

# ALL PRISONERS ARE EQUAL, BUT SOME PRISONERS ARE MORE EQUAL THAN OTHERS: AN INMATE'S RIGHT TO SEX REASSIGNMENT SURGERY AFTER *KOSILEK V. SPENCER*, 889 F. SUPP. 2D 190 (D. MASS. 2012)

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## I. INTRODUCTION

In his classic novel, *Animal Farm*, George Orwell wrote, “All animals are equal, but some animals are more equal than others.”<sup>1</sup> Orwell’s *Animal Farm* offers insight on the human tendency to create a class system within an alleged equal and classless system. Such is the U.S. Department of Corrections. In a system where all prisoners are equal, some prisoners are more equal than others.

How many transgender persons are currently living in the United States? The simple answer: no one is quite sure.<sup>2</sup> Based on what limited data is available, the National Center for Transgender Equality asserts that between 0.25% and 1% of the U.S. population is transsexual.<sup>3</sup> Scholars in transgender studies estimate that 1 in 30,000 adult males seek sex reassignment surgery.<sup>4</sup> This Article will explore a controversial holding of a U.S. District Court regarding transgender prisoner rights. Issues such as transgender rights are no longer stifled by the law, but rather are finally being heard.

In *Kosilek v. Spencer (Kosilek II)*, the U.S. District Court for the District of Massachusetts ordered an injunction for sex reassignment surgery for the very first time.<sup>5</sup> Michelle Kosilek, a transgender inmate with severe gender identity disorder (GID), initially brought suit in *Kosilek v. Maloney (Kosilek I)* seeking hormone therapy and sex reassignment surgery.<sup>6</sup> In *Kosilek I*, his

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1. GEORGE ORWELL, *ANIMAL FARM* 112 (Penguin Grp. Inc. 2000) (1945).

2. NAT’L CTR. FOR TRANSGENDER EQUAL., UNDERSTANDING TRANSGENDER FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 1 (2009), available at [http://transequality.org/Resources/NCTE\\_UnderstandingTrans.pdf](http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf).

3. *Id.*

4. Ami B. Kaplan, *The Prevalence of Transgenderism*, TRANSGENDER MENTAL HEALTH (Mar. 31, 2010), <http://tgmentalhealth.com/2010/03/31/the-prevalence-of-transgenderism/>.

5. 889 F. Supp. 2d 190, 251 (D. Mass. 2012).

6. 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

claim was denied based on an inability to meet every element of his Eighth Amendment claim.<sup>7</sup> Kosilek was successful in *Kosilek II*, but the legal implications of the District Court's order are still unclear.

This Note will argue that *Kosilek II* opens the door for transgender prisoner rights because the U.S. District Court correctly took such a strong, although limited, stance on sex reassignment surgery for transgender prisoners. Section II explores prior transgender prisoner litigation; particularly *Kosilek I*. Section III discusses the facts and findings of the District Court in *Kosilek v. Spencer*. Finally, Section IV will analyze three controversial aspects of this case by predicting the future implications of this controversial holding on upcoming transgender prisoner litigation, considering the Department of Correction's oppressive policies, and evaluating whether such a holding is a reasonable use of taxpayer dollars. Due to the severity of Kosilek's gender identity disorder and the need for social reform, the District Court came to the appropriate conclusion in *Kosilek v. Spencer*.

## II. LEGAL BACKGROUND

Until recently, issues regarding transgender rights were dodged by both circuit and district courts. Given that law-abiding transgender rights were not considered, transgender prisoner rights certainly were not making their way through the judicial system. In *Farmer v. Brennan*, the U.S. Supreme Court heard a transgender prisoner rights case for the first time.<sup>8</sup> The Court described a transsexual as a person who has “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,<sup>9</sup> and who typically seeks medical treatment, including hormone therapy and surgery, to bring about a permanent sex change.”<sup>9</sup> Prisoner treatment and prison conditions, including treatment of transsexual persons, are subject to evaluation under the Eighth Amendment's ban on cruel and unusual punishment.<sup>10</sup> *Farmer* further laid out the standard for injunctive relief for evaluating such treatment, which the district court later applied in *Kosilek I* and *II*.<sup>11</sup> In considering injunctive relief, courts must consider the “attitudes and conduct” of prison staff at the time of the litigation and make inferences into their attitudes once the suit has commenced.<sup>12</sup>

To fully understand the holding of *Kosilek II*, an in depth analysis of *Kosilek I* is necessary. For purposes of this Article, Kosilek will be referred

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7. *Id.*

8. 511 U.S. 825 (1994).

9. *Id.* at 829.

10. *Id.* at 832.

11. *Id.* at 845–47; see also *Kosilek II*, 889 F. Supp. 2d 190, 248 (D. Mass. 2012).

12. *Farmer*, 511 U.S. at 844–47; see also *Kosilek II*, 889 F. Supp. 2d at 248.

to as “he,” consistent with the district court opinion.<sup>13</sup> In *Kosilek I*, Kosilek brought suit against the Massachusetts Department of Corrections (DOC) Commissioner, Maloney, regarding deliberate indifference to a serious medical need and inadequate medical care, but his claim was ultimately dismissed by the district court.<sup>14</sup> However, in dicta, the *Kosilek I* court made many important statements that came to light in *Kosilek II*.<sup>15</sup>

In *Kosilek I*, Plaintiff Michelle Kosilek brought his first claim alleging deliberate indifference to his serious medical need and inadequate medical care from the DOC.<sup>16</sup> Kosilek is currently serving a life sentence for the murder of his wife.<sup>17</sup> Kosilek suffers from GID, which causes him extreme mental anguish, as he feels that he is a woman “cruelly trapped” in a man’s body.<sup>18</sup>

Kosilek’s mother abandoned him at an orphanage at the age of three, where he was often reprimanded and punished for wearing female clothing.<sup>19</sup> He was later reunited with his mother but was then frequently raped by his grandfather.<sup>20</sup> When Kosilek expressed a longing to live life as a female, his stepfather stabbed him.<sup>21</sup> In response to these horrors, Kosilek fled home and took on a female persona, soon falling into a life of drugs and prostitution.<sup>22</sup> For roughly a year, Kosilek received illegal prescription estrogen hormone treatments in exchange for sex.<sup>23</sup> After getting his college degree, Kosilek relapsed back into drug use, and sought treatment at a rehabilitation facility.<sup>24</sup> During his stint in rehab, Kosilek met Cheryl McCaul, a volunteer counselor.<sup>25</sup> McCaul advised Kosilek that his transsexualism “would be cured by a good woman,” and the two got married.<sup>26</sup> Kosilek murdered McCaul in 1990.<sup>27</sup> At his trial, Kosilek claimed self-defense because McCaul poured boiling tea on his genitals.<sup>28</sup>

While awaiting trial, Kosilek took birth control pills that were illegally provided to him by a prison guard.<sup>29</sup> During that time, Kosilek attempted

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13. See *Kosilek I*, 221 F. Supp. 2d 156 (D. Mass. 2002) and *Kosilek II*, 889 F. Supp. 2d at 190.

14. *Kosilek I*, 221 F. Supp. 2d at 156.

15. *Id.*

16. *Id.*

17. *Id.* at 158.

18. *Id.*

19. *Id.* at 163.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 164.

25. *Id.*

26. *Id.*

27. *Id.*

28. Associated Press, *Mass. Inmate Asks for Sex Change*, USA TODAY (June 26, 2007, 2:45 PM), [http://usatoday30.usatoday.com/news/nation/2007-06-26-inmate-sex-change\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-06-26-inmate-sex-change_N.htm).

29. *Kosilek I*, 221 F. Supp. 2d at 164.

suicide twice, and he once tried to castrate himself.<sup>30</sup> Upon his conviction, Kosilek went to the DOC to serve his sentence of life imprisonment without the possibility of parole.<sup>31</sup>

While incarcerated, Kosilek met with many psychologists, most of whom had no background with gender identity disorder patients.<sup>32</sup> However, the World Professional Association for Transgender Health (WPATH) created the Standards of Care, which exists to “provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”<sup>33</sup>

As explained by the court, “The Standards of Care establish a ‘triadic treatment sequence.’ This triadic sequence is comprised of: (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery.”<sup>34</sup> The Standards of Care promote the use of hormone therapy as a way to improve quality of life and diminish depression and suicidal thoughts in those that suffer from GID.<sup>35</sup>

The Standards of Care expressly address hormone therapy for incarcerated inmates.<sup>36</sup> It provides that inmates who were previously prescribed hormone therapy for GID should continue to receive that treatment during their incarceration.<sup>37</sup> The Standards of Care also specifically address sex reassignment surgery, providing that sex reassignment surgery is, in some cases, “medically indicated and medically necessary” and “constitutes a very effective and appropriate treatment for transsexualism or profound GID.”<sup>38</sup>

Kosilek demanded treatment for his severe GID from the DOC, and he consistently claimed that he would commit suicide if treatment was not provided to him.<sup>39</sup> Given these threats and Kosilek’s history, the court concluded that Kosilek did indeed have a serious medical disorder and was suffering from extreme emotional distress.<sup>40</sup>

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30. *Id.*

31. *Id.*

32. *Id.* at 166.

33. WORLD PROF'L. ASS'N. FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONFORMING PEOPLE (7th ed. 2011), available at [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351&pk\\_association\\_webpage=3926](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926).

34. *Kosilek I*, 221 F. Supp. 2d at 166.

35. *Id.*

36. *Id.*

37. *Id.* at 166–67.

38. *Id.* at 167.

39. *Id.* at 164.

40. *Id.* at 165.

In 2000, DOC Commissioner Maloney, a defendant in the initial suit, adopted a freezing policy regarding the treatment of transgender prisoners in the DOC.<sup>41</sup> This policy froze transsexual prisoners by only providing hormone therapy to prisoners for whom it was prescribed prior to incarceration.<sup>42</sup> Since Kosilek never had a valid prescription for hormones, this policy made it impossible for Kosilek to receive hormone therapy.<sup>43</sup>

In meetings regarding Kosilek, Maloney frequently expressed his opinion that sex reassignment surgery or hormone therapy was not an appropriate use of taxpayer dollars.<sup>44</sup> Further, Maloney expressed security concerns, particularly because Kosilek's facility had a high number of sex offenders.<sup>45</sup> DOC doctors indicated that a medical decision was not made, but rather an administrative decision was made, which banned treatment for transgender prisoners.<sup>46</sup>

In response to Kosilek's complaint, Maloney moved to dismiss all claims against him.<sup>47</sup> The court partially granted this motion but denied one claim.<sup>48</sup> As a result, the only claim considered in *Kosilek I* was whether Kosilek was entitled to injunctive relief due to Maloney's violation of Kosilek's rights under the Eighth Amendment.<sup>49</sup>

The Eighth Amendment bans the infliction of cruel and unusual punishment and prohibits the unnecessary and wanton infliction of pain on an inmate.<sup>50</sup> Prison officials have a duty to ensure that inmates have access to adequate medical care.<sup>51</sup> To prevail on an Eighth Amendment claim, a plaintiff prisoner must establish deliberate indifference to a serious medical need that violates "evolving standards of decency."<sup>52</sup>

To have a valid claim for deliberate indifference, both a subjective and an objective component must be met.<sup>53</sup> To meet the objective prong, the prisoner must show by a preponderance of the evidence that he has a serious

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41. *Id.* at 159.

42. *Id.* at 159–60.

43. *Id.*

44. *Id.* at 170–71.

45. *Id.*

46. *Id.* at 171.

47. *Id.* at 173.

48. *Id.*

49. *Id.*

50. *Id.* at 176 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

51. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see also Harris v. Thigpen*, 941 F.2d 1495, 1504 (11th Cir. 1991) ("Federal and state governments...have a constitutional obligation to provide minimally adequate medical care to those whom they are punishing by incarceration."); *Benson v. Cady*, 761 F.2d 335, 339 (7th Cir. 1985) ("A state has an affirmative obligation under the Eighth Amendment 'to provide persons in custody with a medical system that meets minimal standards of adequacy.'").

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

53. *See Farmer*, 511 U.S. at 846 n.9; *Wilson v. Seiter*, 501 U.S. 294, 298–99 (1991); *DesRosiers v. Moran*, 949 F.2d 15, 18 (1st Cir. 1991).

medical need that has not been adequately treated.<sup>54</sup> A serious medical need may be found in one of two ways: diagnosis by a licensed physician or a medical need that is so obvious that an average person would know it needs the attention of a physician.<sup>55</sup> Further, the Eighth Amendment requires that these medical decisions be considered on a case-by-case basis rather than by general prison policy.<sup>56</sup>

In rendering judgments regarding the medical care provided to inmates, the court must base its decisions on medical considerations.<sup>57</sup> Also relevant to deliberate indifference claims are “the realities of prison administration.”<sup>58</sup> These realities include guaranteeing safety of both inmates and prison staff.<sup>59</sup> However, these security concerns must be legitimate and justified, and “concern for controversy is not a constitutionally permissible basis for denying an inmate necessary medical care.”<sup>60</sup>

In applying these standards, the district court noted that Kosilek needed to prove four elements to prevail on his Eighth Amendment claim: “(1) he had a serious medical need; (2) which had not been adequately treated; (3) because of Maloney’s deliberate indifference; and (4) that deliberate indifference was likely to continue in the future.”<sup>61</sup>

First, the court found that Kosilek did have a serious medical need.<sup>62</sup> Neither party disputed Kosilek’s GID.<sup>63</sup> However, GID alone is not enough to establish a serious medical need, so the court considered Kosilek’s history of depression, suicide attempts, and extreme mental anguish in finding that he had a serious medical need.<sup>64</sup> In light of Kosilek’s history, the court found that Kosilek had a serious medical need.<sup>65</sup>

Next, the court held that Kosilek was not given adequate medical treatment.<sup>66</sup> Although some therapy and counseling was offered to Kosilek, the court noted that physicians specializing in GID issues never examined Kosilek to determine what treatment was necessary to treat his severe GID.<sup>67</sup> Further, the DOC policy and guidelines precluded the possibility that Kosilek could ever receive hormone therapy because they banned certain types of

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54. *Kosilek I*, 221 F. Supp. 2d at 180.

55. *Mahan v. Plymouth Cnty. House of Corr.*, 64 F.3d 14, 18 (1st Cir. 1995) (quoting *Gaudreault v. Mun. of Salem*, 923 F.2d 203, 208 (1st Cir. 1990)).

56. *Kosilek I*, 221 F. Supp. 2d at 183.

57. *Estelle*, 429 U.S. at 104 n.10.

58. *Helling v. McKinney*, 509 U.S. 25, 37 (1993).

59. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

60. *Kosilek I*, 221 F. Supp. 2d at 192.

61. *Id.* at 161.

62. *Id.*

63. *Id.* at 184

64. *Id.* at 184–85.

65. *Id.* at 184.

66. *Id.* at 185.

67. *Id.* at 186.

treatments that Kosilek would have greatly benefitted from, including sex reassignment surgery.<sup>68</sup> The court decided that counseling alone was not enough given the severity of Kosilek's condition, and therefore, Kosilek was denied adequate medical treatment.<sup>69</sup> The court found, due to the DOC's freezing policy, that Kosilek never had an appropriate medical evaluation while incarcerated in the DOC, thus rendering the undisputed treatment of his serious medical need inadequate.<sup>70</sup>

Although Kosilek met the first two elements of his cruel and unusual punishment claim, the latter two elements were not met.<sup>71</sup> The court determined that commissioner Maloney did not act with deliberate indifference toward Kosilek for a variety of reasons.<sup>72</sup> In its reasoning, the court noted that Maloney's actions were "rooted in sincere security concerns . . . in a fear of public and political criticism[,] . . . [and] concern[] that any expenditure for hormones or sex reassignment surgery might be an inappropriate use of taxpayers' money."<sup>73</sup> Additionally, and importantly, Maloney was not a medical professional, but his lack of understanding about the medical needs of Kosilek was acceptable to the court.<sup>74</sup>

The court believed that Maloney would not continue to be indifferent to the medical needs of Kosilek.<sup>75</sup> "The court expects 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."<sup>76</sup> Further, the court noted that its decision put Maloney on notice of issues with transgender inmates and instructed how to handle those inmates in the future.<sup>77</sup>

Kosilek also raised concern about the freezing policy of the DOC, but the court said that the policy was sufficient.<sup>78</sup> However, "decisions as to whether psychotherapy, hormones, and/or sex reassignment surgery are necessary to treat Kosilek adequately must be based on an 'individualized medical evaluation' of Kosilek rather than as 'a result of a blanket rule.'"<sup>79</sup>

Although the court entered a judgment for Maloney, the court made many statements that shed light on its policy opinions.<sup>80</sup> First, the court noted that Kosilek should receive counseling from someone trained and well-

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68. *Id.*

69. *Id.* at 189.

70. *Id.*

71. *Id.* at 162.

72. *Id.*

73. *Id.*

74. *Id.* at 191.

75. *Id.* at 193.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (citing *Allard v. Gomez*, 9 F. App'x. 793, 795 (9th Cir. 2001)).

80. *Id.*

versed in dealing with GID patients, rather than doctors who have never encountered GID.<sup>81</sup> Second, if psychotherapy is not enough, the court encouraged treatment by pharmaceutical therapy.<sup>82</sup> Further, the court acknowledged that these considerations may be trumped by the DOC's concerns for safety, if properly pled.<sup>83</sup> However, the court noted that Kosilek already lived as a female in a male prison population, and thus far it had posed no security issues.<sup>84</sup> Although a judgment was entered for Maloney, the district court soon heard again from Michelle Kosilek.<sup>85</sup>

### III. EXPOSITION OF THE CASE

Unfortunately, the DOC did not cooperate with Kosilek as the court had wished in 2002.<sup>86</sup> In *Kosilek v. Spencer*, Kosilek proved the DOC violated his rights under the Eighth Amendment.<sup>87</sup> Where *Kosilek I* dealt specifically with hormone therapy, *Kosilek II* sought “an unprecedented court order requiring that the defendant Commissioner of the Massachusetts Department of Correction (the ‘DOC’) provide him with sex reassignment surgery to treat his major mental illness, severe gender identity disorder.”<sup>88</sup> While the issue of sex reassignment surgery and prisoner's rights had come before the court prior to *Kosilek I*, this case differed significantly in that a DOC physician prescribed sex reassignment surgery to Kosilek as the only means of treating his illness.<sup>89</sup>

Notably, the court provided information on the aftermath of *Kosilek I*.<sup>90</sup> *Kosilek I* was decided in August 2002, and by December 2002, the DOC made significant changes to its freezing policy.<sup>91</sup> Previously, the DOC's policy was to provide hormones to transgender inmates only if they had been prescribed such prior to incarceration, but the new policy allowed for flexible increases or decreases on a case-by-case basis.<sup>92</sup> However, the Commissioner and the Director of the Department's Health Services Division must approve any changes in prescriptions.<sup>93</sup>

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81. *Id.*

82. *Id.* at 193–94.

83. *Id.* at 194.

84. *Id.*

85. *See Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012).

86. *See id.*

87. *Id.* at 198.

88. *Id.* at 196.

89. *Id.* at 197. *See also* Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011); Soneeya v. Spencer, 851 F. Supp. 2d 228 (D. Mass. 2012); Brugliera v. Comm'r of Mass. Dep't of Corr., No. 07-40323, 2009 U.S. Dist. LEXIS 131002 (D. Mass. Dec. 16, 2009); *Kosilek I*, 221 F. Supp. 2d 156 (D. Mass. 2002).

90. *Kosilek II*, 889 F. Supp. 2d at 218.

91. *Id.*

92. *Id.*

93. *Id.*



In 2003, a GID specialist, Dr. David Seil, evaluated Kosilek.<sup>94</sup> As a result of his evaluation, Dr. Seil prescribed Kosilek estrogen therapy.<sup>95</sup> Regarding sex reassignment surgery, Dr. Seil recommended Kosilek be treated with hormones for one year, and if they proved insufficient, then sex reassignment would be necessary to treat Kosilek.<sup>96</sup> In response to this future recommendation, Maloney terminated Dr. Seil's employment with the DOC.<sup>97</sup> However, Maloney and the DOC did provide Kosilek with estrogen treatments beginning in August 2003, and Kosilek was allowed to wear female undergarments.<sup>98</sup> Then, in 2003, Kathleen Dennehy became the commissioner of the DOC, and she was "determined not to be the first prison official in the United States to authorize sex reassignment surgery for an inmate."<sup>99</sup>

In September 2004, Kosilek was to be evaluated for sex reassignment surgery by a specialist from Fenway Community Health Center of Massachusetts, a leading clinic in GID.<sup>100</sup> Fearing a prescription of sex reassignment surgery, Dennehy took an "unprecedented step" and had the DOC find a specialist of its own to evaluate Kosilek.<sup>101</sup>

Given that some Fenway doctors were still in the process of providing treatment to Kosilek, Fenway doctors continued to meet with Kosilek.<sup>102</sup> In a report from the Fenway doctors to the DOC, the doctors advised Dennehy that Kosilek needed sex reassignment surgery and that if Kosilek did not receive surgery, he was at a very high risk of suicide or self-harm.<sup>103</sup> In response, the DOC hired Dr. Osborne, a heavily influenced colleague of a former Vatican physician who was known for his view that sex reassignment surgery is "religiously abhorrent."<sup>104</sup> The court found that the DOC hired Osborne because it was foreseeable Osborne would deny sex reassignment surgery given her Vatican background.<sup>105</sup>

Additionally, Dennehy continued to claim she did not know if Fenway doctors recommended sex reassignment surgery.<sup>106</sup> Dennehy still feigned confusion despite the fact that she wrote a note to the Director of the Bureau of Prisons, writing, "[o]ur medical providers[,] the Commonwealth's medical school, is supporting their consultant's recommendation for the

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 219.

98. *Id.*

99. *Id.* at 220.

100. *Id.*

101. *Id.*

102. *Id.* at 221.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 222.

surgery!!!!!!”<sup>107</sup> Clearly, she was aware of the recommendation.<sup>108</sup> For these reasons, the court found that Dennehy knew that sex reassignment surgery was the only available option to treat Kosilek’s severe GID.<sup>109</sup>

To obtain an injunction ordering sex reassignment surgery, Kosilek had to prove the following,

- (1) he ha[d] a serious medical need; (2) sex reassignment surgery was the only adequate treatment for it; (3) the defendant [knew] that Kosilek was at high risk of serious harm if he [did] not receive sex reassignment surgery; (4) the defendant ha[d] not denied that treatment because of good faith, reasonable security concerns or for any other legitimate penological purpose; and (5) the defendant’s unconstitutional conduct [would] continue in the future.<sup>110</sup>

Since *Kosilek I*, DOC doctors deemed sex reassignment surgery the only adequate option to treat Kosilek, and a DOC specialist prescribed Kosilek with sex reassignment surgery.<sup>111</sup> In response to that recommendation, DOC deputy commissioner Kathleen Dennehy participated in efforts to have the specialist fired.<sup>112</sup> Dennehy then became commissioner of the DOC, and she failed to provide transgender inmates with prescription hormone therapy.<sup>113</sup> The DOC then hired Dr. Cynthia Osborne.<sup>114</sup> Osborne previously worked in the Johns Hopkins psychiatric department, which is known for its strong views opposing sex reassignment surgery, believing that no prisoner should ever need sex reassignment surgery.<sup>115</sup> Osborne had previously evaluated transgender prisoners and always found that sex reassignment surgery was not necessary.<sup>116</sup> Dennehy claimed that the DOC did not hire Osborne because of her anti-sex reassignment surgery stance, which the Court found to be a blatant lie.<sup>117</sup>

Kosilek, at the time of this Article, receives counseling and hormone therapy.<sup>118</sup> Dennehy indicated in 2006 that she was aware of the seriousness of Kosilek’s medical condition, admitting she was on notice that sex reassignment surgery may be the only adequate treatment for Kosilek.<sup>119</sup>

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107. *Id.*

108. *See id.*

109. *Id.*

110. *Id.* at 229.

111. *Id.* at 197.

112. *Id.* at 201–02.

113. *Id.* at 202.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 197.

Despite this knowledge, Dennehy indicated that “providing such treatment would create insurmountable security problems[,]” and therefore, treatment was denied for security reasons.<sup>120</sup> Despite the alleged security concerns, Dennehy did admit that Kosilek’s safety could be “reasonably assured” post-sex reassignment surgery.<sup>121</sup>

In response, Kosilek suggested that security concerns merely cloaked the true reason the DOC denied sex reassignment surgery, claiming they were swayed by “a fear of controversy, criticism, ridicule, and scorn.”<sup>122</sup> The district court agreed and found the denial to be an Eighth Amendment violation.<sup>123</sup> While the court considered the fear of controversy was understandable given the circumstances, the court held that such a fear does not trump a prisoner’s right to be free from deliberate indifference under the Eighth Amendment.<sup>124</sup> The court held that denial of adequate medical care for political reasons is “precisely the type of conduct the Eighth Amendment prohibits.”<sup>125</sup> Due to the political and controversial aspects of the case, the court concluded that the DOC would continue to violate Kosilek’s rights unless judicial action was taken.<sup>126</sup>

In light of these facts, the court ordered an injunction commanding the DOC to provide Kosilek with the prescribed treatment of sex reassignment surgery.<sup>127</sup> In its reasoning, the court noted that GID should be treated just as any other mental illness is treated.<sup>128</sup> The applicable standards in this case were precisely the same as in *Kosilek I*. Like *Kosilek I*, the court found that Kosilek’s GID was an undisputed fact.<sup>129</sup> However, the court had to determine the “current” severity of Kosilek’s GID.<sup>130</sup> The Court referred back to the detailed facts surrounding *Kosilek I*,<sup>131</sup> as explored in the previous Section. In evaluating Kosilek’s current level of distress, the court found that Kosilek’s risk of suicide or self-harm would significantly increase from an already high level if sex reassignment surgery was denied.<sup>132</sup>

The court next determined that sex reassignment surgery was the only adequate treatment for Kosilek’s severe GID.<sup>133</sup> In considering the Standards

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120. *Id.* at 198.

121. *Id.* at 203.

122. *Id.* at 198.

123. *Id.*

124. *Id.*

125. *Id.* at 203.

126. *Id.* at 204.

127. *Id.* at 205.

128. *Id.*

129. *Id.* at 213.

130. *Id.*

131. *Id.* at 213–17.

132. *Id.* at 229–30.

133. *Id.* at 230.

of Care from *Kosilek I*,<sup>134</sup> the court found that it had been well established by the record that sex reassignment surgery is the only adequate treatment for Kosilek, satisfying the objective element of the deliberate indifference test.<sup>135</sup>

Kosilek also satisfied the third element of his burden, proving the subjective prong of the deliberate indifference test.<sup>136</sup> To meet this burden, Kosilek needed to prove that prison officials knew of and disregarded his serious medical need.<sup>137</sup> The court found that the record “clearly establishe[d]” that DOC officials knew of the substantial risk of harm if Kosilek was not adequately treated, given his previous attempts at suicide and castration.<sup>138</sup>

Lastly, the court determined that the deliberate indifference of the DOC would continue.<sup>139</sup> In determining this, the court considered all of the inappropriate actions and decisions on the part of the DOC aimed directly at Kosilek and other transgender prisoners.<sup>140</sup> Since all four elements (as listed in the previous Section) were met, the court issued a rare and limited injunction.<sup>141</sup> The court noted that it would not decide where and who would perform the surgery, nor would it determine where and how Kosilek would be incarcerated post-surgery.<sup>142</sup> Kosilek has yet to receive sex reassignment surgery, as this decision is currently on appeal.<sup>143</sup> Kosilek has, however, received laser hair removal and continues to receive hormone therapy.<sup>144</sup>

#### IV. ANALYSIS

Issues surrounding transgender prisoner rights may seem few and far between. While it is unclear exactly how many transgender persons are currently incarcerated, studies show that transgender persons suffering from

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134. “The Standards of Care ‘triadic sequence is comprised of: (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery.’” *Kosilek I*, 221 F. Supp. 2d 156, 166 (D. Mass. 2002). “Although the Standards of Care have been revised somewhat since *Kosilek I* was decided in 2002, the prerequisites for complete sex reassignment surgery remain the same.” *Kosilek II*, 889 F. Supp. 2d at 231.

135. *Kosilek II*, 889 F. Supp. 2d at 236.

136. *Id.* at 237.

137. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

138. *Id.* at 238.

139. *Id.* at 247.

140. *Id.* at 249; *see also* *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011).

141. *Kosilek II*, 889 F. Supp. 2d at 250.

142. *Id.*

143. Zack Ford, *New York Times: Prisons Should ‘Do The Right Thing’ For Transgender Inmates*, THINK PROGRESS (Aug. 28, 2013, 10:28 AM), <http://thinkprogress.org/lgbt/2013/08/28/2540421/york-times-military-thing-chelsea-mannings-transgender-medical-care/>.

144. JoNel Aleccia, *Beginning Gender Change in Prison is a Long Shot*, NBC NEWS (Aug. 22, 2013, 8:28 AM), <http://www.nbcnews.com/health/health-news/beginning-gender-change-prison-long-shot-6C10974050>.

GID are more likely to end up in prison than average citizens.<sup>145</sup> According to the National Gay and Lesbian Task Force and the National Center for Transgender Equality,

[Transgender persons] are more likely to interact with police because they are more likely to be victims of violent crime, because they are more likely to be on the street due to homelessness and/or being unwelcome at home, because their circumstances often force them to work in the underground economy, and even because many face harassment and arrest simply because they are out in public while being transgender.<sup>146</sup>

Kosilek's case has received positive feedback from the LGBT community and extremely critical feedback from others.<sup>147</sup> While this case is currently up on appeal, there is an online petition set in place by the family of Kosilek's deceased wife, pleading for a reversal of the decision.<sup>148</sup> Other forums have expressed support for the decision, which finally gives a voice to transgender prisoners.<sup>149</sup>

#### A. Impact on Future Litigation

The controversial decision reached in *Kosilek* will have an impact on upcoming transgender prisoner litigation. For example, in August 2013, Private Bradley Manning was sentenced to thirty-five years in prison for disclosing government secrets on the notorious website Wikileaks.<sup>150</sup> While the Manning case received mass media attention due to the sensitive national security information spilled on Wikileaks, the Bradley Manning story took an unexpected turn when Bradley expressed his desire to live as a female.<sup>151</sup> After sentencing, Manning went on national television and said, "As I

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145. Adrienne Lu, *For Transgender Detainees, a Jail Policy Offers Some Security*, N.Y. TIMES, Dec. 23, 2011, at A25A; Cara Kulwicki, *Transgender People and the Prison System*, CURVATURE (Dec. 7, 2007), <http://thecurvature.com/2007/12/07/transgender-people-and-the-prison-system/>.

146. Lu, *supra* note 145.

147. See Nathaniel Penn, *Should This Inmate Get a State-Financed Sex Change Operation? What We Owe a Murderer*, NEW REPUBLIC (Oct. 30, 2013), <http://www.newrepublic.com/article/115335/sex-change-prison-inmate-michelle-kosilek-should-we-pay>; Akiba Solomon, *We Can't Afford to Participate in a 'Justice for Some' Culture*, COLORLINES (Sept. 24, 2012, 10:00 AM), [http://colorlines.com/archives/2012/09/online\\_and\\_in\\_life\\_we\\_simply\\_cant\\_afford\\_to\\_participate\\_in\\_a\\_justice\\_for\\_some\\_culture.html](http://colorlines.com/archives/2012/09/online_and_in_life_we_simply_cant_afford_to_participate_in_a_justice_for_some_culture.html).

148. Susan Johnson, *Commonwealth of Massachusetts: Overturn Ruling on Taxpayer-Funded Sex Change for Convicted Murderer*, CHANGE.ORG, <http://www.change.org/petitions/commonwealth-of-massachusetts-overturn-ruling-on-taxpayer-funded-sex-change-for-convicted-murderer>.

149. *NCTE Joins Brief in Michelle Kosilek Case*, ADVANCING TRANSGENDER EQUALITY (Mar. 4, 2013, 2:27 PM), <http://transgenderequality.wordpress.com/2013/03/04/ncte-and-7-other-lgbt-groups-file-brief-in-michelle-kosilek-case/>.

150. Emmarie Huettelman, *'I Am a Female,' Manning Announces, Asking Army for Hormone Therapy*, N.Y. TIMES, Aug. 23, 2013, at A17.

151. *Id.*

transition into this next phase of my life, I want everyone to know the real me ... I am Chelsea Manning. I am a female. Given the way that I feel, and have felt since childhood, I want to begin hormone therapy as soon as possible.”<sup>152</sup> Although Manning’s situation is governed by military law, both *Kosilek* cases will likely play a huge role in the upcoming litigation as Manning seeks hormone therapy.

In considering what will happen to Manning and other transgender prisoners, it is important to note the scope of the *Kosilek* holding is very limited. What set *Kosilek* apart from previous transgender prisoner claims is that *Kosilek* was *prescribed* both hormone therapy and sex reassignment surgery by *licensed DOC physicians*. In Manning’s case, a mere desire to have hormone therapy is not enough without a valid prescription from prison medical staff. Such a prescription may not be easy to obtain. Additionally, as other transgender prisoners try to use *Kosilek* as a means to receive hormone therapy and sex reassignment surgery, they will likely hit the same roadblock. The court’s narrow holding in *Kosilek* requires a prescription for hormone therapy and sex reassignment surgery before an injunction may be ordered.<sup>153</sup>

#### B. The DOC’s Blatant Discrimination

Additionally, the bizarre action on the part of the DOC in *Kosilek II* played a huge role in the outcome of the case. The DOC’s freezing policy, coupled with the bad faith behavior of high-level DOC employees, made a big difference in *Kosilek*’s ability to prove the DOC had violated his rights and would continue to do so. The DOC’s actions were so obviously discriminatory and so obviously directed at *Kosilek*, that the court simply could not ignore the DOC’s behavior. As future litigation arises, the DOC may not be as blatantly discriminatory, which may shut the door for future claims.

#### C. Theories of Punishment

In this case, the DOC was not able to show that significant security concerns arose due to *Kosilek*’s request for sex reassignment surgery. Now that this decision has come down, DOC officials may learn how to better plead security issues in future litigation. The DOC may find a loophole which indicates that deference should be given to security matters, such as

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152. *Id.*

153. *Kosilek II*, 889 F. Supp. 2d 190, 248 (D. Mass. 2012).

sexual violence by other prisoners in the facility,<sup>154</sup> thus quashing transgender prisoner rights claims as they continue to arise.

Furthermore, this case sheds light on the DOC's harsh policies regarding transgender prisoners. There are four theories of punishment accepted by criminal law scholars: retribution, deterrence, incapacitation, and rehabilitation.<sup>155</sup> Retribution is punishment for its own sake, in that the offender deserves to be punished for his or her wrongful conduct.<sup>156</sup> This provides justice for the victim, the victim's family, and society as a whole.<sup>157</sup> The theory of deterrence is that punishment for one's crimes will deter not only the criminal from committing future crimes, but will also deter others from committing that crime, for fear of incurring the same punishment.<sup>158</sup> Incapacitation is used to prevent crime from occurring, in that criminals cannot continue to harm society if they are locked up.<sup>159</sup> Finally, rehabilitation is the theory that criminals in prison can engage in programs to help prisoners learn skills in order to become active, positive members of society.<sup>160</sup> While rehabilitation efforts have previously been deemed unsuccessful, recent studies show rehabilitation programs reduce the risk of falling back into one's old habits by about ten percent.<sup>161</sup>

Retribution, deterrence, and incapacitation are all present in Kosilek's case. Kosilek is being punished for punishment's sake so as to provide some means of justice for the victim's family and society. As other potential criminals see the life sentence imposed on Kosilek, they are likely deterred from making the same poor choices that Kosilek made. Lastly, Kosilek is incapacitated, as he has lost his liberty and will remain behind prison walls until his death. While these first three theories of punishment are established, the theory of rehabilitation is not as clear.

According to the Massachusetts DOC, one of its primary goals is to "effect positive behavioral change in order to eliminate violence, victimization and recidivism."<sup>162</sup> This displays a clear intent to promote rehabilitation of prisoners within the DOC. However, given the abhorrent behavior of DOC staff in *Kosilek*, it appears rehabilitation was never a goal for the care of Kosilek. If the DOC, particularly Dennehy, took the necessary steps to help Kosilek overcome his mental illness, the DOC could have abided by its own mission statement to affect positive behavioral change in

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154. See Richard Edney, *To Keep Me Safe From Harm? Transgender Prisoners and the Experience of Imprisonment*, 9 DEAKIN L. REV. 327, 327–38 (2004).

155. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 34–41 (5th ed. 2009).

156. *Id.* at 38–39.

157. *Id.*

158. *Id.* at 36–37.

159. *Id.*

160. *Id.* at 37–38.

161. *Id.* at 37.

162. MASS. DEP'T OF CORR., <http://www.mass.gov/eopss/agencies/doc/> (last visited Oct. 2, 2014).

Kosilek. Rather, because of the DOC's policies, Kosilek had to sit and suffer for years before any kind of intervention took place.

Critics may assert that Kosilek will serve a life sentence, so why rehabilitate him? Rehabilitation through education and counseling may be viewed as a human right, for rehabilitation is fundamental to human dignity.<sup>163</sup> As a practical matter, rehabilitation efforts to provide inmates serving life sentences with opportunities to further their education and receive counseling have positive effects on the prison system and society as a whole.<sup>164</sup> Scholars note that rehabilitation through education in the prison system is actually a means to lower costs.<sup>165</sup> Robert Worth, a scholar on the prison system, asserts that,

Education may be the most effective way to lower prison costs [because] '[educational] programs keep prisoners busy, with less supervision than you'd need otherwise. Especially with respect to certain types of prison educational programs, you save money by hiring fewer officers in the short run and reducing recidivism in the long run.'<sup>166</sup>

Additionally, rehabilitation is important for those serving life sentences because there are still judicial and legislative remedies. Prisoners may still file habeas corpus claims, or there may be a subsequent change in the law. Those sentenced to life occasionally do return to society, and it is the duty of the prison system to ensure that they will be properly acclimated.

Additionally appalling is that DOC officials specifically sought out former Vatican physicians to treat Kosilek and other transgender inmates.<sup>167</sup> While theories of punishment may include incarceration and retribution, the Eighth Amendment specifically prohibits cruel and unusual punishment. Bringing in Vatican trained officials, who are obviously against sex reassignment surgery, and for the most part, against social reform for the LGBT community in general, is a clear violation of Kosilek's rights, which the court strongly considered in rendering its judgment.<sup>168</sup> The DOC's behavior in handling Kosilek's medical issue goes against all of the theories of punishment because there is no societal interest at stake in creating policies and hiring physicians specifically aimed at denying Kosilek medical care.

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163. See Tabitha Cohen, *College-in-Prison for Inmates Serving Life Sentences*, THE MORNINGSIDE REVIEW, <http://morningsidereview.org/essay/college-in-prison-for-inmates-serving-life-sentences/> (last visited Oct. 2, 2014).

164. *Id.*

165. See Robert Worth, *A Model Prison*, THE ATLANTIC, Nov. 1995, at 38.

166. *Id.* at 40, 42 (internal citations omitted).

167. *Kosilek II*, 889 F. Supp. 2d 190, 221 (D. Mass. 2012).

168. Furthermore, intentionally hiring Vatican oriented physicians solely for the purpose of discriminating against transgender inmates could potentially violate the First Amendment's separation of church and state. See U.S. CONST. amend. I.



#### D. Taxpayer Dollars

Finally, courts must consider whether sex reassignment surgery is a reasonable use of taxpayer dollars. Given the *Kosilek II* holding, Kosilek is now entitled to receive sex reassignment surgery, which will indeed be funded by state tax dollars.<sup>169</sup> The cost of sex reassignment surgery for one person is anywhere from \$12,000 to \$30,000.<sup>170</sup> Hormone therapy, which is also paid by taxpayer dollars,<sup>171</sup> costs about \$200 per month per prisoner.<sup>172</sup> However, as of 1995, the National Association of Attorneys General indicated that inmate civil rights litigation costs the United States upwards of eighty-one million dollars every year.<sup>173</sup>

Some people and politicians may argue that it is not fair for a transgender prisoner to receive sex reassignment surgery while incarcerated, while those of us with our liberty still intact would have to pay for it ourselves. Even as we move towards universal health care, sex reassignment surgery is likely not covered by either the Affordable Care Act or most normal coverage insurance carriers.<sup>174</sup> However, in a case as serious as Kosilek's, where his life and wellbeing are at stake, it is more responsible financially to take care of his medical needs rather than to continue litigation.

In an article about Kosilek specifically, Zack Ford noted that, "Ironically, the state has spent more than double fighting [Kosilek's] lawsuit than what her surgery would have cost in the first place."<sup>175</sup> Jeff Krehely, Vice President for the LGBT Research and Communications Project, asserts that providing transgender prisoners with appropriate medical care is the fiscally responsible response.<sup>176</sup> Massachusetts has spent over ten years litigating claims regarding the medical care of Kosilek.<sup>177</sup> In 2008, *USA Today* reported that Massachusetts spent at least \$52,000 on medical expert testimony.<sup>178</sup> This cost alone is at least twice as much as sex reassignment surgery would have been in the first place.

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169. Jess Bidgood, *Massachusetts: Sex Change Is Ordered for Inmate*, N.Y. TIMES, Sept. 5, 2012, at A19.

170. Aleccia, *supra* note 144.

171. *Id.*

172. *Id.*

173. 141 CONG. REC. 26,548 (1995) (statement of Sen. Bob Dole).

174. Amanda Marcotte, *Rep. Paul Broun Fears Obamacare Will Turn Him Female*, SLATE (Apr. 9, 2013, 12:03 PM), [http://www.slate.com/blogs/xx\\_factor/2013/04/09/rep\\_paul\\_broun\\_tells\\_voters\\_obamacare\\_mandates\\_sex\\_change\\_operations.html](http://www.slate.com/blogs/xx_factor/2013/04/09/rep_paul_broun_tells_voters_obamacare_mandates_sex_change_operations.html).

175. Ford, *supra* note 143.

176. Jeff Krehely, *Massachusetts Senate Candidates Fail To Understand Importance Of Funding Transgender Health Services*, THINK PROGRESS (Sept. 10, 2012, 10:45 AM), <http://thinkprogress.org/lgbt/2012/09/10/819091/massachusetts-senate-candidates-fail-to-understand-importance-of-funding-transgender-health-services/>.

177. Litigation for *Kosilek I* began in November of 2001 and continues today. See pleadings in *Kosilek I*, 889 F. Supp. 2d 190 (D. Mass. 2012).

178. Associated Press, *supra* note 28.

United States District Chief Judge Mark L. Wolf, who decided both *Kosilek I* and *Kosilek II*, will award over \$700,000 in legal fees to the attorneys of Kosilek.<sup>179</sup> Attorneys for Kosilek indicated that they would drop the request if the DOC would simply comply with the court ordered injunction, rather than continue to litigate *Kosilek II* through the appeal process.<sup>180</sup> According to Judge Wolf, “The repeated violation of constitutional rights of prisoners. . . costs taxpayers money that is needed for other purposes.”<sup>181</sup> Given sex reassignment surgery costs between \$7,000 and \$50,000,<sup>182</sup> the fiscally savvy choice seems apparent. Such funds could be much better used in another government program or even as a means to lower tax rates. Given the narrow criteria transgender prisoners need to attain sex reassignment surgery, taxpayer dollars are much better spent in providing for their requested and needed medical care than to continue endless, expensive litigation. As litigation relating to Kosilek continues to this day, the State continues to cash out more and more taxpayer dollars for a problem that could have been solved long ago.

## V. CONCLUSION

The U.S. District Court properly ordered an injunction requiring sex reassignment surgery for Kosilek. Given the specific facts and abhorrent policies of the DOC in this case, the district court made the correct decision in providing Kosilek with much needed medical care for his severe GID. This holding was extremely narrow, and, therefore, will likely not open the floodgates for future litigation. However, *Kosilek II* will be heavily relied upon as transgender prisoners seek sex reassignment surgery in the future. Further, it is clear from the case that the DOC did not abide by its own policy of rehabilitation. Hopefully, the DOC, both in Massachusetts and elsewhere, will learn from its now criticized policies and change its standards. Finally, given statistical data, it is clear that sex reassignment surgery is not an unreasonable use of taxpayer dollars, given the enormous costs of litigating cases such as *Kosilek I* and *II*. In evaluating this case from an objective, yet humane, point of view, it is clear that Kosilek has a significant medical need, and fortunately, the court set politics aside and addressed that issue appropriately. While this is a polarizing issue, many people lose sight of the fact that although these men and women are incarcerated for serious crimes, they are still people, just like the rest of us. Everyone has a right to receive medical care and to be free from cruel punishments, even the criminally

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179. Milton J. Valencia, *Kosilek's Lawyers to be Paid \$700,000*, BOSTON GLOBE (Dec. 19, 2012), <http://www.bostonglobe.com/metro/2012/12/19/kosilek/4J0TDzj0U5SfJvEPU97J4I/story.html>.

180. *Id.*

181. *Id.*

182. *Id.*

convicted. In a system where transgendered prisoners are often overlooked, the *Kosilek* cases show that our courts are making an effort to ensure that all prisoners are equal.