Laws **2013**, *2*, 428–439; doi:10.3390/laws2040428

OPEN ACCESS

laws

ISSN 2075-471X
www.mdpi.com/journal/laws

Article

Transgendered Prisoners in the United States: A Progression of Laws

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Received: 8 October 2013; in revised form: 29 October 2013 / Accepted: 5 November 2013 / Published: 12 November 2013

Abstract: In 1976, prisoners acquired the right to medical treatment from the U.S. Supreme Court through the Eighth Amendment to the United States Constitution, which forbade, in part, cruel and unusual punishment. The following year, a Fourth Circuit Court of Appeals ruled that medical treatment included psychiatric or mental health treatment. These rulings applied to general prisoners, but not initially prisoners who suffered from gender identity disorder. Courts ruled then that gender identity disorder was not a serious mental disorder—a critical component of the right to medical care and mental health treatment. Later, a few appeals courts ruled that gender identity disorder was a serious mental disorder, triggering a prisoner's right to medical care and mental health treatment for this disorder. Prisoners with gender identity disorder have litigated for sex realignment surgery as part of their treatment, which prison administrators have balked. The latest ruling unequivocally ordered the Massachusetts Department of Corrections to give a prisoner suffering from gender identity disorder sex reassignment surgery, but the prison system has appealed. This ruling, and previous rulings, has furthered policy towards transsexual prisoners.

Keywords: gender identity disorder; transsexual prisoners; cruel and unusual punishment; the right to treatment

1. Introduction

In 1976, prisoners acquired the right to medical treatment from the U.S. Supreme Court through the Eighth Amendment to the United States Constitution, which forbade, in part, cruel and unusual treatment [1]. In 1977, the Fourth Circuit Court of Appeals ruled that medical treatment included

psychiatric or mental health treatment [2]. The later ruling spread to other circuits, cementing the right to mental health treatment for prisoners suffering from seriously mental illness [3–11]. These rulings initially applied to general prisoners, but not prisoners suffering from gender identity disorder. Courts ruled then that gender identity disorder was not a serious mental disorder—a critical component of the right to mental health treatment. Later, courts reversed themselves, ruling that gender identity disorder was a serious mental disorder, triggering a prisoner's right to mental health treatment.

Prisoners with a diagnosis of gender identity disorder have been appealing to the courts for sex realignment surgery as part of their treatment [12–14], but prison administrators and state legislators have criticized such treatment, declaring it was unfair to tax payers [15,16]. This article explored the development in the laws with regard to prisoners with a diagnosis of gender identity disorder. First, this article explained briefly how prisoners acquired the right to mental health treatment, linking it to the Eighth Amendment prohibition against cruel and unusual punishment. Next, this article discusses court decisions recognizing gender identity disorder as a serious mental disorder and court decisions that do not explicitly say so. Additionally, this article discusses states using civil commitment as a means of confinement of individuals with gender identity disorder when some offenders are charged with sex offenses.

2. The Foundation for Prisoners Acquiring the Right to Treatment

The foundation for prisoners acquiring the right to treatment lies in a U.S. Supreme Court ruling in 1976 regarding cruel and unusual punishment—a very broad concept. When colonial America devised its Constitution, it took the prohibition against cruel and unusual punishment from the English Constitution, but American delegates did not define it. Originally, the prohibition against cruel and unusual punishment was used in early court decisions involving capital punishment involving hangings, shootings and the electric chair. All these decisions held executions by these methods not to be cruel and unusual punishments. In 1910, the U.S. Supreme Court held for the first time that a punishment constituted cruel and unusual punishment, declaring that the "Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice" ([17], p. 350). This involved a federal official who had been convicted of destroying public records and given a draconian prison sentence (*i.e.*, he was ordered chained while he was imprisoned, would have no visitors and could not marry when he was released). Later, the U.S. Supreme Court stated that the Eighth Amendment "must draw its meaning from the evolving standard of decency that marks the progress of a maturing society" ([18], p. 101). In this case, a military tribunal convicted a soldier of treason, and the panel tried to give him, in addition to a prison sentence, a loss of his citizenship. Additionally, then, later, the U.S. Supreme Court ruled that when pain is inflicted upon prisoners by the State, the pain becomes violative of the Eighth Amendment if the pain serves no penological interests or objectives [19]. With these cases as a foundation, federal judges, including the U.S. Supreme Court, moved to other areas.

In *Gamble v. Estelle* (1976), a Texas prisoner claimed he injured his back on a work detail. The doctor prescribed aspirins for this prisoner. The prisoner, instead, thought the doctor should have ordered a back X-ray and thought that he had been deprived of medical treatment. This prisoner

appealed to the U.S. Supreme Court, where he lost his appeal. However, the U.S. Supreme Court laid out how an inmate could construct a valid case under the Eighth Amendment. Essentially, a prisoner contending that he or she had been deprived of medical treatment in violation of the Eighth Amendment's prohibition against cruel and unusual punishment must prove that prison officials were deliberately indifferent to a serious medical problem [1]. Specifically, the U.S. Supreme Court stated that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983. The Civil Rights Act 1871, section 1983, is the vehicle for citizens or prisoners to sue in federal court when their constitutional rights have been violated by State actors. The following year, the Fourth Circuit Court of Appeals considered the case of a Virginia prisoner, denied parole because of psychological problems. The prisoner argued that he had a right to mental health or psychological treatment. Like Gamble, Bowring lost his appeal. Guided by the ruling in *Gamble*, the judges stated that deliberate indifference to a prisoner's serious medical needs included mental health or psychiatric problems and only such would constitute cruel and unusual punishment in violation of the Eighth Amendment [2]. Going further, the judges on the Fourth Circuit Court of Appeals stated that "We therefore hold that Bowring (or any other prison inmate) is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial" ([2], p. 47). The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis, and the essential test is one of medical necessity and not simply that which may be considered merely desirable [2].

3. Cases in Which Gender Identity Disorder Specifically Were Not Addressed by the Courts

Courts have not always directly addressed the issue of gender identity disorder and whether it was serious or not serious. Instead, courts dismissed cases for other grounds, such as the lack of proof of the prisoners suffering from gender identity disorder or the prisoners disagreeing with the prisons' treatment efforts. In 2003, the Tenth Circuit Court rendered a decision in *Spicer, a.k.a. Alexis R. Bell v. Terhune et al.* affirming the dismissal of her lawsuit from a California district court [20]. Spicer brought suit against the prison doctor after she was released from prison, arguing that the prison doctor stopped hormone treatment for her gender identity disorder and contended this cessation constituted deliberate indifference. The prison doctor stated that Spicer's hormone treatment was stopped because Spicer had gained 29 pounds in six weeks. Hence, the court ruled that differences of opinions between a prisoner and a medical doctor do not constitute deliberate indifference, and Spicer did not provide any expert opinion regarding her treatment being inadequate [20].

In like manner, a Colorado inmate brought suit against the Colorado Department of Corrections, challenging the Department's written policy regarding the treatment of prisoners who had been

diagnosed with gender identity disorder [21]. She contended that the policy violated the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment, which guaranteed individuals equal protection. Like in the Spicer's case, the Tenth Circuit Court of Appeals stated that a prisoner suffering from gender identity disorder cannot make out a valid case of deliberate indifference under the Eighth Amendment when the prisoners disagree with the Department's treatment. The Department had a policy in which it continued hormonal treatment for individuals coming to prison who were already taking hormonal treatment prior to incarceration. In an alleged violation of the equal protection clause, which does not involved a fundamental right or a suspect class, the proper analysis was rational basis, which deferred to the Department's rational reason for its action [21]. However, the court did not state in its opinion what the reason was that was given by the Department. Other state departments of corrections have similar policies of not giving hormonal treatment for prisoners first diagnosed of gender identity disorder in prisons, but will give hormonal treatment to prisoners who were taking hormonal treatment prior to incarceration [15].

Additionally, a prisoner named Dee Deidre Farmer filed several lawsuits over issues with gender identity disorder. In one of her earlier lawsuits, Farmer sued, claiming that the prison's medical director was deliberately indifferent to her gender identity disorder. Incarcerated at the federal Bureau of Prison (BOP), Famer wrote several letters to the Medical Director requesting treatment. The Medical Director quoted BOP's policy, which was to maintain a transsexual prisoner at the level of change existing prior to incarceration or admission. If the Clinical Director concluded that either progressive or regressive treatment changes were indicated, the Medical Director had to approve these changes prior to implementation. Moreover, the use of hormones to maintain secondary sexual characteristics may be continued at about the same levels as prior to incarceration [22]. The Medical Director would repeat his responses every time Farmer wrote to him. The Medical Director argued that the case should be dismissed, because he was entitled to qualified immunity. Qualified immunity is a defense to a lawsuit when the law has not been established in the area under dispute or the defendant has not violated a law that a reasonable person should know [23]. The U.S. District Court denied the motion for qualified immunity, but the Court of Appeals for the District of Columbia overruled the District Court on the issue of qualified immunity [22]. Simply, the law involving transsexuals in prison or gender identity disorder was not well established in 1998.

In Farmer's second suit, she contended that the prison's policy of providing transsexuals hormonal treatment at the level prior to incarceration violated her rights to equal protection of the law, as other prisoners who were suffering from schizophrenia, depression or manic-depression or other mental health issues were treated differently. In addition, a transsexual prisoner had to have proof that she was taking hormones prior to incarceration. To state a valid claim under the Equal Protection Clause, a plaintiff must meet three requirements. First, the plaintiff must show that she has standing to bring the claim. Second, once she has shown standing, the threshold inquiry in evaluating an equal protection claim is to determine whether a person is similarly situated to those persons who allegedly received more favorable treatment. Third, the plaintiff must show that the requisite relationship between the disparate treatment and the government interest does not exist [24]. Moreover, a defendant can defend a claim by providing the court with a rational basis for its policy. Farmer had been transferred to a Maryland prison and filed another lawsuit, contending she was denied due process in placing her in isolation and being subjected to cruel and unusual treatment. Due process regarding segregation of

prisoners constitutes a hearing, the specific policy or rules that the inmate has violated, the right to respond to the allegation and an impartial tribunal. However, the District Court dismissed her lawsuit [25].

In another lawsuit, a New Jersey prisoner sued several administrators and clinical professionals, contending that, as a prisoner suffering from gender identity disorder, that her rights were violated by inadequate treatment and prevention of violence from other prisoners. Both the U.S. District Court and the Third Circuit Court of Appeals rejected her claims [26].

4. Cases in Which Gender Identity Disorder Was Accepted

Although several prisoners who had gender identity disorders or who were transsexuals had suffered adverse decisions in the courts contesting their treatments, similar prisoners have won several cases in the courts. In 1987, the Seventh Circuit Court of Appeals made a critical ruling in reversing an adverse decision against a prisoner suffering from gender identity disorder. An Indiana prisoner brought suit, challenging her medical care and conditions of confinement. She had been receiving hormone treatment before her incarceration. She had undergone frequent assaults from other inmates, and she was denied treatment for her gender identity disorder. Rejecting the U.S. District Court, the Seventh Circuit Court of Appeals ruled that this prisoner did state that she was suffering from a serious medical condition and was entitled to treatment for her condition [27]. In another case, the Seventh Circuit Court of Appeals also ruled in favor of a transsexual prisoner, stating that she deserved protection and that transsexualism or gender identity disorder presented a serious medical need [8].

Perhaps seeing the precedent from the Seventh Circuit Court of Appeals, the Wisconsin legislature passed a law prohibiting hormonal treatment and sex reassignment surgery for prisoners suffering from gender identity disorder, due to prohibited costs to the taxpayers. Three transsexual prisoners challenged this statute. A U.S. District Court invalidated this statute and held that it was unconstitutional [28]. The Seventh Circuit Court of Appeals affirmed the District Court [28]. Counsel for the defendants disclaimed any argument that the statute, which prohibited hormone therapy and sexual reassignment surgery, was justified by cost savings. On appeal, the attorney for the defendants abandoned the contention that costs were a legitimate defense to these prisoners' cases. The defendants produced no evidence that another treatment was an adequate replacement for hormone therapy. The court stated that denying effective treatment for a serious medical condition that served no valid penological purpose constituted torture [28]. Although the case law permitted the corrections department to provide prisoners with some treatment, the evidence at trial indicated that the prisoners could not be effectively treated without hormones. According to the Seventh Circuit, "the statute was irrelevant to inmates who were not diagnosed with gender identity disorder and in medical need of hormones, and any application of the statute would necessarily have violated the Eighth Amendment" ([27], p. 550). The defendants argued unsuccessfully that the statute was justified by the State's interest in preserving prison security, but produced no evidence of any security concerns associated with a ban on hormone treatment [26]. The Seventh Circuit Court of Appeals consists of Illinois, Indiana and Wisconsin and, thus, the ruling in the case is binding on all prisons in these states. In addition, the defendants requested the U.S. Supreme Court grant certiorari, which is the application for the clerk of the Seventh Circuit to

submit the records in the case for an appeal to the U.S. Supreme Court. Because the U.S. Supreme Court is a discretionary court, the Court can refuse to hear an appeal. The Court denied certiorari [29].

Ophelia Azriel De'lonta, an inmate in the Virginia prison system, took two appeals to the Fourth Circuit Court of Appeals. De'lonta had a compulsion to mutilate herself, because she suffered from gender identity disorder, which the court said is also known as gender dysphoria or transsexualism. She contended in her lawsuit that the medical director and correctional officers were deliberately indifferent to her medical situation. The U.S. District Court dismissed the lawsuit and ruled that the defendants were entitled to qualified immunity and that De'lonta had been given some treatment. However, the Fourth Circuit Court reversed, stating that some defendants were not entitled to qualified immunity. Furthermore, the court ruled that the defendants admitted that the treatment provided to De'lonta may have alleviated her condition. However, the defendants "did not clearly demonstrate that the treatment was provided for that purpose or that it was deemed to be a reasonable method of preventing further mutilation" ([30], p. 360). De'lonta's lawsuit resulted in a settlement between her and the Virginia officials. She was given psychological counseling, hormone therapy and was allowed to dress as a woman, but this treatment had not alleviated her constant mental anguish. However, the GID (*i.e.*, Gender Identity Disorder) treatment guidelines recommended that sex reassignment surgery could be necessary for severe GID after one year of the first two stages. The Fourth Circuit Court of Appeals reversed the adverse decision of the U.S District Court. While the court remanded to the U.S. District for reconsideration consistent with the decision of the Fourth Circuit Court of Appeals, the decision hinted that De'lonta may have to be given sex realignment surgery [31].

In 2012, the Sixth Circuit Court of Appeals rendered a decision involving a prisoner in Michigan suffering from gender identity disorder. Prior to imprisonment within the Michigan Department of Corrections, the prisoner had received silicone injections to increase her breast size, but these injections had caused incessant, severe pain in her breasts during her imprisonment. The doctors served on a medical committee at the institution. The doctors in 2005 denied surgical consultation, and this denial may have constituted deliberate indifference. Thus, a jury may have found one doctor acted with deliberateness tantamount to intent to punish by denying the surgical consultation in 2008. As a result, the prisoner's case should not have been dismissed by the U.S. District Court and, thus, was a valid case to be put before a jury [32].

A more definitive ruling occurred in a U.S. District Court in Massachusetts regarding what should be done medically for a prisoner suffering from gender identity disorder. A judge wrote a 102-page decision that the Massachusetts Department of Corrections had been deliberately indifferent to Michelle L. Kosilek by not giving her sex reassignment surgery. The Department's defense was that it denied Kosilek sex reassignment surgery because of security concerns. However, Judge Wolf stated that the real reason that surgery was denied was because of the Department's fear of controversy, criticism, ridicule and scorn. Judge Wolf ordered the Department to give Kosilek sex reassignment surgery [33]. However, the department has indicated that it would appeal Judge Wolf's decision to the First Circuit Court of Appeals [34]. Ultimately, the U.S. Supreme Court may be asked to consider this case.

The above cases involved prisoners who had been convicted previously of crimes and incarcerated in penal institutions or prisons. They wanted treatment or surgery while they were serving their prison sentences. However, some individuals have been civilly committed to mental institutions. In order for

a free citizen to be committed to a mental institution and taken from society, he or she must be both seriously mentally ill and currently dangerous to self or others [35]. When one of these conditions dissipates, he or she must be freed [35]. This is a cardinal law in mental health civil proceedings.

However, there is a different law for some sex offenders, and some sex offenders who were in prison and nearing completion of their sentences may be committed to mental institutions, allegedly for treatment. The purpose of this law is to appease the public, who clamored for some sex offenders being confined or imprisoned longer [36]. Because a prisoner who has completed his or her criminal sentence must be released at the expiration of a sentence, the only way to keep him or her confined is to use the mental health system and its laws. States came up with a variety of labels, such as "sexually violent predator", "sexually violent offender" or "psychopathic personality disorder", and got mental health professionals to testify that the person the system wanted confined longer was currently a danger. Sometimes, a prisoner would only be transferred to another part of the prison system with the designation that it is a treatment center or unit.

In one case, Keith W. Elmore told a coworker that he had a gift for her husband. Upon arriving at her house, he put a rope around her neck and told her to undress. She asked him to remove the rope, declaring she would submit. When he removed the rope and went to get the gift, she ran from the apartment and called the police. Elmore was civilly committed to a mental health institution as a sexually violent predator. While Elmore was in the mental health institution, a mental health professional diagnosed Elmore as suffering from delusional disorder, sexual sadism, gender identity disorder and a personality disorder not otherwise specified with antisocial features. Elmore, nonetheless, sought to be released from the mental health system, arguing that he no longer met the definition as a sexually violent predator. He also sought a change of name to Rebecca, and the judge granted the name change. Furthermore, the trial judge agreed and ordered a new trial on the issue of her diagnosis. However, the Court of Appeals for the State of Washington reversed, ruling that the trial judge had improperly considered Elmore's age as a factor in granting a new trial [37].

In a Florida case, a man was civilly committed as a sexually violent predator and challenged his commitment because he had a disability and his commitment violated parts of the Americans with Disability Act. Under the Act, a qualified person with a disability had the right to be confined in the least restrictive facility. The defendant in this case was disabled. His appeal was based on five challenges to his civil commitment under the Jimmy Ryce Act, which permitted the civil commitment of some sex offenders. The Florida Appellate Court ruled that the statutory definition of a sexually violent predator rendered less restrictive alternatives inapplicable. The statute required a determination by clear and convincing evidence that the person was a sexually violent predator. In other words, the person suffered from a mental abnormality or personality disorder that made the person likely to engage in acts of sexual violence, if not confined in a secure facility for long-term control, care and treatment. Specifically, according to the Vocational Rehabilitation Act, which defined disability, persons diagnosed with sexual disorders were excluded. Individuals with a disability expressly were excluded with secondary diagnoses of transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders. Hence, if the person was amenable to less restrictive alternative treatment, he or she did not meet the statutory definition of a sexually violent predator and was not subject to commitment under the Jimmy Ryce Act. Therefore, the Court of Appeals upheld the trial judge [38].

The State of Connecticut civilly committed William Karl Olsen to a mental health institution. After Olsen's commitment had ended, Connecticut filed an amended petition to extend the commitment of him under the Sexually Violent Predators Act (SVPA). The SVPA provides for the involuntary civil commitment for treatment and confinement of an individual who is found, by a unanimous jury verdict and beyond a reasonable doubt, to be a sexually violent predator. Olsen had committed a number of sexual assaults. A jury found the allegation that Olsen was a sexually violent predator to be true. The trial court committed Olsen to the state Department of Mental Health for an indeterminate term. On appeal, Olsen raised the following issues: (1) the evidence was insufficient to show that he was currently dangerous; (2) the trial court's response to a juror question was improper; (3) indeterminate commitment under the SVPA violates his constitutional right to equal protection; and (4) the SVPA violates his due process rights, the *ex post facto* and double jeopardy clauses and the Eighth and Fourteenth Amendments of the federal constitution. Mental health professionals diagnosed Olsen with the mental disorders of sexual sadism, gender identity disorder and a personality disorder. The appellate court reversed the order committing to Olsen's custody and remanded the case to the lower court to decide if Olsen's equal protection argument was valid [39].

The State of Connecticut civilly committed Anthony J. Tryzna because he was believed to be incompetent for trial. Tryzna was charged with counts of threatening, breach of peace and assault in the third degree following two separate incidents involving his mother. Mental health professionals disagreed with whether Tryzna was competent or incompetent for trial. Tryzna's diagnoses were dysthymic disorder, obsessive compulsive disorder, factitious disorder, gender identity disorder, sexual masochism, alcohol abuse and cannabis abuse. The court concluded that the defendant was not competent to stand trial and that there was not a substantial probability that he would attain competency within the statutory time. The court ordered Tryzna civilly committed [40].

Sandy Battista had been convicted of a rape of a child, kidnapping and robbery. After serving the sentence of those crimes, the State of Massachusetts had her involuntary committed to the Massachusetts Treatment Center for Sexually Dangerous Persons. This treatment center was within the Massachusetts Department of Corrections, and Massachusetts mandated Battista be separated from offenders participating in treatment programs and those persons awaiting adjudication as sexually dangerous persons. As a civilly committed person, Battista occupied a different group from the other two categories of persons. However, Battista initiated lawsuits when she was a prisoner, requesting treatment of hormone therapy and feminine clothing, but the Department of Correction ignored her requests. The consultant working for the Department of Corrections likened Battista's requests and claims to elective procedures that were similar to tummy tucks and liposuction. However, the University of Massachusetts Correctional Health Program, the Department of Corrections' medical program, disagreed with the Department. This program strongly supported that Battista was suffering from gender identity disorder and asserted that harm could come to Battista, who had sought to mutilate herself without treatment. The Health Program stated that hormone therapy was medically necessary. Disliking the Health Program's opinion, the Department of Corrections hired a different gender specialist, and the gender specialist opined that hormone treatment might be appropriate in addition to other therapies [41].

In 2006, Battista sought a preliminary injunction, but the U.S. District denied it, ruling that Battista failed to show that the Department had been deliberately indifferent to her medical needs. Although

medical professionals continued to assess Battista's medical needs and recommended hormone therapy, the Department said that it would not continue hormone treatment unless security concerns were addressed. Reportedly, the Department was concerned about Battista's feminine appearances being at risk factor for being attacked in an all-male facility. However, in 2008, the U.S. District Court considered the report inadequate and cursory and issued an injunction requiring the Department to give Battista psychotherapy and women's clothing. In addition, the U.S. District Court ordered the Department to provide a monthly report on Battista's condition and to provide a recommendation after hormone therapy was provided to Battista for six months. The First Circuit Court of Appeals adopted a different and lenient standard because she was civically committed and upheld the injunction [41].

In a similar violent crime involving a prisoner who was committed to a mental health facility, Richard S. filed suit over her confinement in a mental health facility. Richard S. met a fifteen-year-old boy and took him home for sex. Allegedly, while the boy was sleeping, Richard S. stabbed the boy three times with a pocket knife. At that time, Richard S. was on probation for manslaughter for killing a man after they had sex. Instead of sustaining a criminal conviction, Richard S. was found Not Responsible by Reason of Mental Disease or Defect (NRRMDD) and was committed to the custody of the Commissioner of Mental Health. Under New York's law, the court ordered a person found guilty by NRRMDD to be given a psychiatric examination and to be given an initial assessment for the determination of whether the person is mentally ill or has a dangerous mental disorder. After this initial assessment, the person is put in one of three categories or tracks. If the court finds that the person has a dangerous mental disorder, then he or she is placed in Track 1. In addition, the court must order confinement for six months for Track 1 designees. If the court finds that the person does not have a mental disorder, he or she is placed in Track 2. For Track 2 designees, the court must order conditions of confinement and place the person in the custody of the State Commissioner of Mental Health. If the person does not have a dangerous mental disorder and is not mentally ill, the court shall free unconditionally the individual, set conditions or issue an order of conditions [42].

Classified as Track I, Richard S. filed a habeas corpus petition, which permits any individual to challenge his or her confinement in prison or mental institution. The State of New York defended its confinement of Richard S. by noting that she had been given periodic reviews, according to New York law. Moreover, the psychiatrists reported that Richard S. had a very complex psychiatric condition and met the criteria for four interwoven disorders, consisting of sexual sadism, gender identity disorder, antisocial personality disorder, and borderline personality disorder. In addition, Richard S. refused mental health treatment, denying that she had a mental disorder. Based upon all these factors, the Second Circuit Court of Appeals rejected Richard S.'s application for a writ of habeas corpus [42].

5. Conclusions

This article shows that the law is extremely important in shaping criminal justice policy. Interpreted by judges, the cruel and unusual punishment clause from the Eight Amendment to the U.S. Constitution is the foundation for deciding many of the rights of prisoners. However, this interpretation comes very slowly. Addressing a convention of social workers in 1939, Judge L. Ulman of Maryland opined that "there is scarcely a subject of legislative action which may not be subjected to judicial review and control; and this is emphatically true in the field of legislation for social welfare. Every

legislative proposal for the amelioration of social hardship is likely to involve an invasion of somebody's rights of property. Every proposal for national action may trench upon the reserved sovereignty of the states. Every comprehensive plan you make, if you want to have it enacted into law, must first be made to fit into the complex pattern of both state and federal constitutions" (Ulman, [43], p. 743).

Judge Wolf was explicit in ordering sex reassignment surgery for Michelle Kosilek. However, how the First Circuit Court of Appeals may rule upon appeal is unknown, and how an appeal to the U.S. Supreme would go is unknown, as well. However, the Fourth Circuit, the Sixth Circuit and the Seventh Circuit Court of Appeals have rendered favorable ruling for prisoners suffering from gender identity disorder. These courts have ruled that gender identity disorder is a serious medical problem requiring treatment in order to comport with the Eighth Amendment to the U.S. Constitution. Critically importantly, these rulings are binding on all prisons in Maryland, North Carolina, South Carolina, Virginia, West Virginia, Kentucky, Michigan, Ohio, Tennessee, Illinois, Indiana and Wisconsin. Other states may be included in this group, as more Circuit Courts of Appeals adopt the principle that prisoners must be given treatment as a matter of constitutional rights when these prisoners suffer from gender identity disorder.

In law, another developing issue is individuals who have been civilly committed to mental health facilities from prisons or jails. A fairly recent development in mental health law is that states can civilly commit certain sex offenders after these prisoners have served their time in prison. Normally, these civil commitment proceedings are commenced shortly before the prisoner is scheduled for release, and the main purpose is to not release these prisoners by declaring that they are dangerous and have a mental disorder. This occurred in one case cited in this paper. In another instance, a state committed a person to a mental health facility in lieu of incarceration. In all these cases, the law has been central in shaping and influencing criminal justice and mental health policies.

Conflicts of Interest

The author declares no conflict of interest.

References and Notes

1. Gamble v. Estelle, 429 U.S. 97 (1976).
2. Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977).
3. Bee v. Greaves *et al*., 744 F. 2d 1387 (10th Cir. 1984).
4. Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982).
5. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979).
6. Knight v. Mills, 836 F. 2d 659 (1st Cir. 1987).
7. Lay v. Norris 876 v.2d 104 (6th Cir. 1989).
8. Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987).
9. Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3rd Cir. 1987).
10. Waldrop *et al*. v. Evans *et al*. 871 F. 2d 1030, (11th Cir. 1989).
11. Woodall v. Foti, 648 F.2d 268, 272 (5th Cir. 1981).

12. Travis Wright Colopy. "Setting gender identity free: Expanding treatment for transsexual inmates." *Health Matrix: Journal of Law Medicine* 22 (2012): 227–72.
13. Ally Windsor Howell. "A comparison of the treatment of transgender persons in the criminal justices systems Ontario, Canada, New York and California." *Buffalo Public Interest Law Journal* 28 (2010): 133–51.
14. Abigail Lloyd. "Defining the human are transgender people strangers to the law." *Berkeley Journal Law & Justice* 20 (2005): 150–95.
15. Rudolph Alexander, Jr., and Jacquelyn Cimaph Akua Meshelemiah."Gender identity disorders in prisons: What are the legal implications for prison mental health professionals and administrators?" *Prison Journal* 90 (2010): 269–87.
16. Linda Chin. "A prisoner's right to transsexual therapies: A look at brooks v. berg." *Cardozo Women's Law Journal* 11 (2004**)**: 151–76.
17. Weems v. United States, 217 U.S. 349 (1910).
18. Trop v. Dulles, 356 U.S. 86 (1958).
19. Gregg v. Georgia, 428 U.S. 153 (1976).
20. Spicer, a.k.a. Alexis R. Bell v. Terhune *et al*., 52 Fed. Appx. 732 (9th Cir. 2003).
21. Zarissa Liriel, Qz'etax v. Ortiz, *et al*., 170 Fed Appx. 551 (10th Cir. 2006).
22. Farmer v. Moritsugu, 163 F.3d 610 (D.C Cir. 1998).
23. Rudolph Alexander, Jr. *Understanding Legal Concepts That Influence Social Welfare and Practice*. Pacific Grove, CA. USA: Brooks/Cole, 2003.
24. Farmer v. Hawk-Sawyer *et al*., 69 F. Supp. 2d 120 (U.S. Dist. DC, 1999).
25. Farmer v. Kavanagh *et al*., 494 F. Supp. 2d 345 (U.S. Dist. MD, 2007).
26. Smith v. Hayman *et al*., 489 Fed. Appx. 544 (3rd Cir. 2012).
27. Meriwether v. Faulkner *et al*., 821 F. 2d 408 (7th Cir. 1987).
28. Fields *et al*., v. Smith *et al*., 653 F. 3d 550 (7th Cir. 2011).
29. Fields *et al*., v. Smith *et al*., 2012 U.S. LEXIS 2411 (U.S., Mar. 26, 2012).
30. De'lonta v. Angelone *et al*., 330 F. 3d 630 (4th Cir. 2003).
31. De'lonta v. Johnson *et al*., 2013 U.S. App. LEXIS 2005 (4th Cir. 2013).
32. Titlow v. Correctional Medical Services, Incorporated *et al*., (2012 U.S. App. LEXIS 25406; 2012 FED App. 1265N (6th Cir. 2012).
33. Kosilek v. Spencer, 2012 U.S. Dist. LEXIS 124758, (US Dist. Dist of Mass, 2012).
34. Travis Andersen. "State appealing federal ruling granting sex change for inmate michelle kosilek." *Boston Globe*, 26 September 2012. Available online: http://www.boston.com/metrodesk/2012/09/26/state-appealing-federal-ruling-granting-sex-change-for-inmate-michelle-kosilek/EjcKFdJ41iXYjc5aUHIr1K/story.html (accessed on December 8, 2012).
35. Rudolph Alexander, Jr. "The Civil Commitment of Sex Offenders in Light of Foucha v. Louisiana." *Criminal Justice and Behavior* 20, no. 4 (1993): 371–87.
36. Rudolph Alexander, Jr. "The Reconstruction of Sex Offenders as Mentally Ill: A Labeling Explanation." *Journal of Sociology and Social Welfare* 24, no. 2 (1997): 65–76.
37. In the matter of Keith W. Elmore, Respondent, The State of Washington, Appellant, Court of Appeals of Washington, Division Two, 134 Wn. App. 402; 139 P.3d 1140 (2005).
38. Elman v. State of Florida, Court of Appeal of Florida, First District, 877 So. 2d 782 (2004).

39. The People v. William Karl Olsen, 2012 Cal. App. Unpub. LEXIS 6621 (2012).
40. State of Connecticut v. Anthony J. Tryzna, Superior Court of Connecticut, Judicial District of Hartford, Geographical Area 13 at Enfield. 2010 Conn. Super. LEXIS 2340 (2010).
41. Batista v. Clarke *et al.*, 645 F. 3d 449 (1st Cir. 2011).
42. Richard S. v. Carpinello *et al.*, 589 F. 3d 75 (2nd Cir. 2009).
43. Joseph Ulman. "Law as a Creative Force in Social Welfare." In *Readings in Social Case Work 1920–1938: Selected Reprints for the Case Work Practitioner*. Edited by Fren Lowry. New York: Columbia University Press, 1939, pp. 736–46.