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Should Transgender Men and Women be Allowed to Get Sex Reassignment Surgery While Incarcerated?

Keimer Raymond

The answer to whether transgender men and women should be allowed to get sex reassignment surgery (“SRS”) while incarcerated hinges on the purpose of punishment. Many experts on criminal law argue that the purpose of punishment is to control crime.¹ Other purposes of punishment include deterrence, retribution, personal reform, and protection of the public.² If the purpose of imprisonment is one or more of the reasons above, then whether transgender men and women should be allowed to get sex reassignment surgery while incarcerated has the seemingly straightforward answer, which is, that SRS is impermissible. However, considerations like gender dysphoria—a diagnosis marked by an incongruence between one’s expressed gender and assigned gender at birth³—makes the answer to whether SRS should be allowed for incarcerated transgender prisoners less clear.

GENDER IDENTITY DYSPHORIA PRESENTS A SERIOUS MEDICAL NEED

Gender dysphoria is a condition in which individuals identify emotionally and psychologically as a gender different than the one they were assigned at birth.⁴ If it is left untreated, a person could self-castrate or self-mutilate, and there is an increased risk of committing suicide.⁵ The accepted course of treatment for alleviating the symptoms of gender dysphoria involves allowing the individual to live as his or her preferred gender.⁶ This treatment includes: (1) changes in gender expression and role; (2) dressing, grooming, and outwardly

¹ 2011 Federal Sentencing Guidelines Manual, Oct. 9, 2015, UNITED STATES SENTENCING COMMISSION, <http://www.ussc.gov/guidelines-manual/2011/2011-1a1>.

² Andrew G. Coyle, *Prison*, Mar. 18, 2014), *available at* <http://www.britannica.com/topic/prison> (hereinafter referred to as “The Big 4”)

³ *Diamond v. Owens*, No. 5:15-cv-50-MTT-CHW at *4 (M.D. Ga. 2015).

⁴ *Transgender inmate Ashley Diamond released from Georgia prison after pressure from SPLC lawsuit*, SOUTHERN POVERTY LAW CENTER, Oct. 11, 2015, <https://www.splcenter.org/news/2015/08/31/transgender-inmate-ashley-diamond-released-georgia-prison-after-pressure-splc-law-suit>.

⁵ *Diamond v. Owens*, No. 5:15-cv-50-MTT-CHW at *4 (M.D. Ga. 2015).

⁶ *Id.*

expressing the preferred gender identity; or (3) hormone therapy treatment; and (4) sex reassignment surgery.⁷

In assessing whether the purpose of punishment and avoiding deliberate indifference—via adequate medical treatment—can be reconciled, *Diamond v. Owens* sheds light on how one court is addressing gender dysphoria.⁸ The case dealt with a transgender woman, Ashley Diamond, who had difficulty accessing hormone treatment while in prison.⁹ Because of this difficulty, she filed a complaint alleging that the Department of Corrections violated the Eighth Amendment prohibition against cruel and unusual punishment.¹⁰ The Department of Justice filed a statement of interest in support of the lawsuit and claimed that the “freeze-frame” policy, that prohibited treatment for inmates beyond the care they received prior to incarceration, was unconstitutional.¹¹ Although the defendant—Georgia officials—filed a motion to dismiss, the court denied the motion and allowed the case to move forward on the merits.¹²

Diamond’s plight is of historical significance in that this pending litigation potentially opens the door to much more lawsuits against other State Department of Corrections facilities for not allowing transgender prisoners’ access to SRS as a medically necessary treatment. In fact, Shiloh Quine—a transgender prison inmate—filed a lawsuit against the state of California claiming that SRS was a medically necessary treatment.¹³ The court granted her permission to get SRS as part of a settlement with the state.¹⁴ However, granting every transgender prisoner suffering with gender dysphoria access to SRS treatment appears unfair when prisons overall are ill equipped to respond to the mental health needs of the general prison population.¹⁵ Prisons were never designed as facilities for the mentally ill and currently, most of its mental services are deficient—crippled by understaffing, insufficient facilities, and limited pro-

⁷ *Id.*

⁸ *Diamond v. Owens*, No. 5:15-cv-50-MTT-CHW (M.D. Ga. 2015)

⁹ *Id.* at 5.

¹⁰ *Id.* at 1.

¹¹ SOUTHERN POVERTY LAW CENTER, *supra* note 8

¹² *Id.*

¹³ Paige St. John, *In a First, California Agrees to Pay for Transgender Inmate’s Sex Reassignment*, LOS ANGELES TIMES, Aug. 10, 2015, <http://www.latimes.com/local/california/la-me-in-mate-transgender-20150810-story.html>.

¹⁴ *Id.*

¹⁵ *Mental Illness, Human Rights, and US Prisons*, HUMAN RIGHTS WATCH, Sept. 22, 2009, <https://www.hrw.org/news/2009/09/22/mental-illness-human-rights-and-us-prisons>.

grams.¹⁶ Furthermore, since SRS only helps alleviate the symptoms, just as hormone therapy or other ameliorative measures do,¹⁷ resources would be better spent assuring that transgender men and women suffering from gender dysphoria get consistent access to hormone therapy and a safe and respectful environment to serve out their sentences.

HOW ARE ILLINOIS STATE PRISONS AND COOK COUNTY JAIL ADDRESSING GENDER IDENTITY?

At Cook County jail, there is a policy in place that permits transgender men and women to express their gender identity.¹⁸ This is one of the medically accepted options for treating the psychological and medical needs of prisoners who suffer from gender dysphoria.¹⁹ Also, Illinois State Prisons are required to provide hormone therapy in accordance with Seventh Circuit case law.²⁰ Providing hormone therapy is another medically accepted option available in treating gender dysphoria.²¹

In practice, however, there are some instances where Cook County and Illinois State Prison policies are less consistently applied. For example, Eisha Love—a transgender woman from the Chicago neighborhood of Austin—was detained for over three-and-a-half years without trial for defending herself against an assailant.^{22, 23} Love was housed with a male roommate in all-male Division 9 of Cook County Jail, was provided inconsistent hormone treat-

¹⁶ *Id.*

¹⁷ *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, Oct. 9, 2015, http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf

¹⁸ Adrienne Lu, *For Transgender Detainees, A Jail Policy Offers Some Security*, Dec. 22, 2011, <http://www.nytimes.com/2011/12/23/us/for-transgender-detainees-a-jail-policy-offers-some-security.html>.

¹⁹ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 21

²⁰ *Meriwether v. Faulkner et al.*, 821 F. 2d 408 (7th Cir. 1987) (case where prisoner suffering from GID had received treatment before incarceration, underwent several assaults while in prison, and was denied treatment. The Court held that the prisoner had a valid claim for treatment of her condition); *Fieldset et al., v. Smith et al.*, 653 F. 3d 550 (7th Cir. 2011) (case where the 7th Cir. overruled the Wisconsin law prohibiting hormonal treatment and SRS for prisoners suffering with GID. The Court rejected defense's arguments that the ban on hormone treatment was justified in preserving prison security. The Court reasoned that denying effective treatment for a serious medical condition that served no penological purpose constituted torture).

²¹ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 21

²² Gretchen Rachel Blickensderfer, *Trans* woman claims self-defense in case*, WINDY CITY TIMES, Sept. 17, 2014, <http://www.windycitymediagroup.com/lgbt/Trans-woman-claims-self-defense-in-case/49008.html>

ment, and had limited access to make-up, hair care, and other aesthetic services. Love was also subjected to verbal taunts from guards: initially housed with two other trans women in the Protective Custody tier, “It took a toll. . . They would look at us as clowns. The respect level was none. They would address me as ‘him.’ I would let them know I was trans but it was their option to choose to say what they wanted to say. It was more not caring at all. I had to tolerate it.”²⁴ As her ordeal dragged on, this verbal abusiveness turned into self-loathing²⁵ and was compounded by her being a transgender woman of color.²⁶

Still, both policies redress valid concerns that not allowing access to treatments would violate the Eighth Amendment prohibition on cruel and unusual punishment (where prison officials exhibit deliberate indifference to prisoners serious medical needs)²⁷ and instead require prison officials to remedy the discomfort and distress that transgender men and women feel, caused by the discrepancy between their gender identity and the gender they are assigned at birth. However, in light of the progressive direction that the Illinois State Department of Corrections pursues, it seems that there will always be criticism that it is not doing enough unless and until transgender men and women are allowed access to *all* gender dysphoria treatment available, including SRS.

²³ Gretchen Rachel Hammond, *Transgender woman released from jail after nearly 4 years without trial*, WINDY CITY TIMES, Dec. 17, 2015, <http://www.windycitymediagroup.com/lgbt/Trans-woman-claims-self-defense-in-case/49008.html>

²⁴ Gretchen Rachel Hammond, *In her own words: Eisha Love looks back*, WINDY CITY TIMES, Dec. 19, 2015, <http://www.windycitymediagroup.com/lgbt/Transgender-woman-released-from-jail-after-nearly-4-years-without-trial-/53731.html>

²⁵ Blickensderfer, *supra* note 26 (“But then there are moments when a deep sadness overtakes her—when she thinks of her siblings growing up without their older sister and her mother who is finding it increasingly harder to keep faith in her daughter’s release. The self-loathing of Love’s transgender identity takes over in words that may seem shocking to the advocacy groups who have recently come forward to loudly declare unity in the battle for transgender rights, but are born out of the neighborhood of Austin and the lives that so many transgender women of color live and lose there. ‘If I wasn’t a tranny,’ Love said. ‘None of this would have happened to me’”)

²⁶ *Id.* (quoting Channyn Lynne Parker) (“Eisha is [a] transgender woman of color born on a side of town that nobody particularly cares about. . . I believe that if Eisha had been born in another zip code, if she was not a person of color, her case would be a lot more promising. But, because she is a transgender woman, nobody is giving her the same privileges that that would be given to anybody else fighting for justice. She is part of an expendable group of people who are just trying to survive, so nobody is putting her case into a proper context—she was just trying to escape with her life”).

²⁷ *Kosilek v. Spencer*, 774 F.3d 63, 80 (1st Cir. 2014).

As David Fischer, Senior Policy Analyst for Health and Medicine Policy Research Group, so eloquently stated, “a transgender person’s experience is personal and no one should be able to say what or what is not valid [treatment].”²⁸ While this is true, it is time that the demand to assure that transgender men and women get consistent access to individualized gender dysphoria mental health treatment include a discussion about the inherent inequity that such redress will have on the general prison population whose mental health is not adequately addressed. It is time to seriously consider whether the purpose of punishment can be reconciled with allowing transgender men and women prisoners the highest level of individualized gender dysphoria treatment, including SRS.

²⁸ Phone Interview with David Fischer, Senior Policy Analyst-Court-Involved Youth Project, Health & Medicine Policy Research Group (Oct. 8, 2015).