

COMMENT

MEDICALLY NECESSARY TREATMENTS FOR TRANSGENDER PRISONERS AND THE MISGUIDED LAW IN WISCONSIN

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INTRODUCTION

When the Wisconsin Legislature passed the Inmate Sex Change Prevention Act (ISCPA or Act), Wisconsin became the only state in the nation to prohibit its Department of Corrections (DOC) from using state funding to provide hormone therapy or sex reassignment surgery to transgender inmates.¹ To transgender advocates, the law is unconstitutional because it deprives transgender prisoners of medically necessary healthcare.² Many transgender prisoners suffer from Gender Identity Disorder (GID), a recognized psychological disorder that requires certain standards of care, including hormone therapy and sex reassignment surgery.³ Opponents of the Act assert that these standards of care are medically necessary treatments to which transgender prisoners have a legal right.⁴ Supporters of the Act claim that hormone therapy and sex reassignment surgery are cosmetic, exorbitant expenditures that waste taxpayer money on the desires and appeasement of criminals.⁵

This note argues for the elimination of the ISCPA and for the expansion of treatment for prisoners with GID. Because transgender people face overwhelming legal discrimination in the areas of housing, employment, and health care,⁶ they often turn to criminal acts and face further discrimination in a prison system that fails to respect the fluidity of gender.⁷ Transgender people often commit crimes in order to survive or pay for black market transgender health care.⁸ In the absence of a legal or correctional system that properly acknowledges the transgender identity, a transgender prisoner's right to medical treatment should be protected against abuse. Doctors and prison staff should be permitted to determine the extent of a transgender prisoner's medical treatment on an individual basis. Costly hormone therapy and sex reassignment surgery should be made available when prison and medical professionals deem them exigent.

1. See Lambda Legal, Sundstrom, et al. v. Frank, et al., <http://www.lambdalegal.org/our-work/in-court/cases/sundstrom-et-al-v-frank-et-al.html> (last visited Nov. 13, 2009).

2. See Gina Barton, *Bill Would Ban Use of State Funds for Sex Changes*, MILWAUKEE J. SENTINEL, Feb. 10, 2005, at B4.

3. See BRIAN MOULTON & LIZ SEATON, HUMAN RIGHTS CAMPAIGN, TRANSGENER AMERICANS: A HANDBOOK FOR UNDERSTANDING 3 (2008), available at <http://www.hrc.org/documents/hrcTGguide.pdf>; Barton, *supra* note 2.

4. See Barton, *supra* note 2.

5. See *id.*

6. MOULTON & SEATON, *supra* note 3 at 11, 17, 25.

7. *Id.* at 42; see Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 195-96 (2006).

8. Dean Spade, *Trans Formation*, 31 L.A. LAW., Oct. 2008, at 34, 36, 38.

Part I of this note presents concepts and terminology related to transgender issues. Part II discusses and critiques major cases concerning the medical rights of transgender prisoners. Part III details the genesis and passage of the ISCPA. Part IV describes the pending suit of Kari Sundstrom against the Wisconsin DOC and the opportunity it presents for reform. Part V explains the urgent need for reform in transgender health care in prisons. Finally, Part VI explores the arguments for and against providing minimal and broad GID treatment plans in prisons, and argues for a Transgender Committee to create treatment plans tailored to the individual needs of the prisoner.

I. TRANSGENDER PEOPLE

The world of transgender people involves a specialized vocabulary. Before beginning a discussion of transgender health care issues it is worth providing a brief overview of common terminology associated with transgender care. This discussion naturally leads to a general familiarization with the effects of hormone therapy and the various surgeries available to transgender people.

A. *Gender Identity Disorder and the Transgender Identity*

To understand the experience of a transgender person, it is important to understand that gender identity exists apart from biological sex and is one's innate sense of feeling male, female or both.⁹ Gender dysphoria is the discomfort felt when one's physical gender assigned at birth is incongruous with one's gender identity.¹⁰ The American Psychiatric Diagnostic and Statistical Manual of Mental Disorders IV (DSM IV) classifies strong feelings of gender dysphoria as GID when they meet five specific requirements.¹¹ Among these requirements are strong cross-gender identification, persistent discomfort in one's assigned sex, and evidence of significant distress or impairment in functioning.¹² According to one set of guidelines for transgender care, once a transgender person acknowledges and asserts his or her transgender identity, he or she is no longer properly called gender dysphoric.¹³ "Gender dysphoric" does not necessarily refer to a psychological disorder, but rather connotes confusion about one's gender identity.¹⁴ However, the term is often used interchangeably with GID,¹⁵ and categorizing transgender

9. GIANNA E. ISRAEL & DONALD E. TARVER II, *TRANSGENDER CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION, AND PERSONAL ACCOUNTS* 6 (1997).

10. *Id.* at 7.

11. JOAN M. BURDA, *GAY, LESBIAN, AND TRANSGENDER CLIENTS: A LAWYER'S GUIDE* 155-56 (2008).

12. *Id.* at 156.

13. ISRAEL & TARVER, *supra* note 9, at 8.

14. *See id.*

15. *See* MOULTON & SEATON, *supra* note 3, at 5; *cf.* *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (referring to gender dysphoria as a "rare condition"); *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1987) (referring to gender dysphoria as a "medically recognized psychological disorder"); BURDA, *supra* note 11, at 156 (referring to gender

individuals as having a psychological disorder can benefit them in a prison setting where receiving proper medical treatment is a concern.¹⁶

The term “transgender” encompasses a diverse group of individuals, including transsexuals, transgenderists, transvestites, and the intersexed.¹⁷ Transsexuals assert their transgender identity by taking steps to live full-time as members of the opposite sex.¹⁸ However, transgenderists typically do not desire treatments like genital reassignment surgery; they are often content with cosmetic surgeries and hormone therapy.¹⁹ Transvestites dress in the clothing of the opposite gender for personal satisfaction, erotic pleasure, or both.²⁰ The intersexed are those with both female and male physical or hormonal attributes.²¹ In this article, “transgender man” refers to someone who makes the transition from female to male, and “transgender woman” refers to someone who makes the transition from male to female.

B. Hormone Therapy Effects and Surgery Options

Hormone therapy and surgery are two consistent ways transgender individuals match their physical appearance with their gender identity.²² Under hormone therapy, physicians prescribe testosterone, estrogens, or other agents that foster a sense of psychological satisfaction and that amplify the desired physical secondary sex characteristics.²³ When transgender women take estrogen, they experience a number of changes, yet most are reversible if hormone therapy ceases.²⁴ Consuming estrogen as part of hormone therapy causes breast tissue to grow, body fat to redistribute, upper body strength to decrease, and the skin to soften.²⁵ Also, body hair decreases, and hair loss on the scalp slows or completely stops.²⁶ In addition, the size of the testicles decreases, and erections are less frequent and less firm.²⁷ While most of these

dysphoria as a disorder included in the diagnosis of “Gender Identity Disorder Not Otherwise Specified”); DEBORAH RUDACILLE, *THE RIDDLE OF GENDER: SCIENCE, ACTIVISM, AND TRANSGENDER RIGHTS* 195-96 (2005) (referring to “gender dysphoria syndrome” as an alternative diagnosis).

16. See Tarzwell, *supra* note 7, at 177; *Meriwether*, 821 F.2d at 413 (stating transsexualism is a “serious medical need”).

17. ISRAEL & TARVER, *supra* note 9, at 8, 16; MOULTON & SEATON, *supra* note 3, at 5.

18. MOULTON & SEATON, *supra* note 3, at 5.

19. ISRAEL & TARVER, *supra* note 9, at 15.

20. *Id.*

21. *Id.* at 16.

22. *Id.* at 56, 82.

23. *Id.* at 56.

24. THE WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS* 14 (6th ed. 2001) [hereinafter WPATH], available at <http://www.wpath.org/Documents2/socv6.pdf>.

25. *Id.*

26. *Id.*

27. *Id.*

changes are reversible, breast enlargement, in particular, will not completely reverse when therapy stops.²⁸

Transgender men experience many physical changes when they start hormone therapy with testosterone and, like in transgender women, many of the changes are reversible as well.²⁹ Reversible changes include an increase in upper body strength, a decrease in hip fat, and weight gain.³⁰ However, permanent changes do occur.³¹ For example, consuming testosterone causes voice deepening, an increase in body and facial hair, and male pattern baldness.³² In addition, the clitoris enlarges, and the breasts decline.³³

Surgery also furthers gender transition.³⁴ A distinction should be made between “genital reassignment surgery” and “sex reassignment surgery.”³⁵ The term “genital reassignment surgery” better portrays the goals of surgeries designed to remove or reassign a transgender person’s genitals in order to make the physical body more consistent with gender presentation.³⁶ Including the terms “sex reassignment surgery” in statutory language is problematic because it includes genital reassignment surgery, as well as a variety of “aesthetic” surgeries—those that do not involve genitals.³⁷ Gender specialist Gianna E. Israel and psychiatrist Dr. Donald E. Tarver II consider breast augmentations, tracheal shaves, and voice augmentations to be aesthetic surgeries for transgender women.³⁸ They qualify bilateral mastectomy - the removal of the breasts - as an aesthetic surgery for transgender men.³⁹

Many medical professionals require a transgender person who wishes to undergo genital reassignment surgery to participate in a real-life test.⁴⁰ Standards of care for transgender individuals vary widely, and the definition of the real-life test depends on each medical provider’s discretion.⁴¹ Generally, the real-life test is a simulation of living as the opposite biological sex.⁴² It begins with a transgender person living in the opposite gender role, and it ends when he or she is deemed an appropriate candidate for aesthetic or genital reassignment surgery.⁴³

28. *Id.*

29. *See id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.*

34. *See id.* at 18.

35. ISRAEL & TARVER, *supra* note 9, at 81.

36. *Id.*

37. *Id.* at 74.

38. *Id.* at 77-78.

39. *Id.* at 78.

40. *See id.* at 11; WPATH, *supra* note 24, at 18.

41. ISRAEL & TARVER, *supra* note 9, at 10-11.

42. *See id.* at 10.

43. *Id.*

Professionals sometimes view the real-life test as the determiner of gender identity.⁴⁴ Under this view, those who fare well in their preferred gender must be transgender.⁴⁵ Alternatively, those who decide not to live as that gender must not be transgender.⁴⁶ However, some transgender guidelines do not espouse this view.⁴⁷ Instead, they conceptualize the real-life test as a real-life experience.⁴⁸ Real-life experience is a test only in that it tests the resolve of the individual and his or her capacity to function in the preferred gender.⁴⁹ Real-life experience is more like a tool that helps the individual and the professional determine how to proceed with treatment.⁵⁰

II. PRECEDENT FOR TRANSGENDER MEDICAL TREATMENT

Legal challenges to the denial of certain transgender medical treatments in prisons frequently involve the Eighth Amendment's protection against cruel and unusual punishment.⁵¹ Some courts have ruled that the Eighth Amendment does not entitle transgender prisoners to certain treatments.⁵² However, there is hope for the broad provision of transgender health care in prisons, as the unclear standards for determining what constitutes a serious medical need do not explicitly exclude extensive transgender care.⁵³

A. *Denying Care to Transgender Prisoners in Accordance with the Eighth Amendment*

Over a span of more than twenty years of litigation, the medical rights of transgender prisoners in some areas of the nation have not expanded substantially⁵⁴ or, even worse, have suffered major setbacks.⁵⁵ *Meriwether v. Faulkner*, a Seventh Circuit decision from 1987, had the practical effect of

44. See WPATH, *supra* note 24, at 18.

45. *Id.*

46. *Id.*

47. See ISRAEL & TARVER, *supra* note 9, at 10-12; WPATH, *supra* note 24, at 18.

48. WPATH, *supra* note 24, at 18; see ISRAEL & TARVER, *supra* note 9, at 10.

49. WPATH, *supra* note 24, at 18.

50. ISRAEL & TARVER, *supra* note 9, at 10; see WPATH, *supra* note 24, at 18.

51. See *Maggert v. Hanks*, 131 F.3d 670, 670 (7th Cir. 1997); *Meriwether v. Faulkner*, 821 F.2d 408, 410, 414 (7th Cir. 1987); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

52. *Maggert*, 131 F.3d at 671-72; *Kosilek*, 221 F. Supp. 2d at 195.

53. Compare *Gutierrez v. Peters*, 111 F.3d 1364, 1373-74 (7th Cir. 1997) (an infected pilonidal cyst was a serious medical need), with *Wells v. Franzen*, 777 F.2d 1258, 1264 (7th Cir. 1985) (abrasions, bruises, and restricted blood flow from restraints were not serious medical needs).

54. See *Kosilek*, 221 F. Supp. 2d at 162 (valuing security issues over the provision of hormones or sex reassignment surgery).

55. See, e.g., Gina Barton, *Inmates Can Keep Receiving Hormones*, MILWAUKEE J. SENTINEL, Feb. 2, 2006, at A1.

providing psychotherapy, but not hormone therapy, for transgender prisoners.⁵⁶ This continues to be the situation for transgender prisoners in Wisconsin.⁵⁷ However, the decision did establish a foundation on which to assert medical rights for transgender prisoners and gave prison officials, rather than state legislatures, the authority to determine transgender medical treatment.⁵⁸

The case concerned a transgender prisoner, Lavarita Meriwether, who claimed an Eighth Amendment violation when DOC officials deprived her of all medical treatment related to her gender dysphoria.⁵⁹ Meriwether had been receiving hormone therapy for nine years prior to her incarceration, but the prison discontinued her therapy once she was incarcerated.⁶⁰ The court acknowledged that depriving a prisoner of all treatment related to gender dysphoria violated the Eighth Amendment's protection against cruel and unusual punishment.⁶¹ Nevertheless, the court refused to proclaim the correct standards of care or assert that a prisoner had a right to certain treatment, such as hormone therapy.⁶² The court maintained that prison officials and doctors who interacted with transgender prisoners were more knowledgeable about an individual prisoner's medical needs and better able to determine an appropriate course of treatment.⁶³ Thus, prison officials could implement the most appropriate type of medical care because they possessed "informed judgment."⁶⁴ The delegation of power that the court established implicitly excluded state legislatures in the determination of prison policy for transgender medical treatment.

Ten years later in *Maggert v. Hanks*, the Seventh Circuit largely adhered to its position in *Meriwether*, but also concluded that the arguments advanced by the defendant did not justify denying transgender health care altogether for prisoners.⁶⁵ The facts of *Maggert* were similar to those of *Meriwether*: a transgender prisoner appealed the dismissal of a suit in which she alleged that prison officials had violated her Eighth Amendment rights by failing to give her estrogen therapy.⁶⁶ The court determined that prisons did not have to provide treatments like hormone therapy and surgery that "cured" gender dysphoria.⁶⁷ A prison only had to provide minimal medical treatment, which was not the same as the treatment a free person would have received.⁶⁸ If prison officials

56. Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 40 (1995).

57. See WIS. STAT. § 302.386(5m) (2007-2008).

58. *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir. 1987).

59. *Id.* at 410, 414.

60. *Id.* at 410.

61. *Id.* at 413.

62. *Id.*

63. See *id.* at 414.

64. *Id.*

65. *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997).

66. *Id.* at 670.

67. *Id.* at 671.

68. *Id.* at 671-72.

are found to have committed acts or omissions that show deliberate indifference to a prisoner's serious medical needs, they have failed to provide minimal medical treatment in violation of the Eighth Amendment.⁶⁹

B. Courts' Misunderstanding of the Serious Medical Needs Associated with Gender Identity Disorder

No clear standard exists for what constitutes a serious medical need. In *Wells v. Franzen*, the Seventh Circuit did not deem a prisoner's bruises, abrasions, and restricted blood flow that resulted from his restraint to be serious medical needs.⁷⁰ However, the Seventh Circuit did consider an infected cyst a serious medical need.⁷¹ The court looked to two standards adopted by other circuit courts.⁷² Under one definition, a serious medical need was "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."⁷³ Another definition established a serious medical need as one where "the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'"⁷⁴ GID could plausibly fall within both definitions.

The *Maggert* court noted that only the affluent could afford hormone therapy and sex reassignment surgery, and as a result, denying these treatments was not cruel and unusual punishment.⁷⁵ However, the court acknowledged the flaw in holding cost as a determiner of the type of medical treatment granted to prisoners.⁷⁶ There were significant holes in this logic considering that Medicaid had authorized treatments that were even more costly than many related to GID.⁷⁷

The *Maggert* court's language and reasoning demonstrates an incomprehension or unawareness of the transgender identity. Even though *Maggert* was a transsexual woman, the court referred to her using the male pronoun.⁷⁸ Furthermore, the opinion regarded someone willing to undergo genital reassignment surgery as "plainly suffering from a profound psychiatric disorder."⁷⁹ The court also speculated that providing hormone therapy and sex reassignment surgeries in prisons would have motivated transgender people to commit crimes because prisons provided the only opportunity for costly

69. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

70. *Wells v. Franzen*, 777 F.2d 1258, 1264 (7th Cir. 1985).

71. *Gutierrez v. Peters*, 111 F.3d 1364, 1373-74 (7th Cir. 1997).

72. *See id.* at 1373.

73. *Id.* (quoting *Laaman v. Helgemone*, 437 F. Supp. 269, 311 (D.N.H. 1977)).

74. *Id.* (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (quoting *Estelle v. Gamble*, 429 U.S. 97, 105 (1976))).

75. *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997).

76. *Id.*

77. *See id.*; ISRAEL & TARVER, *supra* note 9, at 89.

78. *See Maggert*, 131 F.3d at 670.

79. *Id.* at 671.

treatment.⁸⁰ The court's statements paint a transgender person as irrational and unethical and fail to acknowledge that anyone with an extremely costly medical condition could have the same incentive for committing a crime.

Treatments for transgender people often require long-term care.⁸¹ Generally, pre-operative transgender people wait two to seven years before undergoing surgery.⁸² The financial costs are not the only reason; the physical and emotional costs of establishing a new identity also contribute to the delay.⁸³ If a transgender person intended to enter the prison system merely to reap the benefits of treatment, he or she would have had to commit a serious crime that warranted a lengthy sentence. The court also assumed that a transgender person would willingly give up his or her freedom to receive treatment.

The *Maggert* court's most candid reason for denying medical treatment to transgender prisoners was that gender dysphoria was not yet deemed severe enough to require taxpayers to fund costly treatment for those suffering from it.⁸⁴ This statement implies the court's own lack of understanding regarding GID, as well as that of insurance companies, government bodies, and the public. However, the statement does not preclude the possibility of one day granting transgender health care in prisons – perhaps when empathy for the plight of those with GID is greater.

C. *Complications with Applying the Real-life Test in Prisons*

After the *Maggert* decision came a different attack on the prison system in *Farmer v. Hawk-Sawyer*.⁸⁵ Farmer claimed that the Bureau of Prisons violated the Equal Protection Clause of the Fifth Amendment when it deprived her of hormone therapy for her GID.⁸⁶ The court dismissed the claim because the Bureau of Prisons had a rational basis for requiring transgender prisoners to submit documentation of prior hormone therapy in order to receive this treatment in prison.⁸⁷ In support of its decision, the court cited the World Professional Association for Transgender Health (WPATH) Standards of Care recommendation that transgender people have real-life experience before beginning hormone therapy or undergoing sex reassignment surgery.⁸⁸ According to the court, a prisoner could not have real-life experience because prison was not similar to "real life."⁸⁹

The purpose of real-life experience is to inform the transgender person of the "familial, vocational, interpersonal, educational, economic, and legal

80. *Id.* at 672.

81. See ISRAEL & TARVER, *supra* note 9, at 83.

82. *Id.*

83. *Id.*

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

85. *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 121 (D.D.C. 1999).

86. *Id.* at 121, 124.

87. *Id.* at 127-28.

88. *Id.* at 123.

89. *Id.*

consequences” of changing his or her gender presentation.⁹⁰ Admittedly, in the confines of prison, a transgender inmate does not appreciate the economic and vocational consequences of changing his or her gender presentation. However, the court’s assertion that imprisonment precludes real-life experience is too sweeping. For a transgender prisoner with a life-sentence or a substantially lengthy sentence, the prison experience could effectively become his or her “real life.” Even if the prison experience did not satisfy real-life experience, real-life experience is merely a recommendation, not a requirement, for beginning hormone therapy under the WPATH Standards of Care.⁹¹ *Farmer* illustrates that a rigid test requiring real-life experience for every transgender inmate does not realistically ensure that each transgender prisoner will receive medically necessary care.⁹²

To some medical professionals, real-life experience is more important in the context of sex reassignment surgery.⁹³ For example, the WPATH Standards of Care require a period of twelve months of continuous, full time, real-life experience before an individual can become eligible for genital reassignment surgery.⁹⁴ However, the result of *Kosilek v. Maloney* called for granting qualified medical professionals more authority in determining appropriate treatment for transgender prisoners and not precluding the possibility of sex reassignment surgery, even in the absence of real-life experience.⁹⁵ Michelle Kosilek was a transsexual prisoner who had tried to kill herself twice and who also had tried to castrate herself.⁹⁶ Kosilek sued the prison commissioner under the Eighth Amendment, claiming that the denial of hormone therapy and sex reassignment surgery constituted cruel and unusual punishment.⁹⁷

The claim failed because the prison commissioner had not deprived Kosilek’s treatment through his own deliberate indifference, nor had he intentionally caused Kosilek pain.⁹⁸ The prison commissioner had been reluctant to provide hormone therapy or sex reassignment surgery for Kosilek because the law did not require him to do so.⁹⁹ The commissioner feared that providing hormone therapy and sex reassignment surgery would have been an inappropriate use of the taxpayers’ money.¹⁰⁰ Although the court did not find that the commissioner violated the Eighth Amendment, the court specifically stated that refusing to provide adequate health care for a transgender person’s

90. WPATH, *supra* note 24, at 17.

91. *Farmer*, 69 F. Supp. 2d at 123.

92. *See id.*

93. WPATH, *supra* note 24, at 20-21.

94. *Id.*

95. *See Kosilek v. Maloney*, 221 F. Supp. 2d 156, 193-94 (D. Mass. 2002).

96. *Id.* at 158.

97. *Id.* at 158-59.

98. *Id.* at 162.

99. *Id.*

100. *Id.*

serious medical needs on the basis of cost or controversy would violate the Eighth Amendment.¹⁰¹

The court expected the commissioner to allow medical professionals to suggest treatment for Kosilek.¹⁰² If doctors recommended hormones or sex reassignment surgery, the commissioner would have to provide one of those treatments, barring a legitimate safety concern.¹⁰³ For instance, the commissioner would not have to provide the recommended care if Kosilek's living primarily as a woman in a male facility posed security problems that made it impossible to provide such treatment.¹⁰⁴ However, the court speculated that no security problems would arise because Kosilek had already been living as a woman in a male prison, and several states safely house transgender women with men.¹⁰⁵ Unlike the *Farmer* opinion, this inquiry did not specifically demand real-life experience for hormone therapy or sex reassignment surgery.¹⁰⁶

III. LEGISLATIVE HISTORY OF THE WISCONSIN LAW

For many years, Wisconsin policies on transgender health care for prisoners followed a progressive trajectory.¹⁰⁷ However, the passage of the ISCPA reversed years of reform.¹⁰⁸ Donna Dawn Konitzer's suit against the DOC resulted in legislative action, despite the fact that legal precedent had supported providing certain treatment options to ensure proper care for serious medical needs.¹⁰⁹ Nevertheless, the ISCPA passed overwhelmingly,¹¹⁰ even though it had failed to make any mention of GID as a serious disorder.¹¹¹

101. *Kosilek*, 221 F. Supp. 2d at 162.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*; see also *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 123 (D.D.C. 1999).

107. See Wis. Dep't of Admin., Div. of Executive Budget and Finance, Fiscal Estimate-2005 Session for Assemb. Bill 184, <http://www.legis.state.wi.us/2005/data/fe/AB-184fe.pdf> [hereinafter Fiscal Estimate Assemb. Bill 184]; Gina Barton, *Prisoner Sues State over Gender Rights*, MILWAUKEE J. SENTINEL, Jan. 23, 2005, at A1.

108. Compare Fiscal Estimate Assemb. Bill 184, *supra* note 110, and Barton, *supra* note 110, with History of Assembly Bill 184, <http://www.legis.state.wi.us/2005/data/AB184hst.html> [hereinafter History of Assemb. Bill 184] (last visited Nov. 20, 2009), and Wis. Legis. Reference Bureau Drafting Record of Act 105 Laws of Wis. 2005 (Assemb. Bill 184), Bill Drafting Request dated Feb. 10, 2005, [hereinafter Drafting Request], http://www.legis.wisconsin.gov/w3asp/documents/drafting_files.aspx (search "Search Folder" for "2005 Act 105"; then follow "2005 Act 105 (AB 184)" hyperlink; then follow "((02) AB-184" hyperlink; then follow "05-1941df" hyperlink).

109. See *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); Barton, *supra* note 55.

110. See History of Assemb. Bill 184, *supra* note 108.

111. See Drafting Request, *supra* note 108.

A. *Treatment Before the ISCPA*

The treatment options available to transgender prisoners in Wisconsin earlier in this century were quite different from what they are now.¹¹² As recently as 2005, the Wisconsin DOC had maintained a policy of providing appropriate treatment to prisoners who met the criteria for a GID diagnosis.¹¹³ The DOC had advised its medical staff to determine the appropriateness of treatment using correctional and community standards of care.¹¹⁴ Previously, only prisoners who had received hormone therapy for a year prior to their incarceration could continue to take hormones in prison, and therefore, those diagnosed while in custody could not initiate this treatment.¹¹⁵

Undoubtedly, the DOC had made notable reforms before the passage of the ISCPA in 2005, and the medical treatment available to transgender prisoners was increasingly progressive.¹¹⁶ The policy of the DOC gave greater consideration to the health care needs of transgender prisoners, although it did not fully accord GID the legitimacy that its own medical professionals did.¹¹⁷ For example, while DOC medical staff considered both hormone therapy and sex reassignment therapy medically necessary treatments for those with GID,¹¹⁸ the DOC's policy forbade prisoners from undergoing sex reassignment surgery under any circumstances, even if they were to pay for it.¹¹⁹ However, the DOC did allow its doctors to administer hormone therapy for "severe gender dysphoria" with the approval of the DOC Gender Identity Disorder Committee.¹²⁰

B. *The Case of Donna Dawn Konitzer and Legislative Action*

A case involving sex reassignment surgery propelled the issue of transgender prisoners' health care into the spotlight in 2003, when Donna Dawn Konitzer sued DOC Secretary Matt Frank.¹²¹ Konitzer was an incarcerated transgender woman who claimed to have taken female hormones in prison since her GID diagnosis in 1999.¹²² She asserted that a prison doctor had told her she would receive genital reassignment surgery.¹²³ When she did

112. See Barton, *supra* note 107.

113. Fiscal Estimate Assemb. Bill 184, *supra* note 107.

114. *Id.*

115. Barton, *supra* note 107.

116. See Fiscal Estimate Assemb. Bill 184, *supra* note 107.

117. See *Sundstrom v. Frank*, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597, at *28-29 (E.D. Wis. Oct. 15, 2007).

118. *Id.*

119. Barton, *supra* note 2.

120. Fiscal Estimate Assemb. Bill 184, *supra* note 107.

121. See Patricia Simms, *Inmate Wants to be Called a Woman*, WIS. ST. J., Aug. 1, 2004, at A1.

122. See *id.*

123. Barton, *supra* note 107.

not receive this surgery, she claimed that denying her this treatment violated the Eighth Amendment's protection against cruel and unusual punishment.¹²⁴

Konitzer's lawsuit motivated a group of state legislators to draft the ISCPA, which went into force in January of 2006.¹²⁵ When they learned of Konitzer's lawsuit,¹²⁶ Representative Mark Gundrum, Representative Scott Suder, and Senator Ted Kanavas introduced the bill to prohibit the use of government funds to provide hormone therapy or sex reassignment surgery for prisoners or residents of state mental institutions.¹²⁷ Gundrum, then a member of the Wisconsin Legislature's Committee on Corrections and the Courts,¹²⁸ called Konitzer's lawsuit absurd and argued that taxpayers should not have to fund sex change procedures for prisoners.¹²⁹ He complained that it was ridiculous that the legislature needed to take action to prevent the DOC from spending tax dollars for prisoner sex changes: "[I]f they can't do the right thing on their own, it looks like we'll have to legislate common sense."¹³⁰

However, common sense also suggests that prisons should provide suitable health care options for transgender prisoners. According to the Court's language in *Estelle v. Gamble*, the government intended taxpayer money to go toward costs like providing treatment for serious medical needs.¹³¹ The Supreme Court determined that the government had an obligation to provide health care for incarcerated individuals.¹³² Denying health care to prisoners caused pain and suffering that did not serve a punitive purpose.¹³³ For prisoners who had GID, denying hormone therapy and sex reassignment surgery inflicted needless pain and suffering for prisoners whose condition warranted those treatments.¹³⁴ Nevertheless, the drafters of the ISCPA seemed more concerned with how providing these treatments would affect law-abiding citizens.

C. *The Drafting and Acceptance of the ISCPA*

Representative Gary Bies, who was then the chair of the Wisconsin Legislature's Committee on Corrections, saw providing hormone therapy to transgender prisoners as unfair because these individuals would have had to pay for such treatment had they not been incarcerated.¹³⁵ Bies's opinion reveals that transgender health care for prisoners was subject to a high level of scrutiny

124. *Id.*

125. Barton, *supra* note 55.

126. *Id.*

127. Barton, *supra* note 2.

128. Barton, *supra* note 107.

129. *Court Deciding if Inmates Can Continue Hormones*, WIS. ST. J., Apr. 25, 2006, at A4 [hereinafter *Court Deciding*].

130. Barton, *supra* note 2.

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

132. *Id.*

133. *Id.*

134. *See id.* at 103-04.

135. Barton, *supra* note 107.

because some in the prison system and the legislature were not convinced that GID was an actual medical condition.¹³⁶ Despite medical expertise to the contrary, the legislative draft of the ISCPA suggests that the state legislators who sponsored it either wanted to deny or did not believe that GID existed.¹³⁷ Although the bill initially referenced or defined “gender identity disorder” several times, the drafters ultimately eliminated all mention of GID.¹³⁸

In the original draft of the bill, the opening statement forbade the use of state or federal funds to provide hormone therapy or sex reassignment surgery “for the treatment of gender identity disorder.”¹³⁹ The drafters later edited out that statement and instead forbade using funds for treatment “to alter the appearance of a prisoner or forensic patient so that the prisoner or forensic patient appears more like the opposite gender.”¹⁴⁰ The drafters made the same change where that language appeared in the first section of the bill, and they also deleted a definition of GID.¹⁴¹ The original draft of the bill set forth a definition of “gender identity disorder” that adhered closely to that of the DSM IV and Israel and Tarver.¹⁴² It meant “a psychiatric disorder in which a person is not satisfied and is seriously dysphoric with regard to his or her anatomical gender.”¹⁴³ The first subsection of the second section of the bill was originally “Treatment of Gender Identity Disorder,” but the drafters changed it to “Provision of Hormonal Therapy or Sexual Reassignment Surgery.”¹⁴⁴ Eliminating any mention of GID in the bill rejected the medical condition of a transgender individual and implied that hormone therapy and sex reassignment surgery were nonessential procedures that a person chose without a physician’s recommendation.

Even with the edits to the original bill, it received overwhelming support in the Wisconsin Assembly.¹⁴⁵ Eighty-two representatives voted for the bill, while only fifteen representatives voted against it.¹⁴⁶ Senator Fred Risser attempted to carve out a few exceptions for the provision of hormone therapy.¹⁴⁷ He proposed to allow the DOC to use government funds to provide

136. See Drafting Request, *supra* note 108.

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.*; BURDA, *supra* note 11, at 155-56; ISRAEL & TARVER, *supra* note 9, at 7.

143. See Drafting Request, *supra* note 108.

144. See *id.*

145. See History of Assemb. Bill 184, *supra* note 108.

146. *Id.*

147. See Wis. Legis. Reference Bureau Drafting Record of Act 105 of Laws of Wis. 2005, Drafting Request of S. Amendment to Assemb. Bill 184, http://www.legis.wisconsin.gov/w3asp/documents/drafting_files.aspx (search “Search Folder” for “2005 Act 105”; then follow “2005 Act 105 (AB 184)” hyperlink; then follow “((#03) SA1-AB184)” hyperlink; then follow “05a1133df” hyperlink) (last visited Nov. 20, 2009).

hormone therapy for those already taking hormones under physician supervision before their confinement or before enactment of the Act.¹⁴⁸ However, these provisions did not become law.¹⁴⁹

IV. KARI SUNDSTROM'S SUIT AGAINST THE DEPARTMENT OF CORRECTIONS

As a result of the ISCPA becoming law, transgender inmate Kari Sundstrom suffered extensive personal turmoil in prison when her hormone therapy was discontinued, leading her to file a claim against the Wisconsin DOC in 2006.¹⁵⁰ In conjunction with Sundstrom's suit, others have expressed their disapproval of the ISCPA, citing its interference with the judgment of medical experts.¹⁵¹ Although Sundstrom was ultimately dismissed from the suit, the plaintiffs' claims survived summary judgment,¹⁵² keeping hope alive that the district court would eventually strike down the ISCPA.

A. *Sundstrom's Background*

A psychiatrist diagnosed Sundstrom with GID in 1990, when she was twenty-five years old.¹⁵³ Several months after her diagnosis, the psychiatrist prescribed her testosterone blockers and feminizing hormones, which she continued to take until the DOC discontinued her treatment in January of 2006.¹⁵⁴ Shortly after initiating hormone therapy, Sundstrom began living full-time as a woman.¹⁵⁵ She furthered her gender transition in 1995 when she underwent a tracheal shave and a rhinoplasty.¹⁵⁶

When she entered a Wisconsin prison in 2003 for a probation violation,¹⁵⁷ Sundstrom continued to take hormones at the same dosage she had received before incarceration.¹⁵⁸ After the passage of the ISCPA, DOC officials immediately halved the hormone dosage for Sundstrom and several other transgender inmates.¹⁵⁹ These officials informed the prisoners that they would halve their dosages again in thirty days and would completely terminate the hormone therapy thirty days thereafter.¹⁶⁰ Sundstrom and several other

148. *Id.*

149. See WIS. STAT. § 302.386(5m) (2007-2008).

150. See Third Amended Complaint for Declaratory and Injunctive Relief at 11, *Sundstrom v. Frank*, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597 (E.D. Wis. Oct. 15, 2007), <http://data.lambdalegal.org/pdf/legal/sundstrom/third-amended-complaint.pdf> [hereinafter *Sundstrom Compl.*].

151. See *Sundstrom*, 2007 U.S. Dist. LEXIS 76597, at *38.

152. See *id.* at *76.

153. *Sundstrom Compl.*, *supra* note 150, at 6.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 9.

160. *Id.*

transgender prisoners impacted by the change sued DOC officials for violating their equal protections rights under the Fourteenth Amendment and the Eighth Amendment prohibition against cruel and unusual punishment.¹⁶¹ The plaintiffs also sought a declaration that the ISCPA was unconstitutional on its face.¹⁶²

B. Plaintiffs' Claims and the Rationale for Reform

After department officials had reduced her hormone therapy, Sundstrom experienced mood swings, crying fits, hot flashes, bloating, and severe headaches.¹⁶³ Another plaintiff to the suit experienced depression, nausea, muscle weakness, loss of appetite, increased hair growth, and skin bumps.¹⁶⁴ The plaintiffs' Eighth Amendment claim stated that the department officials deliberately acted indifferently to their serious medical needs by denying hormone therapy without any consideration to the individualized medical judgments of health care providers.¹⁶⁵ The plaintiffs alleged that the ISCPA established a rule that caused the same deliberate indifference to their serious medical needs.¹⁶⁶

In the plaintiffs' equal protection claim they alleged that unlike prisoners with other serious health conditions, they did not receive medical treatment based on individualized medical evaluations.¹⁶⁷ The plaintiffs claimed that the ISCPA authorized department officials to treat them differently from similarly situated prisoners by denying recommended medical treatment.¹⁶⁸ They further asserted that this denial had no rational relationship to any legitimate governmental or penological interest.¹⁶⁹ Department officials contended that restricting access to hormone therapy and sex reassignment surgery made prisoners less effeminate and, consequently, less susceptible to prison violence.¹⁷⁰ However, the plaintiffs countered that the ISCPA did not advance the goal of maintaining prison safety.¹⁷¹ Even without surgery or hormone therapy, transsexual women could still show their female gender identity through their appearance and mannerisms, and by doing so they risked assault from male prisoners.¹⁷² The plaintiffs argued that denying surgery or hormone therapy did not rationally further the interest in reducing the risk of assault.¹⁷³

161. *Id.* at 2.

162. *Id.*

163. *Id.* at 9.

164. *Id.*

165. *Id.* at 11.

166. *See id.*

167. *Id.* at 12.

168. *Id.*

169. *Id.*

170. Sundstrom v. Frank, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597, at *71-72 (E.D. Wis. Oct. 15, 2007).

171. *Id.* at *74.

172. *Id.* at *75.

173. *Id.* at *75-76.

As of the writing of this article, the plaintiffs' suit against the DOC officials is still pending.¹⁷⁴ However, the court dismissed Sundstrom and another plaintiff from the suit because they lacked standing.¹⁷⁵ Both were no longer incarcerated and they could not establish a real and immediate threat that they would enter a Wisconsin prison again.¹⁷⁶ The plaintiffs' claim that the ISCPA was invalid on its face survived summary judgment,¹⁷⁷ as did their equal protection claim.¹⁷⁸ In regard to the first claim, the court noted that the recommended medical treatments the ISCPA forbade might have been medically necessary and that interfering with a physician's determination of medical necessity might demonstrate intentional mistreatment.¹⁷⁹ With respect to the equal protection claim, the court found a genuine dispute of material fact regarding whether the Act was rationally related to maintaining prison safety.¹⁸⁰

The fact that the plaintiffs' claims survived summary judgment demonstrates that the legality of providing transgender health care in prisons relies heavily on the facts regarding GID, a condition largely unfamiliar to laymen. Denying hormone therapy and sex reassignment surgery to transgender individuals is not a common-sense conclusion, and officials within the DOC have very different opinions from those of state legislators.¹⁸¹ For example, the DOC Medical Director stated that he did not see any interests that the ISCPA furthered.¹⁸² James Greer, Bureau Director for the DOC Health Services, went even further and declared that the Act took away the autonomy of physicians to practice medicine to the best of their ability.¹⁸³ DOC medical professionals believe that the ISCPA is a bad public policy because it restricts doctors from effectively treating GID.¹⁸⁴ In an issue that relies so heavily on medical fact, the opinions of medical experts within the DOC provide compelling arguments for the court to strike down the ISCPA. If the court in Sundstrom's case assigned great weight to these medical opinions, it could eliminate the ISCPA altogether.

V. NEED FOR REFORM IN TREATING TRANSGENDER PRISONERS

Assuring adequate health care for transgender prisoners is especially important because these individuals must deal with the fact that U.S. prisons

174. See Lambda Legal, *supra* note 1; American Civil Liberties Union, Sundstrom v. Frank - Case Profile, <http://www.aclu.org/lgbt/transgender/24920res20060127.html> (last visited Nov. 16, 2009).

175. *Sundstrom*, 2007 U.S. Dist. LEXIS 76597, at *68.

176. *Id.* at *66-68.

177. *Id.* at *65.

178. *Id.* at *76.

179. *Id.* at *65.

180. *Id.* at *76.

181. See *id.* at *41-42; *Court Deciding*, *supra* note 129.

182. *Sundstrom*, 2007 U.S. Dist. LEXIS 76597, at *41-42.

183. *Id.* at *38.

184. *Id.* at *39.

view gender as a binary phenomenon.¹⁸⁵ A rigid concept of gender reflects a societal prejudice against transgender people that contributes to their imprisonment.¹⁸⁶ This section establishes that, given the cost of transgender health care and the low number of prisoners who would take advantage of it, providing such health care in prisons is reasonable.¹⁸⁷ As insurance policies become more inclusive for transgender health care,¹⁸⁸ prisons will do well to do so also.

A. *Prisons Today and Gender Identity*

The prison system in the United States provides housing according to biological sex.¹⁸⁹ Transgender prisoners who have not had genital reassignment surgery qualify only for housing that corresponds to their birth sex, regardless of the extent of their non-genital gender transition.¹⁹⁰ California, New York, and Connecticut have special prison facilities for transgender prisoners.¹⁹¹ Some support segregating transgender prisoners in a separate wing,¹⁹² which is not objectionable as long as a transgender prisoner wants to reside in such housing. Nevertheless, requiring transgender prisoners to inhabit a transgender-only wing may pose problems for expanding health care for transgender prisoners. Participating in real-life experience, recommended or required for some GID treatment options,¹⁹³ becomes even more challenging in an environment of mainly transgender people.

Furthermore, while some form of transgender segregation in prisons may foster a sense of transgender community, an exclusively transgender unit is not an ideal permanent housing situation for those who will return to the outside world. If transgender prisoners wish to assimilate to free society after their incarceration, segregation may create a false sense of security and conceal the challenges of living as a transgender person upon release. Although the proper prison placement for transgender people is beyond the scope of this article, providing necessary transgender health care is even more essential if transgender prisoners must live in facilities that do not correspond to their gender identity.

185. See Tarzwell, *supra* note 7, at 195.

186. See Spade, *supra* note 8, at 38.

187. See *Sundstrom*, 2007 U.S. Dist. LEXIS 76597, at *39; Barton, *supra* note 107.

188. See ISRAEL & TARVER, *supra* note 9, at 90.

189. See BURDA, *supra* note 11, at 176.

190. See *id.* at 176.

191. Barton, *supra* note 107.

192. Tedeschi, *supra* note 56, at 44.

193. See, e.g., ISRAEL & TARVER, *supra* note 9, at 10; WPATH, *supra* note 24, at 17-18.

B. Transgender Disadvantages and the Unfortunate Path to Prison

A common argument against providing transgender prisoners with treatment for GID is that they deserve less sympathy because of their crimes.¹⁹⁴ Even if GID merits proper health care, it may seem inequitable to allocate taxpayer dollars for treatments that most transgender prisoners could not afford were they not incarcerated.¹⁹⁵ This rationale is tenuous, because it is the immense societal prejudice against transgender individuals that leads some to desperate acts of crime.¹⁹⁶ Transgender individuals resort to crime because they often have difficulty accessing or cannot afford basic health care outside prison.¹⁹⁷ For example, many nonprofit drug treatment programs refuse transgender applicants, and antidiscrimination laws in most states do not forbid such policies.¹⁹⁸ Programs and facilities that do admit transgender individuals sometimes treat them so poorly that they do not reap any real benefit.¹⁹⁹

Moreover, poverty plagues the transgender community because many homeless shelters and foster homes segregate based on birth-assigned gender.²⁰⁰ In this environment of segregation, transgender people experience harassment and assault, and they frequently relinquish these programs.²⁰¹ Homelessness, in turn, creates overwhelming barriers to health care, education, and employment.²⁰² Another barrier is legal employment discrimination based on one's transgender status.²⁰³ Laws that protect against transgender discrimination are under-enforced, and one study reported that 76% of Americans live in jurisdictions where gender identity is not even included in anti-discrimination laws.²⁰⁴ According to another current study, 70% of the transgender population in the United States is unemployed.²⁰⁵ A study of transgender people in Washington, D.C. found that 29% had no income and 31% had annual incomes of less than \$10,000.²⁰⁶

In order to survive, homeless transgender people participate in criminal behavior like sex work, selling illegal drugs, theft, trespassing, and loitering.²⁰⁷ This criminal activity and participation in black market transgender healthcare

194. See, e.g., Bradley A. Sultan, *Transsexual Prisoners: How Much Treatment is Enough?*, 37 NEW ENG. L. REV. 1195, 1228 (2003).

195. See ISRAEL & TARVER, *supra* note 9, at 89; Linda D. Chin, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks v. Berg*, 11 CARDOZO WOMEN'S L.J. 151, 174-75 (2004).

196. See MOULTON & SEATON, *supra* note 3, at 42.

197. See Spade, *supra* note 8, at 38.

198. *Id.* at 38-39.

199. Tarzwell, *supra* note 7, at 176.

200. Spade, *supra* note 8, at 36; Tarzwell, *supra* note 7, at 173.

201. Spade, *supra* note 8, at 36; see also Tarzwell, *supra* note 7, at 171.

202. Spade, *supra* note 8, at 36.

203. See Tarzwell, *supra* note 7, at 172.

204. *Id.*

205. Spade, *supra* note 8, at 37.

206. *Id.*

207. *Id.* at 36.

cause high rates of incarceration in the transgender population.²⁰⁸ For example, Donna Dawn Konitzer's crimes followed an unhappy childhood that included beatings for playing with dolls and wearing makeup.²⁰⁹ As an adult, Konitzer took cocaine to elevate her mood.²¹⁰ Her job as a blood technician did not provide her with enough money, and she began robbing hotels, bars, and restaurants to support her habit.²¹¹ The transgender population also has a high rate of incarceration because transgender people are the target of police profiling²¹² and selective prosecution.²¹³

C. *Relatively Low Cost of Transgender Health Care in Prisons*

Using taxpayer dollars to provide GID treatment for prisoners will not squander that money, nor will it fund an alarming number of sex change procedures.²¹⁴ In December of 2002, only eight prisoners in Wisconsin had GID.²¹⁵ During that time, Wisconsin prisons were providing hormone therapy to transgender prisoners, and transgender people were not recklessly committing crimes to receive this treatment in prison.²¹⁶

Even in the unlikely event that transgender people are committing crimes to reap the benefits of medical treatment, they are probably too few in number to significantly strain prison budgets.²¹⁷ Studies vary widely on the prevalence of GID, but most show that it is not a very common condition.²¹⁸ For example, current studies based on the annual frequency of sex reassignment surgery estimate transsexual women to number as few as one in 500 and as many as one in 250.²¹⁹ A previous study in the DSM IV estimates that one in 10,000 people seek sex reassignment surgery each year in the United States.²²⁰ Within the transgender community, surgery is not common.²²¹ Approximately 1%-3% of all transgender individuals actually undergo genital reassignment surgery.²²² This figure reflects the high cost of surgery, but also the fact that many groups within the transgender community do not desire genital reassignment

208. *Id.* at 38.

209. Barton, *supra* note 107.

210. *Id.*

211. *Id.*

212. Spade, *supra* note 8, at 38.

213. MOULTON & SEATON, *supra* note 3, at 42.

214. *See* Barton, *supra* note 107.

215. *Id.*

216. *See* Fiscal Estimate Assemb. Bill 184, *supra* note 107 (stating that it is impossible to predict how many will come to prison with GID in the future).

217. *See* MOULTON & SEATON, *supra* note 3, at 9; RUDACILLE, *supra* note 15, at 14.

218. *See* MOULTON & SEATON, *supra* note 3, at 9; RUDACILLE, *supra* note 15, at 14.

219. MOULTON & SEATON, *supra* note 3, at 9.

220. RUDACILLE, *supra* note 15, at 14.

221. *See* ISRAEL & TARVER, *supra* note 9, at 83.

222. *Id.*

surgery.²²³ For example, expressing gender through hairstyle or clothing is sufficient for some transgender people.²²⁴ Alternatively, some transgender people are ineligible for surgery because they have other medical issues.²²⁵

Although sex reassignment surgery is very expensive, it is not more expensive than some medical treatments that prisons already provide to inmates.²²⁶ Genital reassignment surgery for transgender women can cost between \$7,000 and \$50,000, while transgender men can pay up to \$100,000 for this surgery.²²⁷ Kari Sundstrom and her fellow plaintiffs agreed with DOC officials on the cost of genital reassignment surgery and other medical procedures.²²⁸ According to these officials, genital reassignment surgery costs approximately \$20,000, while a coronary bypass costs approximately \$37,000 and a kidney transplant costs approximately \$33,000.²²⁹ Between 2005 and 2007, the DOC provided five kidney transplants alone in its hemodialysis unit.²³⁰ As the prison population increasingly comprises elder inmates, the number of highly expensive transplants will likely increase.

In comparison to genital reassignment surgery and more expensive medical procedures that prisons provide, hormone therapy costs much less.²³¹ For the fiscal year in 2004, the DOC spent approximately \$4,400 on hormone therapy for two inmates.²³² The fiscal estimate from the Division of Executive Budget and Finance qualified that relatively low figure by noting that it would be impossible to predict how many prisoners with GID would enter the prison system in the future.²³³ Nevertheless, the fiscal estimate acknowledged that discontinuing treatment for GID might cause transgender prisoners to act disruptively and experience medical side effects.²³⁴ In that circumstance, prisons would need additional resources and funding to manage disruptive

223. *See id.*

224. *See* Spade, *supra* note 8, at 37.

225. *Id.*

226. *Sundstrom v. Frank*, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597, at *39 (E.D. Wis. Oct. 15, 2007).

227. *ISRAEL & TARVER*, *supra* note 9, at 89.

228. *Sundstrom*, 2007 U.S. Dist. LEXIS 76597, at *39 n.29.

229. *Id.*

230. DODGE CORREC. INST., FY 2005 ANNUAL REPORT (2005), http://www.widoc.com/index_adult.htm (follow "DAI Bureau and Institution Links" hyperlink; then follow "Dodge Correctional Institution" hyperlink; then follow "FY05 DCI Annual Report.pdf" hyperlink); DODGE CORREC. INST., FY 2006 ANNUAL REPORT, http://www.widoc.com/index_adult.htm (follow "DAI Bureau and Institution Links" hyperlink; then follow "Dodge Correctional Institution" hyperlink; then follow "FY06 DCI Annual Report.pdf" hyperlink); DODGE CORREC. INST., FY 2007 ANNUAL REPORT, http://www.widoc.com/index_adult.htm (follow "DAI Bureau and Institution Links" hyperlink; then follow "Dodge Correctional Institution" hyperlink; then follow "FY07 DCI Annual Report.pdf" hyperlink).

231. *See* Fiscal Estimate Assemb. Bill 184, *supra* note 107.

232. *Id.*

233. *Id.*

234. *See id.*

behavior²³⁵ like suicide attempts, as well as undisputed health concerns like the nausea and headaches that Sundstrom and her fellow plaintiffs experienced following discontinuation.²³⁶

Denying treatment for GID in Wisconsin prisons reflects a desire to cut costs and reduce the demands on a burdened correctional system. Whereas Wisconsin's incarceration rate was eighty-five per every 100,000 people in 1980, in 2007 that rate jumped to 386 per every 100,000.²³⁷ Cutting spending for transgender prisoners is misguided because they constitute a very small portion of the prison population and the costs related to their GID are comparatively small.²³⁸

In contrast, taxpayer funds are facilitating the incarceration of convicted drug users at an alarming rate.²³⁹ By one estimate, taxpayers in the U.S. spend more than \$1 billion each year to incarcerate 33,600 state and 10,700 federal marijuana offenders.²⁴⁰ Like transgender prisoners who are denied treatment for GID, drug offenders do not necessarily receive the treatment that they need to conquer their drug habits in prison.²⁴¹ Instead, prison can be an ideal environment to learn how to perpetrate crimes from other inmates, so that the offender is more dangerous upon release.²⁴² Making treatment and support services available to non-violent drug offenders instead of incarcerating them would be a better use of taxpayer money²⁴³ and could free up resources to go toward treating medically necessary GID concerns.

D. Trends in Insurance Coverage

Reallocating funds in prison budgets to provide treatment for GID admittedly seems incongruous given that insurance companies generally deny coverage for transgender health care.²⁴⁴ The former president of WPATH did not support providing sex reassignment surgeries to prisoners because most private health insurance and Medicaid plans did not cover these surgeries.²⁴⁵ Insurance companies may even refuse to cover the costs of certain procedures for transgender individuals while covering the same costs for non-transgender individuals.²⁴⁶ For example, an insurance policy that covers testosterone supplements for a non-transgender man who has a low level of the hormone

235. *See id.*

236. *See Sundstrom Compl.*, *supra* note 153, at 9.

237. Ronald Fraser, Op-Ed., *Wisconsin's Carousel of Prisoners*, Wis. ST. J., Oct. 25, 2007, at A8.

238. *See, e.g.*, Fiscal Estimate Assemb. Bill 184, *supra* note 107.

239. *See Fraser*, *supra* note 237.

240. *Id.*

241. *See id.*

242. *Id.*

243. *Id.*

244. MOULTON & SEATON, *supra* note 3, at 25.

245. Barton, *supra* note 107.

246. MOULTON & SEATON, *supra* note 3, at 25.

may not cover paying for a transsexual man's costs for the same supplements.²⁴⁷ Wisconsin Medical Assistance does not cover "transsexual surgery" or any hormone therapy associated with that surgery or the "medically unnecessary alteration of sexual anatomy or characteristics."²⁴⁸ National Medicare and Veterans' benefits similarly do not typically cover genital reassignment surgery.²⁴⁹

Nonetheless, private insurance plans, and those provided through employers, have covered genital reassignment surgery when policyholders have demonstrated a need for the procedure.²⁵⁰ Private insurance companies are even beginning to remove discriminatory exclusions from covering transgender health care.²⁵¹ For example, in 2005, Aetna began offering policies covering medically necessary treatments for gender transition.²⁵² The reform in private insurance policies to provide transgender health care is hopefully the first step toward assuring suitable health care for all transgender people.

VI. GID TREATMENT GUIDELINES AND RECOMMENDATIONS FOR THE FUTURE TREATMENT OF TRANSGENDER PRISONERS

Government agencies and insurance companies differ in their provisions of transgender health care, partly because no uniform methods of treatment exist. In 1966, Dr. Harry Benjamin pioneered the field of transgender health care with the publication of a medical and psychological reference book for transgender individuals.²⁵³ In the late 1970s, WPATH (formerly known as the Harry Benjamin International Gender Dysphoria Association (HBIGDA)) came into existence and established the minimal standards of care for transgender individuals.²⁵⁴ By 1993, the International Conference on Transgender Law and Employment Policy formulated its own health care standards.²⁵⁵ In 1997, Temple University Press published the most recent guidelines, *Recommended Guidelines for Transgender Care*, by Israel and Tarver.²⁵⁶ The existence of various guidelines does not necessarily highlight discord among professionals regarding transgender healthcare, but rather it demonstrates that there is more than one way of assessing the proper care for these individuals.

247. *Id.*

248. WIS. ADMIN. CODE [DHS] § 107.03(23)-(24) (2009).

249. ISRAEL & TARVER, *supra* note 9, at 91.

250. *Id.* at 90.

251. *See* MOULTON & SEATON, *supra* note 3, at 25.

252. *Id.*

253. Joy Diane Shaffer, *Foreword* to GIANNA E. ISRAEL & DONALD E. TARVER II, *TRANSGENDER CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION, AND PERSONAL ACCOUNTS*, at xi (1997).

254. Dallas Denny & Jan Roberts, *Results of a Questionnaire on the Standards of Care of the Harry Benjamin International Gender Dysphoria Association*, in *GENDER BLENDING* 320, 322 (Bonnie Bullough et al. eds., 1997).

255. *Id.*

256. *See* ISRAEL & TARVER, *supra* note 9.

Multiple guidelines for treating GID may also give the false impression that providing low-cost, minimal health care to transgender prisoners is as effective as sex reassignment surgery. After all, surgery does not always benefit transgender people.²⁵⁷ However, with the careful consideration of a committee of health care professionals and prison officials, treatments would likely be more effective.²⁵⁸ Ideally, the committee would consult with the prisoner to establish an individualized treatment plan.²⁵⁹ In order to ensure effective treatment, the committee should have a wide range of surgeries and hormone therapies from which to choose.²⁶⁰

A. Minimal or Broad Health Care for Transgender Inmates?

In the absence of a uniform standard for transgender health care, providing minimal care to prisoners seems reasonable, especially because the consequences and benefits of sex reassignment surgeries are questionable.²⁶¹ After all, gender is a psychological concept, and altering the body through surgery does not seem to automatically resolve GID.²⁶² Moreover, living as a person of the opposite sex is an individual choice, and one does not necessarily need surgery in order to do so.²⁶³ As one transgender man opines, cost is not the only barrier to undergoing surgery for male genitalia: "It's really important to me, but I'm never going to have enough money to have that operation [phalloplasty – the surgical creation of a neo-phallus]. I don't really want to mess with my body like that. . . . I'm a different kind of a thing, a new thing, and that's okay."²⁶⁴

Furthermore, sex reassignment surgery does not necessarily create the physical characteristics of the opposite sex, and the surgery may promote unrealistic expectations of physically altering gender appearance.²⁶⁵ One study of post-operative transgender women found that more than 35% were dissatisfied with their genital surgery.²⁶⁶ Structural problems such as the creation of vaginas that are too small can result from sex reassignment.²⁶⁷ Artificial openings can also form between the rectum and the newly created vagina.²⁶⁸ In addition, genital reassignment surgery can cause serious kidney

257. See GORDENE OLGA MACKENZIE, *TRANSGENER NATION* 19 (1994).

258. See Tarzwell, *supra* note 7, at 216.

259. See *id.* at 215.

260. *Id.* at 218.

261. See MACKENZIE, *supra* note 257, at 19.

262. See Virginia Prince, *Seventy Years in the Trenches of the Gender Wars*, in *GENDER BLENDING* 469, 471 (Bonnie Bullough et al. eds., 1997).

263. *Id.*

264. RUDACILLE, *supra* note 15, at 182; see also ISRAEL & TARVER, *supra* note 9, at 86 (defining phalloplasty as the surgical creation of a neo-phallus).

265. MACKENZIE, *supra* note 257, at 13.

266. *Id.* at 19.

267. *Id.*

268. *Id.*

infections if the urethra closes up.²⁶⁹ Such problems require more plastic surgery, adding to the cost of surgical treatment.²⁷⁰ Even if no problems immediately arise after surgery, the WPATH Standards of Care recommend long-term follow-ups with surgeons in order to ensure an optimal outcome.²⁷¹

Surgery also does not ensure happiness for transgender men.²⁷² In fact, many transgender men choose not to undergo phalloplasty because it is very unlikely that it will produce a functioning penis.²⁷³ Transgender men who undergo genital reassignment surgery have reported several problems, and newly constructed penises have even fallen off.²⁷⁴ Most transgender men instead opt for hormone therapy, which elongates the clitoris.²⁷⁵

Transgender men's reluctance for surgical treatment discounts the need for genital reassignment surgery.²⁷⁶ Harry Benjamin contended that hormonal and surgical interventions are "life-saving measure[s]" for transsexuals.²⁷⁷ However, the WPATH Standards of Care require hormone therapy and real-life experience to precede genital reassignment surgery.²⁷⁸ This requirement suggests that hormone therapy and real-life experience are more crucial forms of treatment than sex reassignment surgery. Moreover, studies repudiate the notion that sex reassignment surgery is a life-saving measure, and they further indicate an extremely high suicide rate among post-operative transsexuals.²⁷⁹

Despite the existence of different treatment guidelines and studies questioning the benefits of sex reassignment surgery, transgender prisoners need individualized health care in order to ensure that those who need certain treatments receive them.²⁸⁰ Ideally, doctors would make treatment decisions.²⁸¹ Instead, DOC officials face the burden of limiting health care to transgender individuals based on cost.²⁸² However, with the passage of the ISCPA, even DOC officials no longer have the ability to determine medically necessary treatment for transgender individuals under an imperfect cost analysis.²⁸³ Reversing the ISCPA and allowing a committee of health care professionals,

269. *Id.* at 19-20.

270. *See id.* at 19.

271. WPATH, *supra* note 24, at 22.

272. *See* MACKENZIE, *supra* note 257, at 20.

273. *Id.*; *see also* ISRAEL & TARVER, *supra* note 9, at 86 (for a definition of phalloplasty).

274. *Id.*

275. *Id.*

276. *See id.*

277. *Id.* at 21.

278. WPATH, *supra* note 24, at 20.

279. MACKENZIE, *supra* note 257, at 21-22.

280. *See* Sundstrom v. Frank, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597, at *9 n.2 (E.D. Wis. Oct. 15, 2007).

281. *See* Chin, *supra* note 195, at 174.

282. *See id.*

283. *See* WIS. STAT. § 302.386(5m)(b) (2007-2008).

prison officials, and legal advocates to help decide treatment plans best ensure adequate medical treatment for transgender prisoners.²⁸⁴

B. Treatment Options

Under the ISCPA, hormone therapy and sex reassignment surgeries are not options for treating transgender prisoners.²⁸⁵ However, as many as 35% of GID patients will commit suicide if they do not receive treatment.²⁸⁶ Although determining what course of treatment is medically necessary requires individualized evaluations, treatment most often includes hormone therapy, surgery, or both.²⁸⁷

1. Hormone Therapy

Israel and Tarver's guidelines recommend that prisons provide hormone therapy to transgender inmates.²⁸⁸ Not providing hormone therapy for transgender individuals correlates with an increased risk of self-mutilation, clinical depression, illegal drug consumption, and suicide attempts.²⁸⁹

The WPATH Standards of Care also recognize that hormone therapy is often a medically necessary treatment for transgender individuals, and that it is a good option for those who do not want surgery.²⁹⁰ The WPATH Standards of Care advise continuing treatment for transgender individuals who have taken hormones prior to their incarceration.²⁹¹ Suddenly withdrawing hormone therapy puts transgender prisoners at risk of injuring themselves²⁹² or suffering painful side effects.²⁹³ The care warranted for transgender individuals who have not taken hormones prior to incarceration is less clear under the guidelines. In order to qualify for hormone therapy, the WPATH Standards of Care require the patient to acquire knowledge of the risks and benefits of taking the hormones.²⁹⁴ Furthermore, the patient must either participate in real-life experience as a transgender person or psychotherapy with a mental health professional.²⁹⁵ Although fulfilling real-life experience in prison is not

284. See Tarzwell, *supra* note 7, at 213.

285. See § 302.386(5m)(b).

286. Sundstrom v. Frank, No. 06-C-112, 2007 U.S. Dist. LEXIS 76597, at *9 n.2 (E.D. Wis. Oct. 15, 2007).

287. *Id.*

288. ISRAEL & TARVER, *supra* note 9, at 19.

289. *Id.*

290. WPATH, *supra* note 24, at 13-14.

291. *Id.* at 14.

292. *Id.*

293. See Sundstrom Compl., *supra* note 153, at 9.

294. WPATH, *supra* note 24, at 13.

295. *Id.*

feasible,²⁹⁶ a prisoner can meet the eligibility criteria for hormone therapy if she or he has received psychotherapy.²⁹⁷

2. Surgery

According to Israel and Tarver's guidelines, surgeons and insurance providers should consider genital reassignment surgery as a crucial procedure that benefits the medical and psychological well-being of a transgender person.²⁹⁸ However, one single surgery does not effect genital reassignment.²⁹⁹ Gonad removal surgery is less expensive and more popular than total genital reassignment among transsexuals, yet some groups within the transgender community do not commonly seek either type of surgery.³⁰⁰ With judicious analysis and study, a team of professionals and officials could determine the number and kinds of surgeries, if any, that transgender prisoners needed.

Under Israel and Tarver's guidelines, genital reassignment surgeries for transgender women include castration, surgically creating a neo-vagina, labial revisions, and any necessary post-operative revisions.³⁰¹ Genital transition in transgender men may require more surgeries.³⁰² Genital reassignment surgeries for transgender men include hysterectomy, removing the ovaries, removing the fallopian tubes, phalloplasty, and restructuring the clitoris.³⁰³ In addition, post-operative revisions are typical for some procedures such as phalloplasty.³⁰⁴

The WPATH Standards of Care anticipate more surgeries than solely genital reassignment.³⁰⁵ Like Israel and Tarver's guidelines, the WPATH Standards of Care deem surgical sex reassignment a meaningful, effective treatment option for transsexuals and those with extreme cases of GID.³⁰⁶ The WPATH Standards of Care recommend that hormone therapy precede genital reassignment surgery and require real-life experience prior to the surgery.³⁰⁷ Under these guidelines, transgender women may undergo surgical breast augmentation if, after eighteen months of hormone therapy, their physicians find the breast enlargement insufficient to make the transgender women comfortable in their gender role.³⁰⁸ However, the guidelines authorize breast removal for transgender men when they begin hormone therapy.³⁰⁹ The breast

296. See *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 123 (D.D.C. 1999).

297. See WPATH, *supra* note 24, at 13.

298. ISRAEL & TARVER, *supra* note 9, at 82.

299. See *id.* at 85-86 (listing various genital-reassignment procedures).

300. See *id.* at 83.

301. *Id.* at 85.

302. See *id.* at 85-86.

303. *Id.*

304. *Id.*

305. See WPATH, *supra* note 24, at 19-20.

306. See *id.* at 18.

307. *Id.* at 20.

308. *Id.*

309. *Id.*

removal surgery is usually the first surgery that transgender men undergo, and it is the only surgery that some transgender men pursue.³¹⁰

According to the WPATH Standards of Care, the same reservations that apply to commencing hormone therapy should apply to undergoing breast surgery.³¹¹ Legal definitions of sex and gender do not specify a certain size or even the presence of breasts.³¹² The WPATH guidelines state that the desired effects of hormones in transgender men and women are the atrophy and growth of breasts, respectively.³¹³ Furthermore, sex reassignment procedures like breast surgeries are crucial treatment options that might allow transgender prisoners to transfer to prisons consistent with their gender identity.³¹⁴ Wisconsin allows people with a birth certificate registered within the state to petition for a legal sex change because of a “surgical sex-change procedure.”³¹⁵ However, sex reassignment surgery encompasses many procedures, and the Wisconsin Statutes do not specify which procedures qualify an individual to legally change his or her sex.³¹⁶ Like all treatment options for transgender prisoners, a committee of professionals should assist in determining whether breast surgeries are appropriate and which procedures qualify transgender prisoners for transfer to a different facility.³¹⁷

C. *Transgender Health Care Determinations and the Transgender Committee*

Providing low-cost, minimal health care to transgender prisoners may seem reasonable given that GID experts disagree on the best treatments and who qualifies as transsexual.³¹⁸ However, the existence of various guidelines for treating GID does not change the fact that providing minimal health care may fail to afford treatment that is medically necessary.³¹⁹ Former Submissions and Notes Editor of the Columbia Human Rights Law Review, Sydney Tarzwell, sets forth a practical and thorough plan to ensure medically necessary treatment for transgender prisoners.³²⁰ Tarzwell acknowledges that adopting the recommendations will not create the “ideal environment for transgender prisoners,”³²¹ yet it is difficult to imagine that an ideal prison environment for anyone—transgender or not—is feasible or desirable.

310. *Id.*

311. *Id.* at 19-20.

312. *Id.* at 19.

313. *Id.* at 14.

314. See BURDA, *supra* note 11, at 176 (stating that the prison system in the U.S. assigns housing based on biological sex).

315. See WIS. STAT. § 69.15(4)(b) (2007-2008).

316. See *id.*

317. See Tarzwell, *supra* note 7, at 215.

318. See Sultan, *supra* note 197, at 1227.

319. See Tarzwell, *supra* note 7, at 212.

320. See *id.* at 213-18.

321. *Id.* at 212.

Nevertheless, Tarzwell's policy recommendations give a much-needed voice to transgender prisoners who face unnecessary obstacles in the prison system.³²² Under Tarzwell's plan, a Transgender Committee should consult with each prisoner to determine the appropriate health care.³²³ The committee would consist of one prison medical official, one prison mental health official, one prison security official, a consultant in transgender health care, and a transgender legal advocate.³²⁴ Experts from different fields would bring specialized knowledge to the treatment discussion.³²⁵ The Transgender Committee would create treatment plans for each transgender prisoner and would receive regular training on transgender awareness.³²⁶ The committee would be required to put a treatment plan in writing, justify its treatment choices, and routinely review it.³²⁷ Formally committing the plan to writing would ensure the accountability of prison staff to implement sensible policies.³²⁸ Moreover, requiring the presence of outside consultants, transgender awareness training, and justifying treatment decisions in writing, decrease the likelihood that bias will influence decision-making.³²⁹

Most importantly, restrictions on providing sex reassignment surgeries and hormone therapy do not limit the treatment deliberations under Tarzwell's plan.³³⁰ If the Transgender Committee deemed a surgery as an appropriate treatment option, that surgery would not be considered cosmetic.³³¹ If a prisoner could not produce evidence that he or she had received treatment for GID prior to incarceration, the committee would not simply assume that the prisoner had not.³³² Even if a prisoner had not received such treatment, he or she would still be eligible for the same treatments available to those who had received GID treatment prior to incarceration.³³³

CONCLUSION

Wisconsin's law depriving hormone therapy and sex reassignment surgeries to transgender prisoners is inappropriate because it ignores treatments that can effectively alleviate a serious medical need. GID is a complex condition, and non-transgender people inevitably struggle to grasp the nature and difficulties of living transgender. Court decisions have not gone so far as to ensure effective treatments for transgender prisoners. The Wisconsin

322. *See id.* at 213.

323. *Id.* at 215.

324. *Id.* at 213.

325. *See id.* at 216.

326. *Id.* at 213.

327. *Id.*

328. *See id.* at 215-16.

329. *See id.* at 216.

330. *See id.* at 215.

331. *Id.*

332. *Id.*

333. *Id.*

Legislature erred in bypassing the DOC's policies and eliminating treatment options. Although the policies did not provide the full range of treatment options, the DOC understood the needs of its transgender prisoners far better than did the state legislators. The need to overturn the ISCPA is urgent, and the need to provide adequate treatment for an oppressed minority is even more pressing. A committee that thoughtfully establishes an individualized plan to treat the serious medical needs of each transgender prisoner will meet this urgent demand.

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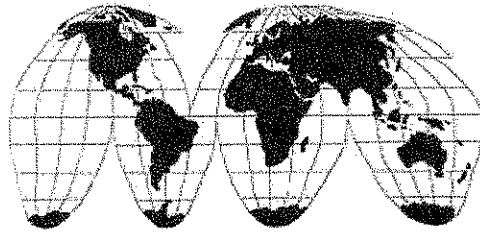


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