute deliberate indifference and thus violate the Eighth Amendment. However, many cases, including Kosilek, do not fit neatly within this kind of scenario, and therefore, a more in depth understanding of deliberate indifference in the medical treatment context is necessary.

In Estelle, the Court was certain that the Eighth Amendment prohibited responsible officials from being deliberately indifferent towards serious medical needs of prisoners. The decision came at a time when the “hands off” approach, which had been used extensively in the past, had begun to diminish. During the “hands off” era, in response to Eighth Amendment claims brought by prisoners whose central allegation challenged the discretion of the medical authority, most courts deferred to the decisions of the medical personnel. However, there had never been a total disregard for prisoners’ right to medical treatment. Even before Estelle, courts had found that an intentional failure to provide medical treatment for prisoners would constitute “cruel and unusual” punishment.

Since the deliberate indifference standard was announced, the Court has stated that a prison official responsible for providing medical care would be in violation of the Eighth Amendment if the prisoner could demonstrate that there was a “serious medical need”

The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that “it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”

Id. (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

64. Id. at 104-06. The Estelle Court concluded that “an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscious of mankind.’” Id. at 105-06. However, it also noted that deliberate indifference can be “manifested 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 treatment once prescribed.” Id. at 104-05.

65. Id. at 104 (“[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”).

66. Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506, 506 (1963) (explaining the “hands off” doctrine as “a denial of jurisdiction over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment”).

67. See Berkson, supra note 19, at 132.

which the official intentionally neglected. It makes no difference, for purposes of Eighth Amendment liability, that the underlying complaint concerns the inadequacy of medical treatment as opposed to a total lack thereof. There is no deliberate indifference exception made for claims based on inadequacies of medical treatment. Therefore, the prisoner must simply prove that he or she suffered from a serious illness and that the prison official acted with the requisite culpable intent in not providing treatment or by providing inadequate treatment. Each of these elements will be discussed in turn.

1. The Medical Need That the Prisoner Alleges Has Not Been Adequately Treated Must Be "Sufficiently Serious"

The Supreme Court has succinctly stated that the "deprivation alleged must be, objectively, 'sufficiently serious'" in order for a violation of the Eighth Amendment to exist. The Court has also stated that the objective requirement would be fulfilled when the responsible official's act or omission resulted "in the denial of the 'minimal civilized measure of life's necessities.'" It is important to appreciate the use of the word "minimal" because there is no doubt among the legal community that prisoners are not entitled to ideal care. The "sufficiently serious" requirement applies equally to allegations involving physical ills as well as claims concerning psychological illness. There is no dispute among courts as to the similarity between physical and psychological problems. Both re-

69. Estelle, 429 U.S. at 104.
70. See Wilson v. Seiter, 501 U.S. 294, 303 (1991) (finding "no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement").
71. Estelle, 429 U.S. at 106 ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.")
73. Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).
75. See Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991) ("The extension of the eighth amendment's protection from physical health needs, as presented in Estelle, to mental health needs is appropriate because, as courts have noted, there is 'no underlying distinction between the right to medical care for physical ills and its psychological..."
quire adequate medical treatment. Thus, a prison official who exhibits deliberate indifference towards a prisoner's mental health needs would be in violation of the Eighth Amendment.76

Courts agree that "a condition that a reasonable physician would deem worthy of treatment and which, if left untreated, could result in further significant injury to the inmate or the wanton infliction of pain" constitutes a sufficiently serious need.77 Categories of serious medical conditions recognized by courts have been those involving "highly contagious or dangerous conditions for which treatment is mandated by statutes;78 those conditions diagnosed as serious by medical personnel and which threaten substantial harm if left untreated;79 . . . chronic disabilities and afflictions;80 and conditions which may result in serious injury when requests for their treatment are denied."81 Significantly, a serious medical need that has been misdiagnosed by a medical professional could not amount to deliberate indifference, and thus, no Eighth Amendment violation would result.82

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76. See Torraco, 923 F.2d at 234; Smith v. Jenkins, 919 F.2d 90, 92 (8th Cir. 1990); Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990).


79. Pappas, supra note 78, at 164 (citing West v. Keve, 571 F.2d 158, 162 (3rd Cir. 1978); Freeman v. Lockhart, 503 F.2d 1016, 1017 (8th Cir. 1974); Derrickson v. Keve, 390 F. Supp. 905, 906-07 (D. Del. 1975)).


81. Id. (citing Freeman, 503 F.2d at 1017).

82. Estelle v. Gamble, 429 U.S. 97, 105-06 (1976). According to Estelle, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, 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.

Id.
2. Evaluating the Treatment the Prisoner Receives

The next step in determining whether a violation of the Eighth Amendment exists requires an evaluation of the treatment that the prisoner actually received. On the one hand, the Supreme Court has confirmed "that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" \(^{83}\) On the other hand, it is clear that mere disagreement with the chosen medical treatment cannot be the basis of a cognizable constitutional claim. \(^{84}\) When courts consider these two contradictory notions in deciding Eighth Amendment claims brought by transsexual prisoners, problems often arise.

For example, in Kosilek, the court concluded that the appropriate method for determining whether the prisoner received adequate treatment should involve an evaluation of the treatment in relation to the professional medical standards practiced in the community. \(^{85}\) The court went on to state that the treatment a prisoner receives should be individualized and specific to the unique medical requirements of that prisoner. \(^{86}\) However, this is a somewhat novel strategy, and courts have been more prone to utilize a balancing system and consider a host of factors before determining whether an inmate possesses a valid constitutional claim. \(^{87}\) In the end, the deter-


\(^{84}\) See Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980); Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977); Jones v. Lockhart, 484 F.2d 1192, 1193 (8th Cir. 1973); Hyde v. McGinnis, 429 F.2d 864, 867-68 (2d Cir. 1970); Kosilek v. Maloney, 221 F. Supp. 2d 156, 160 (D. Mass. 2002).

\(^{85}\) Kosilek, 221 F. Supp. 2d at 160 ("Adequate care requires treatment by qualified personnel, who provide services that are of quality acceptable when measured by prudent professional standards in the community.").

\(^{86}\) Id. ("Adequate care is tailored to an inmate's particular medical needs and is based on medical considerations.").

\(^{87}\) See Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981). The court recited factors which have been considered relevant to a balancing approach as: the seriousness of the prisoner's illness, the need for immediate treatment, the likely duration of his incarceration, the possibility of substantial harm caused by postponed treatment, the prospects of some cure or substantial improvement in his condition, and the extent to which the prisoner presents a risk of danger to himself or other inmates. On the other hand, the court should consider the availability and expense of providing psychiatric treatment and the effect of such unusual care on ordinary jail administration. In balancing the needs of the prisoner against the burden on the penal system, [courts] should be mindful that the essential test is one of medical necessity and not one simply of desirability.

Id.
mination depends on the particular facts – especially the extent of
treatment involved. When GID is at issue, the analysis becomes
more complicated. In order to comprehend the difficulties that
prison administrators, and eventually courts, face in dealing with
constitutional challenges brought by transsexual inmates, it is help­
ful to understand GID and its potentially serious effects.

II. GENDER IDENTITY DISORDER

In the past, GID has been referred to by courts as “gender
dysphoria” or “transsexualism,” which are older terms used to iden­
tify the condition. A simplistic definition of GID might character­
ize the condition as involving a belief that one is “trapped” in the
body of the opposite sex. However, the primary criteria which
medical professionals use in diagnosing GID involves evidence of a
strong and persistent desire to be a member of the opposite sex,
which accompanies a persistent discomfort about one’s assigned sex
and entails significant distress or impairment of functioning in soci­
ety. The definitions adopted by courts are consistent with medical
definitions and stress the discomfort associated with the illness.
The Supreme Court definition of transsexual is “one who has [a]
rare psychiatric disorder in which a person feels persistently uncom­
fortable about his or her anatomical sex,’ and who typically seeks
medical treatment, including hormonal therapy and surgery, to
bring about a permanent sex change.”

GID seriously affects the lives of those who suffer from it and
is considered by the majority of the medical community to be bio-

88. See id.
89. See Debra Sherman Tedeschi, The Predicament of the Transsexual Prisoner, 5
TEMP. POL. & CIV. RTS. L. REV. 27, 29-30 (1995) (noting that while courts use the two
terms interchangeably, gender dysphoria is a broad term, and transsexualism is a partic­
ular type of gender dysphoria).
90. MERCK MANUAL OF MEDICAL INFORMATION, Home Edition, Sect. 7, Mental
Health Disorders. ch. 87.
91. See AMERICAN PSYCHIATRIC ASSOCIATION, DSM-IV-TR: Diagnostic and
Statistical Manual of Mental Disorders 578 [hereinafter DSM-IV-TR].
Airlines, Inc., 742 F.2d 1081, 1083 n.3 (7th Cir. 1984) (describing transsexualism as “a
condition that exists when a physiologically normal person (i.e., not a hermaphrodite –
a person whose sex is not clearly defined due to a congenital condition) experiences
discomfort or discontent about nature’s choice of his or her particular sex and prefers to
1990) (describing the plaintiff’s disorder as “discomfort and rejection of one’s gender
based on physical characteristics and sex assigned at birth”).
93. Farmer, 511 U.S. at 829 (citation omitted).
logical and innate. Adults with GID may exhibit an intense desire to not only take on the physical characteristics of the opposite sex, but also to adopt the social role associated with that gender. The uncomfortable feelings associated with GID may lead adults to "adopt the behavior, dress, and mannerisms of the other sex." It is difficult to determine how prevalent GID is; however, statistics from smaller European countries have shown that roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek the ultimate in treatment for the illness: sex-reassignment surgery.

GID commonly affects relationships, and "many individuals with GID become socially isolated." In some instances, the condition can be so great that it affects nearly every aspect of the person's life. Eventually, the person's everyday life may center around only those activities that tend to decrease the associated stressful feelings. GID can also lead to incidents of substance abuse and attempted suicide. In extreme cases, individuals with GID might also attempt self-castration or mutilation of genitals.

GID is treatable. While psychotherapy is considered helpful, it is not intended to cure the illness, nor is it one of the three standard treatments according to the Standards of Care. The Standards of Care, which is considered to be the generally accepted course of treatment in the medical community, establish three types of treatment options: (1) hormone therapy; (2) real-life experience; (3) self-castration or mutilation of genitals.

94. DSM-IV-TR, supra note 91, at 577.
95. Id.
96. Id. at 579. See also Harry Benjamin, International Gender Dysphoria Association, The Standards of Care for Gender Identity Disorders 17 (Symposium Publishing, 5th ed. 1998) (hereinafter The Standards of Care) (providing information concerning the prevalence of GID and presenting data from Holland, which provides that "1 in 11,900 males and 1 in 30,400 females" may be afflicted with the illness).
97. DSM-IV-TR, supra note 91, at 578.
98. Id.
99. Id.
100. Id.
102. Id. at 32. Hormone therapy involves the use of hormones, generally androgen for females with GID and estrogens for males, for the purpose of allowing the patient to take on physical characteristics of the opposite sex and thereby relieve the distress associated with the illness.
103. The real-life experience treatment option is considered "essential" if the goal of treatment is a complete transition and involves allowing the patient to "fully adopt a new or evolving gender role or gender presentation in everyday life." Id. at 30. See also Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002) (citing The Standards of Care throughout the opinion). A patient's real-life experience, as a member of the opposite sex, is ordinarily supplemented with hormones and requires the patient to con-
and (3) sex-reassignment surgery.\textsuperscript{104}

The aim of the different treatment options is to provide "personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment."\textsuperscript{105} The treatment options are intended to be flexible and individualized in order to ensure the best possible result for the patient. However, when the patient is a prisoner, the responsible officials in charge of maintaining an orderly prison may not be willing to be as flexible as the \textit{Standards of Care} suggest – especially when issues like security, politics and expense arise. The next part of this Note examines four early decisions that considered some of the difficult issues inherent in the incarceration of transsexuals.

A. \textit{Legal Actions by Prisoners Involving Gender Identity Disorder}

Many courts that have dealt with legal claims brought by plaintiffs experiencing GID have considered the condition valid and serious.\textsuperscript{106} However, in \textit{Lamb v. Maschner},\textsuperscript{107} the court’s difficulty in grasping the seriousness of GID was evident. The plaintiff claimed to be transsexual, sought transfer to a female facility, and requested that the prison provide cosmetics and female clothing.\textsuperscript{108} In discussing whether the plaintiff was in fact a transsexual, the court did
take into account that the prisoner had inflicted a laceration to his scrotum.\textsuperscript{109} However, the court did not consider the incident indicative of mental illness but rather illustrative of the plaintiff's character as a "non-conformist."\textsuperscript{110} Such reasoning demonstrates the lack of understanding that often accompanies claims involving GID and its unique manifestations.

The early case of \textit{Supre v. Ricketts}\textsuperscript{111} illustrated not only some of the complex issues involved with incarcerating transsexuals, but also the confusion which can exist in regards to GID. The facts of the case reveal that the inmate-plaintiff was in need of psychological attention\textsuperscript{112} and had been targeted by other inmates in part because of his feminine characteristics.\textsuperscript{113} During the plaintiff's incarceration, he "engaged in various forms of mutilation of his sex organs."\textsuperscript{114} The repeated self-mutilation resulted in severe damage, which caused the plaintiff to undergo surgery in order to remove his testicles.\textsuperscript{115} In the aftermath of surgery, prison medical staff refused to prescribe the inmate hormones, despite recommendations for hormone therapy given by outside medical professionals.\textsuperscript{116}

The Tenth Circuit found the disagreement among the medical professionals regarding hormone treatment to be a reflection of the controversial nature of treating GID.\textsuperscript{117} Further disagreement illustrating not only the difficulty in treating GID, but also in litigating cases involving GID can be seen in the different interpretations taken by the district court and the court of appeals in deciding whether the prison officials acted appropriately. Whereas the district court found that the prison failed to provide minimal treatment by not administering low cost estrogen hormones,\textsuperscript{118} the Tenth Cir-

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 354.
\item \textsuperscript{110} \textit{Id.} (dismissing claim because deliberate indifference on the part of the prison could not be shown).
\item \textsuperscript{111} 792 F.2d 958 (10th Cir. 1986). The Tenth Circuit's decision involved whether the inmate plaintiff could be considered a "prevailing party" for purposes of deciding the appropriateness of the district court's award of attorney fees. \textit{Id.} Nonetheless, the court made interesting statements regarding the treatment of prisoners with GID. The underlying suit involved a transsexual inmate who claimed the treatment offered by the prison was not adequate and therefore constituted an Eighth Amendment violation.
\item \textsuperscript{112} \textit{Id.} at 960.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.} at 963.
\item \textsuperscript{118} \textit{Supre v. Ricketts}, 596 F. Supp. 1532, 1535 (D. Colo. 1984) ("Although it would not be reasonable to expect the prison system to finance an expensive sex change
The circuit found the prison official's medical recommendations to be informed and adequate.\textsuperscript{119} Thus, the plaintiff failed to establish a valid Eighth Amendment claim.\textsuperscript{120}

The decisions in \textit{Lamb} and \textit{Supre} did little in the way of addressing the issues involved with incarcerating persons with GID.\textsuperscript{121} The case that established at least some meaningful precedent came soon after \textit{Lamb} and \textit{Supre}. In \textit{Meriwether v. Faulkner},\textsuperscript{122} the plaintiff was a convicted murderer who had undergone extensive surgical augmentation prior to incarceration, which resulted in most of his\textsuperscript{123} physical characteristics resembling that of a female.\textsuperscript{124} The inmate had received estrogen therapy for nine years under medical supervision prior to incarceration.\textsuperscript{125} The plaintiff, similar to the plaintiffs in \textit{Lamb} and \textit{Supre}, alleged insufficient medical treatment.\textsuperscript{126} The plaintiff also claimed he had been humiliated by the Medical Director at the prison.\textsuperscript{127} Despite a prior diagnosis of gender dysphoria made at the beginning of incarceration, the plaintiff was denied medical treatment.\textsuperscript{128}

Unlike \textit{Lamb} and \textit{Supre}, where both plaintiffs received some sort of medical treatment, the court in \textit{Meriwether} found that there "had been a total failure to provide any kind of medical attention at all."\textsuperscript{129} In discussing the inadequacy of the treatment, the court

\begin{itemize}
  \item operation, minimal treatment was not being administered to the plaintiff; the cost of plaintiff's female hormones was approximately $10 a month.

\textsuperscript{119} \textit{Id.} at 963.

\textsuperscript{120} \textit{Id.} ("[T]he Department of Corrections made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs. The medical decision not to give plaintiff estrogen until further study does no represent cruel and unusual punishment.").

\textsuperscript{121} The \textit{Lamb} and \textit{Supre} decisions can also be seen as deferential to prison administrators' discretion when faced with issues relating to the treatment of prisoners with GID. In \textit{Supre}, the plaintiff's sentence was ultimately commuted because the prison considered the inmate to be a "management problem." \textit{Id.} at 961. Similarly, the plaintiff in the \textit{Lamb} case was eventually removed by transferring him to the State Security Hospital, where he underwent medical treatment. \textit{Lamb v. Maschner}, 633 F. Supp. 351, 354 (D. Kan. 1986).

\textsuperscript{122} 821 F.2d 408 (7th Cir. 1987).

\textsuperscript{123} \textit{Id.} at 409 n.1. The Court used feminine pronoun because plaintiff's counsel referred to inmate as "she," and during review of a dismissal, a court must accept factual allegations as true. \textit{Id.}

\textsuperscript{124} \textit{Id.} at 410 (noting the "surgical augmentation of her facial structure, breasts, and hips so as to alter her body shape to resemble that of a biological female").

\textsuperscript{125} \textit{Id.} (treatments caused the plaintiff's chemical castration).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} The plaintiff alleged that prison's medical director had told her he would "make sure" she never received estrogen while in prison. \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 414.
found that GID did constitute a serious medical need and thus could be reviewed under Eighth Amendment scrutiny. The case is important therefore because it recognized the seriousness of GID; however, because of its procedural posture, the decision did little more.

Another noteworthy decision regarding the treatment of prisoners with GID was made by the Seventh Circuit in *Maggert v. Hanks.* The complaint in this case stemmed from a prisoner’s dissatisfaction over a prison psychiatrist’s refusal to provide estrogen therapy. The psychiatrist did not find that the prisoner suffered from gender dysphoria. Therefore, the court upheld the lower court’s dismissal of the suit because the plaintiff failed to show that there was a genuine medical condition present. In affirming, the Seventh Circuit went on to address broader issues involving prisoner’s civil rights in relation to the treatment of gender identity disorders. While this portion of the opinion is mostly dicta, it is interesting to consider the economic justification used to resolve whether a prison’s denial of hormone therapy would rise to level of cruel and unusual.

In recognizing gender dysphoria as a serious medical disorder, the court did not refer to medical literature or case law. Instead, it considered the great physical and financial sacrifice that a person suffering from the condition must undergo in order to alleviate the associated pain. In commenting on the extent of a prison’s duty

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130. *Id.* at 413 (“There is no reason to treat transsexualism differently than any other psychiatric disorder. Thus contrary to the district court’s determination, plaintiff’s complaint does state a ‘serious medical need.’”).

131. *Id.* at 410. The *Meriwether* court was only concerned with whether the district court’s dismissal of the plaintiff’s claim was proper and reviewed the dismissal assuming the plaintiff’s allegations to be true.

132. 131 F.3d 670 (7th Cir. 1997).

133. *Id.* at 670-71.

134. *Id.* at 671 (“The psychiatrist does not believe that Maggert suffers from gender dysphoria, although he acknowledges that Maggert’s ‘sexual identity is polymorphous and his sexual aims ambiguous.’”).

135. *Id.*

136. *Id.*

137. *Id.* at 672.

138. *Id.* at 671. *Maggert* referred to gender dysphoria as “the condition in which a person believes that he is imprisoned in a body of the wrong sex” and went on to refer to the illness as “a serious psychiatric disorder, as we know because the people afflicted by it will go to great lengths to cure it if they can afford the cure.” *Id.* The court also recognized the surgical procedure involved in GID cases and commented that, “[s]omeone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.” *Id.*
to treat a prisoner's GID, Judge Posner found the expense of the surgical treatment option important and discussed the expense factor in light of the Eighth Amendment's guarantee of medical treatment. It was clear to Judge Posner that a prisoner's entitlement of minimal care cannot be stretched to include a costly surgical treatment option. However, the court did state that a prison, in certain special circumstances, may be required to provide costly medical treatment to a prisoner suffering from GID. In the end, this possibility was considered highly unlikely due to the rarity of the condition and its lack of acceptance and awareness in the community.

The *Maggert* opinion demonstrated the Seventh Circuit's concern over the obvious inequity that would arise if convicts were provided with expensive medical treatment unavailable to most law-abiding citizens. This and other related problems are challenging. Difficult issues surely arise for those responsible for the care and treatment of transsexual inmates. Determining how much a prison staff must do in order to fulfill its constitutional obligation to a transsexual inmate can be quite complicated, as the facts of the *Kosilek* case illustrate.

### III. Case Discussion

Kosilek's demands for medical treatment began during detention in the county jail. At his own expense Kosilek was allowed

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139. *Id.* In commenting on the extent of the prison's constitutional obligation towards the medical needs of the prisoner, the court stated "it does not follow that prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to 'cure' a prisoner's gender dysphoria. Those procedures are protracted and expensive." *Id.*

140. *Id.* ("A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person. He is only entitled to minimum care.") (citation omitted).

141. *Id.* at 672 ("Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment.").

142. *Id.*

143. *Id.* ("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.").

144. *Id.* In its discussion of the cost of the treatment, which "can easily reach $100,000" *id.*, the court expressed concern over the possibility that severely ill individuals might commit crimes as a means of obtaining medical treatment. The court explicitly stated: "We do not want transsexuals committing crimes because it is the only route to obtaining a cure." *Id.*

to consult with a medical expert qualified to treat GID. The medical expert’s recommendation, which involved psychotherapy with a qualified practitioner in treating GID, was not followed by the Sheriff. It was also during his stay in jail that Kosilek attempted to castrate himself and where he attempted suicide twice. Kosilek’s demands for treatment continued after his conviction and transfer to the medium-security male prison at MCI-Norfolk.

Ultimately, Kosilek requested the court issue an injunction requiring that the prison treat his condition with a qualified medical professional according to recognized medical standards. The court realized that Kosilek’s risk of harm was great and accepted that his GID was the cause of his severe emotional distress. The court then considered whether deliberate indifference had occurred in a systematic manner, paying particular attention to the course of treatment Kosilek actually received.

A. The Objective Analysis Under the Deliberate Indifference Standard

In order to decide on the validity of the constitutional issue involved, the court needed to assure that “Kosilek had a genuine [GID] and, if so, what the recommended treatment would be if Kosilek were not incarcerated.” The DOC retained a GID expert, Dr. Forstein, who concluded that Kosilek did have GID and recommended psychotherapy with a qualified therapist. In addition, Forstein recommended that Kosilek receive female hormones, consult with a specialist in sexual reassignment, and have access to personal items such as makeup. At the core of the recommendation was concern over Kosilek’s potential suicidality if his condition

146. Id. at 164.
147. Id.
148. Id.
149. Id.
150. Id. at 166.
151. Id. at 164-65.
152. Id. at 168.
153. Id.
154. Id.
was not treated. The doctor’s report to the DOC included his belief that there was “a great risk for self harm, perhaps mutilation, if not suicide.” The doctor’s recommendations were not followed by the prison medical staff.

Kosilek’s medical treatment was at all times subject to the discretion of the DOC medical staff. The medical staff met with Commissioner Maloney in order to discuss Kosilek’s demands, and it was clear to the medical staff from the outset of their involvement that Maloney did not want to provide Kosilek with hormones or surgery. The medical personnel, who had no experience in treating GID, then attempted to establish a GID policy in response to Kosilek’s legal action.

Relying on the medical staff’s research and legal advice given by DOC attorneys, Maloney adopted a “freeze-frame” policy to deal with Kosilek and future issues involving the treatment of those with GID. The “freeze-frame” approach was outlined by a memorandum prepared by one of the prison doctors, Dr. Packer. Under the new policy,

[t]he DOC would provide hormones to any inmate who had pre-

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155. Id.
156. Id.
157. Id.
158. Id. at 168-69 (noting that the DOC medical personnel were comprised of a psychiatrist, who was also the director of the program that treated prisoners’ mental health problems, and a doctor of the medical school that was contractually bound to provide mental health care to prisoners).
159. Id. at 169.
160. Id.
161. Id. at 170.
162. Id. at 169-70. Dr. Packer’s recommendation was based on an article by Dr. Robert Dickey. Id. at 169 (citing Dr. Robert Dickey et al., Transsexuals with the Prison System: An International Survey of Correctional Services Policies, 14 BEHAV. SCI. & L. 219 (1996)). The article stated that no prisons surveyed had a policy allowing sex reassignment surgery. Id. In the article, Dr. Dickey claimed that the “freeze frame” approach was a sound way of dealing with the management of transsexuals. Id. The court pointed out that Packer’s memorandum, which purported to provide “the gist of the article,” id., did not include relevant information such as the fact “that twenty-seven of the sixty-four jurisdictions surveyed stated that they would decide on a case-by-case basis whether to initiate hormone therapy for an inmate and three more jurisdictions stated that they would consider initiating such treatment reasonable.” Id. at 170.
163. Id. During a meeting with his attorneys “Maloney was told that no reported case had held that the Constitution required initiating hormones for a prisoner not taking hormones before being incarcerated. Rather, he was told that court decisions indicated that mental health counseling was sufficient treatment for an inmate with a gender identity disorder.” Id.
164. Id. at 171.
165. Id. at 169.
viously been prescribed hormones, probably place that person in the general population of the prison, and deal with any security issues that might arise. The DOC would not, however, initiate hormones for an inmate for whom hormones had not been prescribed prior to his incarceration. 166

Prior to formal adoption of the guidelines, Maloney had read Dr. Forstein's recommendations and was aware of the numerous risks involved with inadequately treating GID, including acute depression, self-mutilation or autocastration, and suicide. 167 DOC employees who interacted with Kosilek the most, as well medical experts retained by Kosilek for purposes of trial, agreed that if adequate treatment was not provided the future risk of attempted suicide would be high. 168

The court found the inadequacy of Kosilek's care wholly the result of a rigid "blanket policy" adopted by Maloney, not because of sound medical advice, but rather as a result of an administrative decision. 169 In assessing this decision, the court considered the agreement among medical experts who concluded that "prohibiting the initiation of hormones in every case is not appropriate." 170 Before concluding that treatment offered by the DOC was inadequate, the court found it useful to contrast the treatment of GID with other illnesses. It found that "if an inmate were depressed because he had cancer, the DOC would not limit its efforts to addressing the depression. Rather, it would also attempt to cure, or at least diminish, the cancer by providing care that would be regarded as adequate in the community." 171

In determining whether a valid constitutional claim under the Eighth Amendment existed, the court made clear that the proper focus would be on the conduct of Maloney. 172 Maloney's actions

166. Id. at 171 (noting that up to time that the Guidelines were drafted Dr. Packer was neither aware of the Standards Of Care nor Dr. Forstein's diagnosis).

167. Id. at 171-72.

168. Id. at 165 n.4.

169. Id. at 175. The court stated that:

[N]o clinical assessment of Kosilek's individual circumstances and medical needs has been made. Rather, major forms of the treatment provided in the community in the United States pursuant to prudent professional standards have been eliminated as options by an administrative decision made by Maloney, who acknowledges that he is not qualified to decide what treatment is medically necessary for a particular inmate.

Id.

170. Id.

171. Id.

172. Id. at 168-69.
would be scrutinized not merely because he was the Commissioner of the DOC, but because he effectively made all major decisions concerning the treatment of Kosilek.\textsuperscript{173} It was Maloney's administrative decision that essentially circumscribed Kosilek's treatment and restricted the professional judgment of DOC medical personnel.\textsuperscript{174} Despite Maloney's admitted lack of medical expertise,\textsuperscript{175} it was his decision that controlled Kosilek's treatment; thus, deliberate indifference would have to be shown on the part of Maloney.\textsuperscript{176}

1. Kosilek Met the Objective Requirements of Deliberate Indifference

In finding that Kosilek's GID was serious enough to warrant treatment, the court made certain to recognize that not every prisoner with GID could state a valid claim under the Eighth Amendment.\textsuperscript{177} The facts presented in this case, however, demonstrated that Kosilek's mental illness was indeed severe.\textsuperscript{178} Besides the medical diagnoses of two different experts, the court considered the past instances of attempted suicide and mutilation as relevant to the issue of establishing a serious medical need,\textsuperscript{179} and the court considered the potential danger of suicide and self-mutilation still ongoing.\textsuperscript{180} The court also considered prior case law and found the facts of the case more similar to Meriwether, where no informed medical judgment had been made, and less similar to the cases of Supre and Lamb where the prisoners had received some form of medical

\textsuperscript{173.} \textit{Id.} The court stated that:

'The decisions on how to deal with Kosilek and any other prisoner suffering from a gender identity disorders was, as a practical matter, made by Maloney in his capacity as the Commissioner of the DOC. . . . Therefore, Maloney is the person on whom the court must focus in determining whether deliberate indifference required to establish a violation of the Eighth Amendment has been proven in this case.

\textit{Id.}

\textsuperscript{174.} \textit{Id.} at 175.

\textsuperscript{175.} \textit{Id.} at 169 ("Maloney testified . . . that he was not qualified to make medical judgments.").

\textsuperscript{176.} \textit{Id.} ("[I]t is necessary to focus on Maloney's state of mind to determine whether deliberate indifference has been proven.").

\textsuperscript{177.} \textit{Id.} at 184 ("[G]ender identity disorders have differing degrees of severity . . . [S]ome individuals with gender identity disorders manage to find their own comfortable, effective ways of living . . . ").

\textsuperscript{178.} \textit{Id.}

\textsuperscript{179.} \textit{Id.} (quoting Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997)) ("Someone so eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.").

\textsuperscript{180.} \textit{Id.}
The facts revealed that the DOC deviated from its customary practice of retaining a medical expert in cases where the DOC staff was unqualified in dealing with a particular medical issue – which was the case with GID. The court ultimately found that Kosilek’s medical treatment was determined not by qualified medical professionals or the medical staff within the DOC, but rather by Maloney. The court found the Guidelines, which Maloney instituted, to be, in effect, a total prohibition of any actual treatment. The combination of the severity of Kosilek’s illness, the lack of any real medical treatment, and the rigid policy adopted by Maloney amounted to a failure to provide adequate or even essential care. Thus, the court found the objective component of the deliberate indifference analysis satisfied.

B. The Subjective Component of the Deliberate Indifference Standard

In evaluating the subjective component of deliberate indifference, the court wisely bifurcated the analysis. Relying on Farmer, the court first sought to determine whether Maloney knew of a substantial risk to Kosilek’s health or safety; if he did know of a substantial risk, the court then needed to establish if Maloney disregarded that risk. The majority in Farmer, to the dismay of the dissent, established that “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.” The facts presented in Kosilek illustrated this type of case.

1. Was Maloney Aware of Facts From Which to Infer Risk to Kosilek?

The court concluded that Maloney was aware of the relevant facts surrounding Kosilek’s circumstances, which could have ena-
bled him to infer the existence of a significant risk to the health and well being of Kosilek. The facts that the court found relevant to this determination were that Maloney had read Dr. Forstein's report and recommendations, which included concern regarding the great risk of attempted suicide by Kosilek. Moreover, Maloney had been made aware of the significant risks of harm that could result by inadequately treating a GID. These facts demonstrated that "Maloney was aware of facts from which he could have inferred that there was an excessive risk to Kosilek's health." Therefore, one of the two elements of the subjective component of the deliberate indifference standard had been satisfied.

2. Did Maloney Form the Belief That There Was a Substantial Risk of Serious Harm to Kosilek?

The facts presented could not demonstrate that the lack of medical attention caused by Maloney's inflexible policy was due to deliberate indifference. Deliberate indifference could not be shown partially because Maloney relied on prison procedures already in place, which protected against the possibility of prisoner suicide. Interestingly, the court considered Maloney's lack of medical expertise a pertinent factor in his inability to appreciate the risks associated with Kosilek's GID. The court also took into account Maloney's request of legal advice in assessing whether deliberate indifference could be shown. In the end, the facts presented were analogous to a scenario depicted by Justice O'Connor in her Farmer concurrence. The court found that Maloney "knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." This type of knowledge could not support a finding of deliberate indifference; therefore, the court concluded that Maloney had not acted with the requisite intent and entered judgment in Ma-

190. Id.
191. Id.
192. Id.
193. Id.
194. Id. at 191.
195. Id.
196. Id.
197. Id. (noting that DOC attorneys had informed Maloney that no transsexual prisoner had been successful in arguing that the exclusion of hormone therapy was unconstitutional under the Eighth Amendment).
198. Id. (quoting Farmer v. Brennan, 511 U.S. 825, 844 (1994)).
IV. Legal Analysis

It is evident from the opinion that the court thoroughly assessed all relevant facts before concluding that Maloney had not acted with the requisite subjective motivation sufficient to support a finding of deliberate indifference. The level of the court's in-depth examination of the complex issues presented had not been achieved by prior federal court decisions. The purpose of this section is to discuss the most important findings and recommendations made in the court's well-reasoned decision.

A. The Constitutional Obligation to Provide Treatment for GID

In certain situations, severe GID may pose a significant risk to a prisoner's health and safety; therefore, responsible prison officials should be cautious when incarcerating such an individual. The court in *Kosilek* appropriately found that GID is not "necessarily a serious medical need." GID, like most illnesses, has varying degrees of severity. But GID is similar to other potentially serious psychological conditions; thus, prison officials may have a constitutional obligation to provide adequate treatment after a proper diagnosis has occurred. Like previous decisions, *Kosilek* affirmed that an inmate with GID may require a responsible prison official to provide adequate care. Similar to *Meriwether*, the court in

199. Id. at 191-95.
200. Id. at 189.
201. Id. at 184. See also Farmer v. Moritsugu, 163 F.3d 610, 615 (D.C. Cir. 1998) ("[M]erely because someone is a transsexual, it does not inexorably follow that he or she needs psychotherapy. . . . Farmer had no guarantee of psychotherapy for transsexuality absent a demonstrated need.").
202. See, e.g., Robert E. v. Lane, 530 F. Supp. 930, 938-39 (N.D. Ill. 1981). For the *Lane* court, there was no reason to treat mental illness differently than a physical ailment.

Mental illness, like physical illness, occasions pain and suffering in the afflicted. The refusal to treat, in combination with the state's conduct in confining the individual in a manner that prevents him from getting any help on his own, therefore amounts to the infliction or aggravation of pain and suffering. *Id.* at 938 (citing Comment, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731, 747 (1978)). The court went on to cite numerous other courts that had adopted this rationale. *Id.*

203. See *Meriwether* v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987). In a claim brought by an incarcerated transsexual, the *Meriwether* court found that the plaintiff had pleaded facts "which, if proven, would entitle her to some kind of medical treatment." *Id.* However, the court proceeded to limit its holding by stating: "It is important to emphasize . . . that she does not have a right to any particular type of treatment . . . ."
Kosilek found it difficult to justify a failure to provide treatment for GID where a similar decision to not provide treatment for a different illness, for example cancer or schizophrenia, would almost surely be a violation of the Eighth Amendment. Indeed, it is very difficult to attempt to distinguish one potentially serious mental illness, which would require treatment under the Eighth Amendment, from a severe case of GID. Therefore, when the incarceration of inmates who may have severe GID is at issue, the best approach for prison officials would be to receive an evaluation by a competent medical professional in order to determine the extent of the prison’s duty of care. This approach, besides being the least risky from the prison official’s perspective, is best in terms of policy and logic.

The Kosilek case teaches that responsible officials charged with the care of a transsexual inmate should at least foster the opportunity for a competent medical evaluation. Of course, this possibility does not necessarily mean that prisons will be obligated to pay for costly sex reassignment surgery. Prisons are only required to provide adequate treatment. Adequate treatment, for many individuals, may only require psychotherapy. Kosilek, however, instructs that the decision as to proper treatment must be made by medical professionals – not prison officials or the inmate. The well-established rule, which prevents liability when there is mere disagreement with the treatment provided, safeguards prisons later on if an inmate pursues legal action because the recommended treatment is less than what he or she hoped to receive. But, as

Id. See also Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000); Wolfe v. Horn, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001) (“Courts have consistently considered transsexualism a 'serious medical need' for purposes of the Eighth Amendment.”) (citations omitted).

204. Kosilek, 221 F. Supp. 2d at 188. In Kosilek, the court considered how the prison might have treated Kosilek if his illness had been cancer and concluded the prison policies were inconsistent. Id. (“As Hughes, testified, if Kosilek had cancer, and was depressed and suicidal because of that disease, the DOC would discharge its duty to him under the Eighth Amendment by treating both his cancer and his depression.”). Likewise, in Meriwether, the court found it hard to distinguish between illnesses. Meriwether, 821 F.2d at 413 (“There is no reason to treat transsexualism differently from any other psychiatric disorder.”).

205. See supra note 15.


207. Kosilek, 221 F. Supp. 2d at 160.

208. Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998). In affirming the general understanding among courts, Chance held it “well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.” Id.
Kosilek and other cases demonstrate, prison officials choosing not to provide any competent evaluation run the risk of violating the Eighth Amendment – and legal challenges based on these grounds will often be able to at least survive a summary judgment hearing.209

B. Rigid Prison Administrative Policies Do Not Provide Sufficient Solutions

In assessing the objective factors under the deliberate indifference standard, the court considered the administrative decisions made by Maloney and the policies instituted in order to deal with Kosilek's needs.210 Although the DOC revised a former policy to allow for the possibility of psychotropic medications to be prescribed in the future, the court still found the new treatment plan deficient in terms of adequately treating Kosilek's illness.211

This is one of the important findings made by the court and, in part, demonstrates that rigid administrative policies will not always be appropriate when dealing with inmates with GID.212 The court came to its conclusion after hearing testimony from qualified medical professionals.213 The court ultimately found that adequate treatment of GID requires an "individualized medical evaluation,"214 and it determined that all medical decisions should be the product of "sound medical judgment, based upon prudent professional standards, particularly the Standards of Care."215 While the court did allow MCI-Norfolk to continue with the "freeze-frame" policy adopted by Maloney, it made clear that future decisions regarding treatment would have to be individualized and not based

\[209. \text{See Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003). Brooks, a recent challenge brought by a transsexual inmate, involved a summary judgment motion. The court concluded that "[p]rison officials are thus obliged to determine whether Plaintiff has a serious medical need and, if so, to provide him with at least some treatment." Id. See also Barrett v. Coplan, 292 F. Supp. 2d 281, 285-86 (D. N.H. 2003); Kosilek, 221 F. Supp. 2d at 186 (finding a total failure on the part of the prison based on the fact that "no informed medical judgment has been made by the DOC concerning what treatment is necessary to treat adequately Kosilek's severe gender identity disorder"); Wolfe v. Horn, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); Meriwether, 821 F.2d at 413 (reversing the lower court's finding that plaintiff had not stated a valid Eighth Amendment claim, which might have entitled her to treatment if proven).}

\[210. \text{Kosilek, 221 F. Supp. 2d at 174.}

\[211. \text{Id. at 174-76.}

\[212. \text{Id. at 175.}

\[213. \text{Id.}


\[215. \text{Id. (citations omitted).} \]
solely on blanket policy.\textsuperscript{216}

The court found the DOC's policy regarding the treatment of GID distinct from its policy relating to the treatment of other serious illnesses.\textsuperscript{217} The reason for the distinction between the DOC's policies is hard to reconcile and troublesome in light of other court decisions. The Second Circuit has suggested that the decisions relating to prisoners' medical care should be the product of "sound medical judgment."\textsuperscript{218} Likewise, the Ninth Circuit has found that medical decisions that are not based on "individualized medical evaluation" create triable issues as to the determination of deliberate indifference.\textsuperscript{219} Most recently, a federal district court in New York found that "[p]rison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration."\textsuperscript{220} These decisions, at a minimum, demonstrate that the adoption of a rigid administrative policy does not absolve prison administrators from the Eighth Amendment's requirements.\textsuperscript{221}

Policies which severely restrict treatment options, and which do not provide opportunity for an individualized medical evaluation, may run counter to notions underlying the Eighth Amendment.\textsuperscript{222} This may be especially true, as \textit{Kosilek} illustrates, when facts and circumstances indicate that a prisoner has a medical condition that poses a serious risk of harm to either themselves or other inmates. In contrast, policies with some flexibility, which provide opportunity for evaluation by professionals who implement medical procedures similar to those practiced in the community, do not present a similar risk. These notions prove true when one considers the guiding principle of the Amendment, which involves "evolving standards of decency that mark the progress of a maturing society."\textsuperscript{223} Certainly medicine, and especially the study of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id.} at 176.
\item \textsuperscript{218} Chance v. Armstrong, 143 F.3d 698, 704 (2d Cir. 1998).
\item \textsuperscript{219} Allard, 9 Fed. Appx. at 795.
\item \textsuperscript{220} Brooks v. Berg, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003).
\item \textsuperscript{221} See Barrett v. Coplan, 292 F. Supp. 2d 281, 286 (D. N.H. 2003) (illustrating the most recent acceptance of this idea). The \textit{Bartlett} court cited \textit{Kosilek} when it stated that: "A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment." \textit{Id.}
\item \textsuperscript{222} \textit{Id.} See also \textit{Kosilek}, 221 F. Supp. 2d at 181-83.
\item \textsuperscript{223} Estelle v. Gamble, 429 U.S. 97, 103 (1976) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
\end{enumerate}
\end{footnotesize}
mental illness, is constantly developing, and congruently, society becomes more aware of different types of illness and their potential seriousness. If prison policies do not provide enough flexibility, by not accounting for such inevitable medical progress, Eighth Amendment challenges will have a greater likelihood of success as prisoners will claim that the failure to provide opportunity for individualized attention creates a "substantial risk of serious harm." 224

If prison officials adopted Kosilek's preferred method of providing opportunity for individualized evaluations it would be difficult for a prisoner-plaintiff to establish a valid constitutional violation under the Eighth Amendment. In Kosilek, the court considered Maloney's belief that existing DOC procedures would prevent serious harm to Kosilek relevant in deciding the issue of deliberate indifference. 225 The court ultimately found that the procedures were incapable of accomplishing this purpose. 226 In order to avoid this uncertainty, as to whether a prison policy provides constitutionally adequate measures of safety and care, the Kosilek opinion seems to offer a reasonable solution. Prison officials should secure themselves from potential liability by adopting policies that can surely be seen as adequate when measured under the microscope of deliberate indifference. This can be almost certainly be achieved by allowing inmates the opportunity for individualized medical attention with a qualified professional experienced in the treatment of GID. Kosilek can thus be seen as a warning to prison officials – "an Eighth Amendment violation may be established by proof of failure to adjust an established policy to accommodate a serious medical need." 227

C. Political Considerations

In analyzing Maloney's decision-making process, the court found that the DOC Commissioner erroneously considered the potential of politically controversial consequences. 228 Maloney's con-
cern over political controversy was not directly related to the expense of the treatment requested by Kosilek. Rather, the court found that Maloney believed it would be an "inappropriate use of taxpayers' money" to provide treatment, such as hormones or surgery. The court considered this factor improper where the pertinent issue involved the extent of medical treatment Kosilek was to receive and found political controversy a poor excuse for denying the constitutional right to adequate medical care. According to Kosilek, prison officials need not consider political ramifications, or political fallout, regarding their decisions to provide medical care.

The rationale for the court's position concerning the role of political consequences was clearly expressed when it stated that

[t]he Bill of Rights provides citizens, including those who are incarcerated, with certain rights that even a majority of their contemporaries cannot properly decide to violate. Prison officials share with the courts the duty to protect those rights, even if they believe that it may be unpopular to do so.

This powerful idea, interpreting the Bill of Rights as specific guarantees that may not be abridged even when a popular majority might disagree with the course of action, is at the heart of Kosilek. This idea represents an important aspect of the Kosilek opinion and should be appreciated, not only by courts, but also by prison administrators. Determining the level of treatment to which a prisoner, and especially a murderer, is entitled can certainly spark strong sentiment from even the most apolitical individuals. The court in Kosilek understood this and wisely attempted to limit the political influences as much as possible. By focusing solely on the seriousness of the medical need at issue and the responsiveness of the DOC, the court adeptly avoided the political trap that Commissioner Maloney could not.

229. Id.
230. Id. at 162.
231. Id. at 192 ("[C]oncern for controversy is not a constitutionally permissible basis for denying an inmate necessary medical care.").
232. Id. at 162.
233. Id.
234. The court's impartial focus on the issues presented is evident throughout the opinion. Indeed, its quest for objectivity can be gleaned from the following statement: "Kosilek's claims raise issues involving substantial jurisprudence concerning the application of the Eighth Amendment to inmates with serious medical needs. This case requires the neutral application of the principles that emerge from that jurisprudence to the facts established by the evidence in this case." Id. at 160.
A disturbing aspect of the Kosilek case is that Maloney, who was not a medical professional nor qualified to make decisions relating to health care, "effectively precluded qualified professionals" from providing Kosilek with treatment. In fact, Maloney's actions were based mainly on reasons other than medical considerations, and the decisions that were made were based primarily on legal advice given by attorneys, who had informed Maloney that a court had never required prescription of hormones for a prisoner. The court found that Maloney would not have allowed Kosilek to receive hormones, or sex reassignment surgery, "unless the law required him to do so" and described Maloney's decision-making process as a "major problem" in the case and rightly so.

While the Supreme Court has afforded prison administrators considerable deference regarding matters of prison security and regulations involving "legitimate penological interests," the Court has not, since Estelle, been similarly deferential when a legitimate medical need is at issue. Therefore, Kosilek correctly downplayed the politically controversial issues related to the incarceration and treatment of individuals with GID. It becomes difficult and potentially dangerous to justify the prohibition of medical treatment based on political notions, even otherwise persuasive notions such as leaving such decisions to the majority's will. The argu-

235. Id. at 191.
236. Id. ("A major problem in this matter is that Kosilek's condition has been treated primarily as presenting legal issues rather than medical questions.").
237. Id. ("Maloney was substantially influenced by his attorneys' advice that, as of April 2000, no court had held that the Eighth Amendment required prison officials to provide hormones for an inmate for whom they had not been prescribed prior to his incarceration.").
238. Id.
239. Id. The court recognized that the information given to Maloney by the attorneys was relevant to the issue of whether Maloney should have been held personally liable for damages or whether he deserved "qualified immunity." Id. However, the court explained that the legal advice given to Maloney would not alone have provided protection from the determination of whether he had the requisite knowledge in determining the issue of deliberate indifference. Id.
240. See Shaw v. Murphy, 532 U.S. 223, 229-30 (2001) (referencing a four-part balancing test used to measure the extent to which a regulation impinges upon an inmate's constitutional rights); Block v. Rutherford, 468 U.S. 576, 591 (1984) (citing Bell v. Wolfish, 441 U.S. 520 (1979)) ("We reaffirm that 'proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees.'").
ment made by those who would allow prisons or states the right to prohibit costly medical treatment of inmates cannot be justified solely on the grounds that a plurality of voters would support such a decision without compromising notions underlying the Bill of Rights and Supreme Court precedent. 242

The question of whether a “majority of the population [would] support such a punishment” 243 may be useful in determining whether a specific practice runs counter to “standards of decency that mark the progress of a maturing society.” 244 However, the issue regarding political consequences addressed by Kosilek is different.

The court found that prison administrators do not have the authority to make decisions that ultimately affect an inmate’s medical care because they feel that most citizens in the state might disagree with the course of action. 245 In the court’s view, Maloney had an inflexible constitutional duty to provide adequate treatment, and political concerns could not be used to determine what the adequate treatment should or should not have been. 246 Reasons of policy and logic justify this conclusion. The appropriateness of costly medical treatment, in most situations, is an issue of constitutional magnitude with which courts and legislatures – not prison administrators – are equipped to deal. 247 Giving prison officials the authority to restrict medical care based on political considerations raises a

242. See Bradley A. Sultan, Note, Transsexual Prisoners: How Much Treatment Is Enough?, 37 New Eng. L. Rev. 1195, 1225 (2003). Sultan argues that transsexual prisoners receive only the most basic medical care and considers whether a popular majority would agree with allowing medical treatment for transsexual prisoners. While not referring to any actual polls or data the author states that “[c]learly ... one may determine that the prohibitions on treatments for the indigent transsexuals are supported by the majority of Americans ...” Id. at 1224-25.

243. Id. at 1224. Sultan relies on the Supreme Court decision in Gregg v. Georgia, 428 U.S. 153 (1976), which reinstated the death penalty. Id. at 1224 n.211. However, there is a relevant distinction between a majority’s acceptance of capital punishment and whether prisoners should receive costly medical treatment. When capital punishment is imposed it is done through court decision and relates directly to the crime for which the person has been found guilty. In contrast, a prison’s constitutional obligation to provide medical treatment has never, since Estelle, been subject to compromise, challenge, or referendum. Estelle clearly established that the government’s obligation to provide medical treatment was “elementary.” Estelle v. Gamble, 429 U.S. 97, 103 (1976). In sum, there exists a relevant distinction between the constitutionality of a specific type of criminal punishment and the constitutionality of depriving prisoners of medical treatment. The latter issue has never been seriously questioned in toto.

244. Estelle, 429 U.S. at 102 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).


246. Id.

247. Id.
serious threat to Estelle's guarantee of adequate medical treatment, and the practice should therefore be condemned by courts.

Despite the improper restrictions on Kosilek's treatment,248 Maloney did consider legitimate concerns in handling Kosilek’s situation.249 It was of course reasonable for Maloney to be cautious in deciding whether an inmate should receive treatment that would result in the enhancement of female characteristics.250 Security concerns are of utmost importance for all prison administrators.251 Kosilek recognized that prison officials dealing with the issue of treating transsexual prisoners will not only have to deal with the unique medical needs of the prisoner, but also the security issues inevitably raised by the housing of a prisoner resembling a member of the opposite sex. These challenging considerations are the focus of the next section.

D. Treating GID Behind Prison Walls and Security Concerns

In Kosilek, the court held that "judgments concerning the care to be provided to inmates for their serious medical needs generally must be based on medical considerations.”252 The statement begs the question: when should a prisoner’s right to medical care be outweighed by the security concerns that the treatment brings about? It may be helpful to first consider this difficult question in the abstract, according to Supreme Court case law.

In Whitley v. Albers,253 the Court found that

the State's responsibility to attend to the medical need of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently 'deliberate indifference to a prisoner's serious illness or injury' can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.254

Like Wilson, which recognized that deliberate indifference

248. Id. at 161 (“Qualified physicians have never evaluated Kosilek for the primary purpose of prescribing treatment.”).
249. Id. at 162.
250. Id.
254. Id. at 320.
"depends upon the constraints facing the official," Helling v. McKinney reaffirmed the importance of "the realities of prison administration." Thus, the issue of whether the treatment of GID clashes with prison administration may be extremely important to the success or failure of future challenges brought by transsexual inmates.

In some circumstances, it is plausible that the treatment may raise genuine security concerns to a level where it must be prohibited in order to protect the safety of the transsexual inmate. However, in Kosilek, the court seemed to suggest that this was not the case. In the closing paragraphs of the opinion, the court implied that sex reassignment surgery would not necessarily be precluded given the facts and circumstances involved. The court even suggested that if sex reassignment surgery was deemed medically necessary in the future, Maloney would have to "consider whether security requirements make it truly necessary to deny Kosilek adequate care." Because "Kosilek is already living largely as a female in the general population of a medium security male prison" and "[t]his has not presented security problems," the court cast doubt upon Maloney's ability to meet such a burden.

Although the court was not required to decide upon any other issue besides deliberate indifference, it made interesting recommendations to the DOC in order to deal with Kosilek's condition more effectively in the future. Unlike previous decisions, the court did not overlook the inevitable problems that may arise when incarcerating transsexual inmates receiving treatment while in prison, and the court recognized that responsible officials should proceed with caution. The court took notice of the security issues and Malo-

257. Id. at 37.
259. Id. (emphasis added).
260. Id. at 194.
261. Id. at 193. Finding it unlikely that prison officials would act indifferently towards Kosilek in the future, the court expect[ed] that, educated by the trial record and this decision, Maloney and his colleagues will in the future attempt to discharge properly their constitutional duties to Kosilek. . . . While concerns about security and public controversy have made [Maloney] reluctant to do more for Kosilek than the law requires, the court does not expect that Maloney will be recalcitrant in the future.

Id.
262. Id. at 193-94.
ney's sincere concern over the possibility of sexual assault. However, in the end, the court maintained that Kosilek could be provided with adequate care and pointed to the Supreme Court's decision in *Hudson v. Palmer*, requiring officials to "take reasonable measures to guarantee the safety of the inmates." The court then suggested that the DOC "make reasonable efforts to incarcerate [Kosilek] with a less dangerous population of other prisoners."

Although these suggestions were specific to the facts surrounding the case, they offer novel and interesting suggestions as to how prison officials should deal with the incarceration of transsexuals. Could "reasonable efforts to incarcerate [Kosilek] with a less dangerous population" include a transfer to a female facility? The transfer of male transsexual inmates, who are undergoing treatment, to a female facility raises one possible option for prison officials; however, prison systems place inmates based on rigid gender classifications; therefore this option seems unrealistic.

On the other hand, male transsexuals, like Kosilek, are often targets of abuse in male facilities. Accordingly, the court's suggestion of placing Kosilek in a facility with a less dangerous population seems reasonable under the circumstances and seems to be the option with the least potential for problems. Kosilek's transfer to a facility with less dangerous offenders would lessen the potential for harm and increase Kosilek's safety and thereby mitigate some of

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263. *Id.* at 170 ("Maloney expressed sincere and serious concerns about security within the prison if Kosilek or any other inmate were to receive hormones or sex reassignment surgery. Maloney understood that twenty-five percent of the inmates in his custody were sex offenders."). See also *id.* at 194 (clarifying that the court did "not intend to denigrate the significance of Maloney's security concerns").


266. *Id.*

267. *Id.*

268. See *Crosby v. Reynolds*, 763 F. Supp. 666, 669-70 (D. Me. 1991). In *Crosby*, the court considered whether housing a preoperative transsexual with females violates a clearly established constitutional right. Ultimately, it found the "contours" of the right to privacy unclear when "it comes to the determination of where to house transsexuals." *Id.* at 670.


271. Cf. *Maggert*, 131 F.3d at 672 (suggesting assignment to protective custody may offer a solution).
the security concerns. Of course, the transfer should be conditioned on Kosilek's past behavior and present dangerousness.

Treating GID in prison may be challenging considering the unusual treatment options. However, the Standards of Care are intended to be flexible in order to adapt to the patient's unique situation. Thus, decisions involving a specific course of an inmate's treatment should ultimately be made on a case-by-case basis. In some cases, treatment may pose few problems, especially if the recommended treatment consists only of psychotherapy. But if the recommended treatment consists of the implementation of hormones, prison administrators might want to consider whether it is possible to place the inmate in a setting that decreases potential security concerns. It is difficult to come to any real solution when balancing medical needs with "the realities of prison administration." However, Kosilek clearly provides that prisons cannot simply foreclose the possibility of treatment without potentially running afoul of the Eighth Amendment.

E. The Expense of Providing Treatment for GID

Lastly, the court considered the issue of cost. Kosilek directly challenged the Seventh Circuit's opinion in Maggert, in which Judge Posner opined on the economic limits that might affect the treatment of transsexual prisoners. In Kosilek, the judge was not persuaded by the Seventh Circuit's reliance on cost as a potential reason to deny the administration of hormone therapy or sex reassignment surgery. The court considered this focus on cost misguided and fundamentally inconsistent with precedent. The main flaw in Maggert ultimately had to do with the Supreme Court's decision in Estelle. In Maggert, Judge Posner considered the inequity of providing costly treatment to convicts when they would not be able to afford treatment had they not broken the law. The court in Kosilek found this argument unconvincing because, in contrast to law-abiding citizens, prisoners have a right to medical

272. Standards of Care, supra note 96, at 1.
275. Id.
276. Id.
277. Id.
278. Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997).
care. 279 This distinction is important and raises the issue of equity, which is at the core of most people's disagreement and outrage over providing treatment to transsexual inmates.

Judge Posner pointed to this inequity in *Maggert* and had difficulty finding any cruelty in denying a prisoner costly treatment. 280 However, it becomes difficult to determine what is, or is not, cruel and unusual by focusing solely on the expense of treatment. If cost is the sole criteria, where must society draw the line? Should courts only allow treatment for illnesses that are inexpensive to treat? Some might go a step further and argue that *Estelle* should be overturned; perhaps convicted criminals deserve no more than the approximately 41.2 million law-abiding Americans who are without health insurance.

*Estelle*, however, remains controlling and provides the response to the questions posed, proper or not: "[E]lementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration." 281 Because the Supreme Court has never provided economic limitations to this rule, 282 the court in *Kosilek* could not agree with the reasoning in *Maggert* and thus refused to restrict Kosilek's future treatment on the grounds that it might prove expensive. 283 In defense of its position, the court pointed to the relatively inexpensive cost of hormones and compared the costs associated with the treatment of GID to other forms of potentially expensive treatments. 284

The court's position relating to the issue of cost is part of the innovative analysis of the complex legal issues associated with the incarceration of transsexuals. In sum, the court maintained that the

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280. *See Maggert*, 131 F. 3d at 672. The *Maggert* court held that 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.
282. *See Barbara Kritchevsky, Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483, 497 (2004) ("The Supreme Court has done little to resolve the question of whether budgetary constraints can negate culpability and enable a defendant to avoid Eighth Amendment liability.").
284. *Id.* ("There is no showing that providing sex reassignment surgery for Kosilek would be more expensive than the treatments provided to some inmates with cancer, kidney failure, or any other serious medical condition.").
treatment of GID should be no different than the treatment of other medical conditions.\textsuperscript{285} Such reasoning is part of what makes the \textit{Kosilek} decision noteworthy. Future challenges by transsexual inmates involving allegations of inadequate treatment will reveal whether the \textit{Kosilek} approach becomes influential.

\textbf{Conclusion}

GID can be a serious condition, and in some cases the consequences of failing to provide adequate treatment can be grave. The \textit{Kosilek} opinion offers new and valuable perspectives to the challenging issues that courts, as well as prison administrators, face in responding to the needs of inmates experiencing moderate to severe GID. \textit{Kosilek} does not provide all the answers; however, the decision takes a step forward in the direction of recognizing that inmates with GID present special issues and, in certain circumstances, require adequate medical treatment under the Eighth Amendment. The \textit{Kosilek} approach comports best with Supreme Court precedent and with the standards of decency and humanity that underlie the Eighth Amendment because the court solely considered the medical need at issue without being influenced by prejudice, cost, or politics.

\textit{Nikolas Andreopoulos}\textsuperscript{*}

\textsuperscript{285} \textit{Id.} at 192 ("[W]e are, fundamentally, a decent people, and decent people do not allow other human beings in their custody to suffer needlessly from serious illness or injury.").

\textsuperscript{*} I would like to thank Professor Jennifer L. Levi for the comments and support she provided during the writing of this Note.