NOTE

HORMONE THERAPY FOR INMATES: A METONYM FOR TRANSGENDER RIGHTS

*Silpa Maruri**

The issue of hormone therapy for transgender inmates, while seemingly limited in importance, is one that involves issues of greater importance for the transgender community. The greatest issue at the heart of the matter is the legal argument that is traditionally used to gain access to hormone therapy: the Eighth Amendment. The Eighth Amendment prohibits deliberate indifference to the medical needs of inmates. Traditionally, transgender inmates have gained access to hormone therapy by appealing to the DSM-IV's classification of Gender Identity Disorder (GID) as a mental illness, and by establishing that prison officials' failure to provide hormone therapy constitutes deliberate indifference to a serious medical need. However, appeal to GID is a double-edged sword: while it allows access to hormone therapy, it does so by describing transgender individuals as somehow sick or infirm. This description is at odds with the transgender community's conceptualization of itself. This Note seeks to square the legal arguments for provision of hormone therapy to transgender inmates with the philosophical backdrop that shapes the transgender rights movement by using Plyler v. Doe as a model. This Note argues that access to hormone therapy by transgender inmates involves the intersection of a quasi-fundamental right with a quasi-suspect class. By utilizing such an argument, the transgender community is not bound by the negative expressive effect that the law may have in describing it as infirm or deficient.

* B.A., University of Chicago, 2006; J.D. Candidate, Cornell Law School, 2011; Articles Editor, *Cornell Law Review*, Volume 96. Thank you to Miles Clark and the *Cornell Journal of Law and Public Policy* for the careful editing of this Note.

INTRODUCTION

In 2002, convicted killer Michelle Kosilek sued the Massachusetts Department of Corrections to pay for her sexual reassignment surgery. As a transgender female, Kosilek wanted to realize the physical anatomy of a female while in prison. Sensational headlines and blog-posts read "Cross-Dressing Killer Wants You to Pay for Hair-Removal Treatments Behind Bars,"[1] and "Transsexual Murderer Robert Kosilek Is Still Whining."[2]

Stories such as these evoke the ire and disdain of the public and politicians. In Wisconsin, political opposition to hormone therapy was so strong that the state passed a statute imposing a categorical ban on the provision of hormone therapy to inmates.[3] Responding to the statute, the ACLU filed suit in 2007 on behalf of two transgender inmates in Wisconsin,[4] and in 2010, a district court ultimately found the statute uncon-

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[1] Ryan Smith, *Cross-Dressing Killer Robert Kosilek Wants You to Pay for Hair Removal Behind Bars*, CBS NEWS CRIMESIDERS BLOG (Nov. 23, 2009, 1:51 PM), http://www.cbsnews.com/8301-504083_162-5748570-504083.html.

[2] Van Helsing, *Transsexual Murderer Robert Kosilek Is Still Whining*, MOONBATTERY BLOG (Mar. 3, 2008, 9:16 AM), http://www.moonbattery.com/archives/2008/03/transsexual_mur.html.

[3] WIS. STAT. § 302.386(5m)(b) (2006).

[4] *See Sundstrom v. Frank—Case Profile*, AM. C.L. UNION, http://www.aclu.org/lgbt-rights_hiv-aids/sundstrom-v-frank-case-profile (last visited Nov. 29, 2010).

stitutional.[5] This case and others like it[6] underscore the status of transgender rights in general, and finding a suitable model for addressing the treatment of transgender prisoners is critical to understanding transgender rights in the evolving modern context.

This Note analyzes a major problem facing the transgender prison community: the provision of hormone therapy. Traditional analysis of transgender rights has opted to advocate for civil rights by (a) appealing to the idea that transgender persons constitute a suspect class, (b) arguing that limitations on transgender persons constitute a violation of their fundamental right to sexuality, and (c) arguing a violation of the Eighth Amendment.[7] This Note undertakes a different approach: it advocates for viewing a transgender inmate's right to hormone therapy through the lens of *Plyler v. Doe*[8] and argues in favor of viewing transgender inmates and access to hormone therapy as the intersection between a quasi-suspect class and a quasi-fundamental right. Part I explains why the issue of hormone therapy availability warrants analysis and provides background on accessibility problems. Part II describes and highlights the problems with the traditional approaches applied to transgender rights in the context of transgender inmates' rights to hormone therapy while incarcerated. Part III posits a new approach to the problem of hormone therapy by applying *Plyler v. Doe*. The final Part is a conclusion.

I. THE CONTEXT FOR HORMONE THERAPY

A. *Why Analyze Transgender Inmates' Rights to Hormone Therapy?*

Before an analysis of transgender inmates' rights may begin, one must address the question of why legal scholars should analyze the problem of access to hormone. It may not be clear how many individuals, directly or immediately, benefit from a discourse that addresses the problem of the access to hormone therapy in prisons for transgender inmates. Admittedly, the number of transgender inmates who occupy the prison system is uncertain.[9] In the general population alone, it is notoriously difficult to estimate how many individuals are transgender, and there are no statistics available as to the number of transgender inmates within the

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5 *See generally* Fields v. Smith (*Fields I*), No. 06-C-112, 2010 WL 1929819 (E.D. Wis. May 13, 2010) (finding Wisconsin's statute facially unconstitutional under the Eighth Amendment and under the Equal Protection Clause's rational basis review).

6 *See, e.g.*, Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Brooks v. Berg, 270 F. Supp. 2d 302 (N.D.N.Y. 2003); Kosilek v. Maloney, 221 F. Supp. 2d 156, 195 (D. Mass. 2002).

7 U.S. CONST. amend VIII.

8 457 U.S. 202 (1982).

9 George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORRECTIONAL HEALTH CARE 280, 281 (2009).

federal prison system. Nonetheless, some data may be instructive on the scope of the population. One study on the characteristics of individuals leaving the New York City Department of Corrections found that 0.6% of adult males in the prison systems self-identified as transgender.[10] Another study noted that there are likely between 500–750 transgender inmates in custody in state facilities, as well as another 50–100 in federal facilities.[11] These numbers, however, may underestimate the total number of transgender prisoners because many inmates are "undiagnosed."[12] While transgender persons are overrepresented in prisons when compared to the population at large,[13] the number of transgender inmates is small relative to the total prison population.[14] Given that the transgender inmate population represents such a small proportion of the prison population, why address the argument over transgender prisoners' constitutional right to hormone therapy?

Aside from the obvious argument that personal rights matter regardless of how many individuals are adversely affected by their denial, the issue of prisoners' rights to hormone therapy has greater expressive value for the transgender population as a whole. The denial of hormone therapy implicates a greater historical struggle within the transgender community as to autonomy in self-definition. Generally, transgender advocates seek to assert the rights of transgender individuals through arguments that transgender individuals constitute a suspect class or are exercising a fundamental right;[15] these arguments are usually unsuccessful. As a historical matter, the only means by which inmates have accessed hormone therapy is through the appeal to the prohibitions of the Eighth Amendment, by arguing that the denial of hormone therapy amounts to deliberate indifference to the medical needs of transgender inmates.[16] This argument relies on the Diagnostic and Statistical Manual of Mental Disorder (DSM-IV)'s classification of Gender Identity Disorder (GID) as a mental illness, by positing that prison officials act with deliberate indif-

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10 Nicholas Freudenberg et al., *Comparison of Health and Social Characteristics of People Leaving New York City Jails by Age, Gender, and Race/Ethnicity: Implications for Public Health Interventions*, 122 PUB. HEALTH REP. 733, 739 (2007).

11 *See* Brown & McDuffie, *supra* note , at 281.

12 *Id.*

13 *Id.* at 282 (finding that at least 750 inmates were in custody in 2007).

14 *See id.* (noting that an estimated 2,193,798 inmates were in custody in the United States in 2005).

15 *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000) (finding that male plaintiff dressed in traditional female attire could gain protection under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); Schwenk v. Harford, 204 F.3d 1187, 1203 (9th Cir. 2000) (finding that transgender persons should be given protection under federal sex discrimination laws).

16 *See, e.g.*, *Fields I*, 2010 WL 1929819 at *36 (E.D. Wis. May 13, 2010); Brooks v. Berg, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 800 (W.D. Mich. 1990).

ference when they fail to acknowledge the disorder. However, such an argument implicates the larger concerns of the transgender community over the mainstream population's perception of transgender identity. As Judith Butler notes, "To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all."[17] Thus, transgender activists and progressive psychiatrists have argued that the diagnosis should be eliminated altogether and that transgender individuals should be considered to be engaging in an act of self-determination, an exercise of autonomy.[18]

Thus, the problem becomes one of squaring the philosophical backdrop that shapes the transgender movement with the desire to acquire legal rights. The scientific model assumes that uncontrollable forces affect the diagnosed individual, who suffers from delusion or dysphoria.[19] Because the presumption here is that there is error in not having gender norms take root as they normally "should," this approach seeks to uphold norms as currently constituted.[20] In the context of the prison system, individuals have often been asked to demonstrate a medical need for hormone therapy; thus, to attain rights, they must engage the language of the DSM-IV. The problem for transgender inmates is therefore emblematic of the problem for the transgender population as a whole: "one purchases one sort of freedom only by giving up another."[21] Thus, finding a solution to the problem of hormone therapy for transgender inmates is part of a larger project of articulating a legal solution to transgender rights that both addresses theorization of transgender identity by the transgender community and simultaneously constitutes a legally viable argument to secure rights.

B. Background

Transgender inmates are a vulnerable population within the prison system. The penal system typically classifies and houses pre-operative

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[17] Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS 274–75 (Paisley Currah et al. eds., 2006).

[18] *Id.* at 275.

[19] *Id.*

[20] *See id.*

[21] *Id.* at 288. Butler writes:

> [T]he only way to secure the means by which to start this transformation is learning how to present yourself in a discourse that is not yours, a discourse that effaces in you in the act of representing you . . . . In acquiring the ability to have an operation, the transgender loses the very thing that he or she seeks: the ability to define him or herself according to his or her own terms. Instead he or she must speak in the language of disease, describing him or herself as a person with an illness.

Id.

transgender prisoners according to their birth gender.[22] In addition to being the targets of sexual abuse,[23] transgender inmates present a myriad of practical issues, including confrontation with rules regarding healthcare, clothing, and makeup.[24] The medical and psychiatric needs of the transgender population undergoing hormone therapy presents particular problems. Transgender inmates are more likely to suffer from depression, anxiety, posttraumatic stress disorder, schizophrenia, and substance abuse problems.[25] Denial of hormone therapy, in particular, presents issues for the transgender inmate population. According to the psychiatric community, autocastration, which has potentially lethal consequences, is often the consequence of failure to receive hormone therapy.[26] In at least six facilities in four states, transgender inmates have castrated themselves while incarcerated.[27]

The traditional response of the psychiatric community and prison officials, when the problem has been acknowledged, is to require advocates of providing hormone therapy to appeal to GID, classified as a mental illness by the American Psychiatric Association (APA).[28] According to the APA, the symptoms of GID are: (1) a strong and persistent cross-gender identification manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or conviction that he or she has the typical feelings and reactions of the other sex; (2) persistent discomfort with his or her sex or senses of inappropriateness in the role of that sex manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics; (3) the disturbance is not concurrent with a physical intersex conditions; and (4) the condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.[29] The treatment that psychiatrists tradi-

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22 NAT'L CTR. FOR LESBIAN RIGHTS, RIGHTS OF TRANSGENDER PRISONERS 1 (2006), *available at* http://www.nclrights.org/site/DocServer/RightsofTransgenderPrisoners.pdf?docID=6381.

23 *See* Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 517–23 (2000); *s*ee also Brown & McDuffie, *supra* note 9, at 288 ("Transgender inmates also have concerns that include safe housing, the potential for physical and sexual assault from other residents as well as caretakers, and privacy issues." (internal citations omitted)).

24 *See* Brown & McDuffie, *supra* note 9, at 280.

25 *Id.* at 287.

26 *Id.*

27 *Id.* at 288 (noting that while cost may be a consideration in denying hormone therapy, the cost of caring for individuals who autocastrate themselves is also great).

28 AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV 532 (4th ed. 1994).

29 David Seil, *The Diagnosis and Treatment of Transgendered Patients*, 8 J. GAY & LESBIAN PSYCHOTHERAPY 99, 100 (2004); *see also* Fields v. Smith, No. 06-C-112, 2010 WL 1929819, at *2 (E.D. Wis. May 13, 2010) (explaining one transgendered inmate's reaction to being denied hormone medication).

tionally prescribe for GID is a period of therapy, followed by the prescription of hormone therapy, and observation of the subjective impression of the changes that occur during hormone therapy.[30] In some instances, where the psychiatrist finds it appropriate, surgery may also be prescribed.[31] As a result of this traditional analysis, most successful attempts at attaining legal rights have been accomplished through resorts to psychiatry.

II. ANALYZING THE ADVANTAGES AND PROBLEMS OF ALTERNATIVE APPROACHES

This section provides a review of the traditional means for securing transgender persons' rights, and discusses the potential problems with the application of these approaches to transgender prisoners' rights to hormone therapy.

A. Treating Transgender Identity as a Suspect Classification

Several attempts have been made to fit transgender identity within the parameters of a suspect classification, in order to allow persons considered transgender to gain protection under the Fourteenth Amendment's Equal Protection Clause. In some states, courts have found that transgender persons are protected under the state's civil rights laws that prohibit discrimination on the basis of disability.[32] However, many are hesitant to use disability laws in order to gain protection. Transgender advocates argue that "using the legal category of disability to secure legal protections for transgender people will perpetuate social myths and stereotypes that transgender people are sick, abnormal, or inferior."[33] Others argue that the framework of seeking rights through disability protections is valid, positing that the modern conception of disability revolves around the distinction between impairments and disabilities; impairments involve the loss of capacity to perform in some way, but disabilities are the product of the ambient society's construction of barriers.[34]

There are several problems, however, that such an argument encounters. First, many transgender advocates object to the usage of disability laws as a means of protection because of the stigma associated with

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30 *See* Seil, *supra* note 29, at 103.

31 *See id.*

32 Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, *in* TRANSGENDER RIGHTS, *supra* note 17, at 74; *see, e.g.*, Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412 (Mass. Super. Ct. 2002); Enriquez v. W. Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

33 Levi & Klein, *supra* note 32, at 74.

34 *Id.* at 79 (quoting LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 41 (2002)).

the term "disability."[35] Furthermore, when Congress passed the Americans with Disabilities Act (ADA) in 1990, it explicitly excluded from the definition of disability "transsexualism" and "gender identity disorders not resulting from physical impairments."[36] While one may argue that state statutes do not contain the same explicit exclusion, many state laws utilize the same language as the ADA in their own disability statutes.[37] Moreover, the requirements for satisfying the terms of many disability statutes would serve as a severe impediment to many transgender individuals because many of the statutes require that an individual fulfill one of three requirements: (1) have a physical or mental impairment that substantially limits major life activity, (2) have "a record of such an impairment," or (3) be regarded as having such an impairment.[38] While some transgender persons might be able to satisfy these criteria, even proponents of this approach agree that many might not be able to fall under any of the three requirements.[39]

Other advocates argue for protecting transgender persons through the use of statutory protections afforded on the bases of "sex" and "gender." These advocates argue that discrimination and unfavorable treatment because of transgender identity is in fact discrimination on the basis of gender, in that individuals are discriminated against because they fail to conform to stereotypes and expectations about gender. In particular, such advocates appeal to *Price Waterhouse v. Hopkins*,[40] in which the Court found that an employer had violated Title VII's safeguard against discrimination on the basis of sex when it refused to grant partnership to a woman, in part because her demeanor, appearance, and personality were deemed not sufficiently feminine.[41] While courts were initially reluctant to afford protection to transsexual and transgender persons under *Price Waterhouse*, new decisions reflect an increasing willingness to do so.[42]

However, this argument runs into the problematic decision of *Romer v. Evans*,[43] in which the Court analyzed whether homosexuals were entitled to a higher level of scrutiny under Equal Protection analy-

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35 *Cf.* Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS 274–75 (Paisley Currah et al. eds., 2006).

36 Levi & Klein, *supra* note 32, at 83.

37 *Id.* at 84.

38 *Id.*

39 *See id.* at 87 ("It is important to acknowledge that pursuing protections under disability law may not protect all transgender people.").

40 490 U.S. 228 (1989).

41 *See id.* at 258; Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, *in* TRANSGENDER RIGHTS, *supra* note 17, at 93.

42 *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Harford, 204 F.3d 1187 (9th Cir. 2000).

43 517 U.S. 620 (1996).

sis. In *Romer*, while purporting to apply rational basis scrutiny to homosexuals, the Court made distinctions that suggested that it was not purely applying rational basis scrutiny.[44] For example, the Court seriously examined the stated objective of the statute,[45] an unusual approach under rational basis scrutiny. Further, for the first time, the Court articulated the rule that a statute that is "at once too narrow and too broad" confounds judicial review.[46] Consequently, the language of *Romer* does suggest some sort of elevated form of judicial review for homosexuals, but this elevated review still does not rise to the level of intermediate or strict scrutiny.[47] Given that rational basis is the level of scrutiny afforded to homosexuals, it seems unlikely that courts would afford transgender persons intermediate scrutiny, based upon the argument that transgender identity is the product of gender. To the extent that circuit court interpretations of Title VII suggest that "sex" and "gender," as used in the statutory context, encompass transgender identity,[48] it is unclear whether the Supreme Court would construe the terms in the same way.

Consequently, although treating transgender identity as a suspect classification would greatly advance the cause of transgender prisoner treatment, it is unlikely that transgendered persons would constitute a suspect classification warranting strict or intermediate scrutiny. While the fundamental rights regime is considerably limited in the context of incarceration, Equal Protection remains a powerful doctrine within the prison context. The Court has found that racial discrimination, for example, is unconstitutional in prisons except in extreme circumstances for the preservation of prison security and discipline.[49] However, given the unlikelihood of the Court finding transgender individuals constitute a suspect class, this doctrine is a problematic for the advancement transgender rights.

B. Treating Transgender Identity as a Part of the Fundamental Right to Sexual Identity

In contrast to Equal Protection, application of the Due Process Clause of the Fourteenth Amendment as a means of securing transgender prisoners' rights to hormone therapy suffers from the opposite problem.

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44 *See id.* at 635.

45 *See id.* ("Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.").

46 *Id.* at 633.

47 *See id.* at 635.

48 *See, e.g.*, Kastl v. Maricopa Cnty. Comm. Coll. Dist., 325 Fed. Appx. 492 (9th Cir. 2009).

49 *See* Cruz v. Beto, 405 U.S. 319, 321 (1972).

While it is, as a matter of doctrine, more likely that the Court would recognize a fundamental right to autonomy in sexual self-definition, it is simultaneously less likely that this fundamental right would yield significant protection in the prison context, given that the exercise of fundamental rights in prisons is severely constrained.[50]

Transgender advocates view the ruling in *Lawrence v. Texas*,[51] which may be argued to have secured a fundamental right to autonomy for sexual self-definition, as constituting a basis for protection for transgender individuals. In *Lawrence*, the Court held that a Texas statute banning homosexual sodomy was unconstitutional.[52] There is debate over the level of scrutiny that the Court applied when it famously declared that, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[53] While it is unclear what level of review the Court applied in that instance,[54] the Court recognized some form of respect for relational and sexual autonomy. Further, in the *Lawrence* opinion, the Court highlighted its own history of respecting personal autonomy. The Court noted that in *Planned Parenthood v. Casey*,[55] it had declared, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."[56] Thus, the language of *Lawrence* and *Casey* points to the recognition of a right, if not necessarily a fundamental right, to personal, sexual autonomy.

In dissecting the Court's opinion in *Lawrence*, Laurence Tribe noted that while the Court did not explicitly say that it was applying strict scrutiny, its standard of review "could hardly have been more obvious."[57]

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50 See *infra* note 72 and accompanying text.

51 539 U.S. 558 (2003).

52 *Id.* at 567.

53 *Id.*

54 *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004) (alluding to the Court's "'mysterious' standard" of review).

55 505 U.S. 833 (1992).

56 Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing *Casey*, 505 U.S. at 851).

57 Tribe, *supra* note 54, at 1917. To the extent that Tribe posits that the Court did not undertake merely rational basis review in deciding *Lawrence*, however, he also suggests that the Supreme Court was approaching due process in an ultimately different way than it ever has. He notes:

> In deciding that the laws banning sodomy should be so regarded, the *Lawrence* majority did not articulate a doctrinal "test" as such, or even a specific mode of analysis, but—as perhaps befits a Court more comfortable with the exposition of common law than with the construction of theory—it laid down markers that future courts

Further, other commentators have posited that a fundamental right to determine one's gender exists.[58] In particular, these commentators argue that *Lawrence* and *Casey* guarantee autonomy, in terms of self-expression, as a fundamental right.[59] Along the same lines, recent case law generated by "Don't Ask, Don't Tell" (DADT) also suggests that discussions of sexuality, apart from obscenity, are protected by both due process and the First Amendment's,[60] further suggesting a fundamental right to sexual self-expression.

However, to the extent that such a model is an operative means of viewing transgender rights, this model may not aid transgender prisoners. Prison, by definition, allows the deprivation of certain fundamental rights. Incarceration inherently infringes upon fundamental rights, particularly the right to be free from physical restraint.[61] The general inquiry used to determine whether infringement of a fundamental right in the prison context is appropriate is two-pronged: (1) whether the right is fundamentally inconsistent with incarceration, and (2) whether the prison regulation abridging that right is reasonably related to legitimate, penological interests.[62] If the right claimed in the first prong is fundamentally inconsistent with incarceration, the inquiry ends and the second prong need not be explored. To avoid a finding of fundamental inconsistency,

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> might retrace and extend less through abstract speculation than by the light of unfolding experience.

Id. at 1943.

58 *See* Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L & C.R. 101, 123–26 (2006) (noting that "[w]hen the state interferes with this process of self-definition, or prevents gender self-determination entirely, it violates the constitutionally based right to liberty because of the dramatic extent to which personhood is abused by institutionalized denials of the opportunity to self-actualize"). *See also* Franklin H. Romeo, *Beyond a Medical Mode: Advocating for a New Conception for Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005):

> Like pregnancy, a person's experience of gender is intimately connected to that person's experience of their body and affects the most profound personal choices they make in life. A reproductive rights analogy could provide a useful framework through which courts could conceive of gender in a way that . . . acknowledges that gender—like pregnancy—is a healthy aspect of life that presents fundamental issues of bodily integrity and personal choice, which every person has an inherent interest in self-determining.

Id. at 745.

59 These arguments fail to take into account that the articulation of sexual practices was not described as a fundamental right explicitly in the text of *Lawrence*, and the language from *Casey* that supports such an interpretation provides only a vague allusion to self-definition.

60 *See* Log Cabin Republicans v. United States, No. CV 04-08425-VAP (ex), slip op., at 74, 75 (C.D. Cal. Nov. 9, 2010) (describing how DADT's ban on discussions of sexual orientation violated both the First Amendment and the Due Process Clause). Recent legislative action repealing "Don't Ask, Don't Tell" moots the case, as a practical matter, for the purposes of the policy, but its language still suggests an important relationship between the First Amendment and sexual expression.

61 *See* Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002).

62 *See* Turner v. Safley, 482 U.S. 78, 95–97 (1987).

four factors must be met: (1) a valid, rational connection between the prison regulation and the legitimate, neutral government interest put forward to justify it, (2) the existence of alternative means of exercising the right available to inmates, (3) the impact that accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally, and (4) the absence of readily available alternatives to the prison for achieving the governmental objectives.[63]

Thus, with respect to whether the prison context requires prison officials to respect a fundamental right to sexual self-definition, the first question is whether the right is fundamentally inconsistent with incarceration. *Gerber v. Hickman*[64] is instructive on this point.[65] In *Gerber*, the court examined whether due process required a prison warden to allow an inmate to mail a specimen of his sperm to his wife for the purposes of artificial insemination.[66] The court found the right to procreate was fundamentally inconsistent with the prison setting.[67] In so finding, the court noted that separation from family and friends, and consequently the right to intimate association, is necessarily infringed by imprisonment.[68] Further, in *Kentucky Dep't. of Corrections v. Thompson*,[69] the Court held that government agents could restrict a prisoner's rights to meet with a particular visitor without a violation of the Due Process Clause.[70] Further, it is well settled that prisoners have no constitutional right to conjugal visits.[71] Although these cases establish that not all fundamental rights are preserved in the prison context, important in these cases is the rationale that imprisonment necessitates a barrier to relational contact as it exists in the outside world. The problem of transgender inmates is unlike an issue of relational liberty, and is rather a problem of fundamental self-definition, as it involves not one's relationship with others, but rather one's relationship to self.

Consequently, because hormone therapy is about an individual's expression of gender identity, the case law on prisoners' rights to free speech under the First Amendment might be more instructive than the relational-rights case law. In the prison context, a court determines whether the prisoner's First Amendment claims are inconsistent with the

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63 Shaw v. Murphy, 532 U.S. 223, 229–30 (2001).

64 291 F.3d 617 (9th Cir. 2002).

65 *Id.* at 621.

66 *See id.* at 620.

67 *See id.* at 621–22.

68 *See id.* at 620.

69 490 U.S. 454 (1989).

70 *Id.* at 461 (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)).

71 *See, e.g.*, Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994); Davis v. Carlson, 837 F.2d 1318, 1319 (5th Cir. 1988).

status of a prisoner or with the legitimate penal objectives of the corrections system.[72] In the past, although the Court has admitted that there is no absolute bar on the exercise of speech in prisons, most First Amendment claims that have proceeded to the Supreme Court have been unsuccessful.[73] Likewise, inherently problematic to the claim that gender identity is a fundamental right in the prison context is the limitation on access to fundamental rights in prisons. As a result, the fundamental rights regime suffers from the opposite problem as Equal Protection: while Equal Protection carries great weight in the prison context, it is not likely to apply to transgender persons; a fundamental right to autonomy in sexual self-definition likely exists, yet it is unlikely to have efficacy in the prison context.

C. The Most Common Argument: Failure to Provide Prisoners with Hormone Therapy Violates the Eighth Amendment

Advocates for providing hormone therapy to transgender prisoners most commonly argue that the failure to do so violates the Eighth Amendment. The Eighth Amendment provides protection from "cruel and unusual punishment,"[74] and a prison official violates the Eighth Amendment if she commits an act or omission accompanied by "deliberate indifference" to a substantial risk of serious harm to an inmate.[75] The deliberate indifference standard requires that a prison official, in so acting or failing to act, have knowledge of the risk of harm.[76] Whether a prison official had the requisite knowledge of the substantial risk is a question of fact litigants may prove by circumstantial evidence, and the fact-finder may conclude that the prison official knew of substantial risk from the fact that the risk was obvious.[77] With respect to psychiatric care, the deliberate indifference standard is more difficult to reach. To meet the deliberate indifference standard, a litigant must show: (1) a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) the potential for harm to the prisoner resulting from delay or denial of care would be substantial.[78]

The application of the deliberate indifference standard to the rights of transgender prisoners has become more liberal with the passage of time. Initially, litigants did not succeed in arguments based on the Eighth Amendment for access to transgender hormone therapy in pris-

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72 *See* Shaw v. Murphy, 532 U.S. 223, 229 (2001) (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).

73 *See, e.g.*, Beard v. Banks, 548 U.S. 521, 530 (2006); *Shaw*, 532 U.S. at 229.

74 U.S. CONST. amend. VIII.

75 *See* Farmer v. Brennan, 511 U.S. 825, 842 (1994).

76 *Id.*

77 *See id.*

78 Bowring v. E. Godwin, 551 F.2d 44, 47 (4th Cir. 1976).

ons.[79] For example, in *Supre v. Ricketts*, the court held that the state of Colorado did not need to administer estrogen therapy to a transgender inmate to satisfy the State's duty of care to prisoners.[80] Gradually, however, the tide began to turn and some cases established that transgender prisoners were entitled to "some kind of medical care" but did not articulate the extent of that treatment.[81] In *Kosilek v. Maloney*, for example, the court maintained a moderate approach, holding that although prison officials did not provide adequate care for a serious medical need, the inmate failed to show that the lack of care was the result of the official's deliberate indifference.[82] Nevertheless, the court held that as a result of the litigation, prison officials were on notice of the inmate's medical need and had a duty to provide the inmate with adequate medical treatment.[83]

Later cases, however, found that failure to supply transgender inmates with hormone therapy violated the Eighth Amendment. In *Brooks v. Berg*,[84] the court held that the plaintiff's GID was a serious medical condition and prison officials failed to prove that they had given the plaintiff adequate medical treatment.[85] Similarly, in *Phillips v. Michigan Department of Corrections*,[86] the court ordered prison officials to reinstate hormone therapy for a transgender inmate, distinguishing between the withdrawal of hormone therapy and sex reassignment surgery: the court described the former as the reversal of "healing medical treatment," and the latter as an improvement of medical condition.[87] Most recently, in *Fields v. Smith*,[88] a district court held that a Wisconsin statute, barring prison doctors from prescribing hormone therapy or sex reassignment surgery to inmates in state custody, was unconstitutional.[89]

As these various court opinions suggest, the major issues that an argument based on the Eighth Amendment encounters are similar to

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79 *See, e.g.*, Maggert v. Hinks, 131 F.3d 670, 672 (7th Cir. 1997) (holding that the Eighth Amendment does not entitle an inmate to treatment for a gender identity disorder); Lamb v. Maschner, 633 F. Supp. 351, 353–54 (D. Kan. 1986).

80 792 F.2d 958, 962–63 (10th Cir. 1986).

81 *See, e.g.*, Meriwether v. Faulkner, 821 F. 2d 408, 414 (7th Cir. 1987).

82 221 F. Supp. 2d 156, 195 (D. Mass. 2002).

83 *See id.* at 193.

84 270 F. Supp. 2d 302 (N.D.N.Y. 2003) (vacated in part).

85 *See Id.* at 308–10. The court vacated this decision after the defendants conceded the plaintiff was entitled to medical care but pleaded that they did not adequately address the issues before the court. Nevertheless, the grounds for vacating the judgment had little to do with the merits; instead, the court vacated the judgment in the interest of judicial economy, so that the defendants could resubmit their arguments. *See* Brooks v. Berg, 289 F. Supp. 2d 286, 289 (N.D.N.Y. 2003).

86 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991).

87 *See id.* at 800.

88 712 F. Supp. 2d 830 (E.D. Wis. 2010), *modified*, July 9, 2010).

89 *See id.* at 841.

those encountered in defining transgender persons as disabled. Specifically, in terms of the expressive effect of the law, defining transgender identity as a psychological disorder is problematic because of society's overall misconception of the transgender community.[90] As discussed earlier,[91] the arguments made in order to secure treatment under the Eighth Amendment rely heavily on an appeal to GID.

The *Fields* court, for example, evaluated the constitutionality of a statute that banned the provision of hormone therapy to inmates, focusing on medical need and the importance of individualized evaluation of transgender inmates, and found that some inmates might require hormone therapy.[92] The court specifically focused on the fact that in some instances "the disorder is so intense and severe" that some inmates suffer from symptoms like "anxiety, irritability, suicidal ideation, suicide attempts, and self-mutilation or autocastration," meaning that because of the statute, inmates that might have medically required hormone therapy were not receiving it.[93] Similarly, in *Phillips*, the court focused on the healing effects of hormone therapy, and the possibility that denying hormone therapy could reverse the positive effects of past hormone treatments.[94]

The transgender community has attempted to distinguish its reliance on the Eighth Amendment in order to secure access to hormone therapy and to avoid criticisms that this plays into mainstream fears that transgender persons are abnormal and that their condition derives from psychological disorder.[95] The main distinction the transgender community uses in order to retain the benefits accrued by considering transgenderism a medical condition is between considering transsexualism "a medical rather than a psychiatric status."[96] Recognizing that a diagnosis of GID remains necessary to get hormone therapy and surgery, even outside the prison context, the transgender community has struggled with the idea of advocating against GID.[97] As a consequence, GID and its relationship to the Eighth Amendment remains a complicated problem, implicating the

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90 *See* Butler, *supra* note 17, at 275 (noting that in seeking treatments through appeals to GID, the transgender person loses power over self-definition).

91 *See supra* notes 17 to 21 and accompanying text.

92 *See Fields I*, 2010 WL 1929819 at *32 (E.D. Wis. May 13, 2010) (finding that the act is facially unconstitutional under Eighth Amendment analysis because "[t]he statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment").

93 *Id.* at *30.

94 *See* Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 800 (W.D. Mich. 1990).

95 *See* Shannon Minter & Phyllis Randolph Frye, *A Joint Statement by the International Conference on Transgender Law and Employment Policy (ICTLEP) and The National Center for Lesbian Rights (NCLR)*, 5 INT'L CONF. ON TRANSGENDER L. & EMP. POL'Y A1, A1 (1996), *available at* http://www.liberatinglaw.com/media//DIR_13185/FRYE11c2-JointStatementICTLEP-NCLR.pdf.

96 *Id.*

97 *See id.*

tension between the desire of transgender people to access the means to achieve self-definition through transitioning and the compromise of self-definition that transgender people must make by accepting a GID dignosis.[98]

III. PROPOSED SOLUTION

The above descriptions suggest that transgender activists have encountered difficulty in finding a comfortable home for transgender rights that presents both a viable legal argument and does not involve the stigmatizing label of "illness." This section proffers a possible solution to this problem, finding a place for this nomadic issue. It argues that a transgender prisoner's right to hormone therapy involves the intersection of a quasi-suspect class with a quasi-fundamental right.

The doctrine described in *Plyler v. Doe*[99] is an unusual home for transgender rights in many respects. First, *Plyler* itself is a doctrine of questionable value, and many scholars have questioned its continuing viability.[100] Second, outside of purely justifying the doctrine itself, the application of *Plyler* to the present case must be supported. Finally, assuming *Plyler* is a viable home for transgender rights, one must question whether recognizing that hormone therapy involves the intersection between a quasi-fundamental right and a quasi-suspect class will actually impose an obligation on prisons to provide hormone therapy. These distinct problems are the subject of the following subsections.

A. *Justifying* Plyler v. Doe

In *Plyler v. Doe*, the Supreme Court struck down a state statute that denied funding for the education of children of illegal immigrants based on a finding that the statute was inconsistent with the Fourteenth Amendment.[101] The Court analyzed the problem presented through the lens of both Equal Protection and Due Process analysis.[102] The Court found that although public education was not a right granted in the Constitution, it was not merely some governmental benefit,[103] as education has impor-

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98 Judith Butler notes:

> [O]n the one hand, the diagnosis [of GID] continues to be valued because it facilitates an economically feasible way of transitioning. On the other hand, the diagnosis . . . continues to pathologize as a mental disorder what ought to be understood instead as one among many human possibilities of determining one's gender for oneself.

Butler, *supra* note 17, at 275.

99 457 U.S. 202 (1982).

100 *See infra* notes 108 to 113.

101 Plyler v. Doe, 457 U.S. 202, 216–30 (1982).

102 *See id.* at 211–23.

103 *Id.* at 221.

tance in helping to maintain the nation's basic institutions.[104] Further, the Court noted that while illegal immigrants constitute a "shadow population," they did not constitute a suspect class under the Equal Protection Clause because the characteristic was not immutable but chosen.[105] At the same time, the Court noted that the children of illegal immigrants did not have the same choice as their parents.[106] Concluding, however, that the case did not implicate a fundamental right or a suspect classification, the Court applied a level of scrutiny that was previously unseen: asking whether the statute furthered "some substantial goal of the state."[107]

Both the courts and scholars have called into question the continuing viability of *Plyler*'s analysis.[108] *Plyler* appears to have blended rational basis review with intermediate scrutiny to create a level of scrutiny that falls between the two traditional standards of review.[109] In *Kadrmas v. Dickinson Public Schools*,[110] the Supreme Court refused to extend *Plyler* to reach the problem of an imposed user fee on children who wished to use buses to and from public school.[111] Further, even Chief Justice Burger observed in *Plyler* that "the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases."[112] Scholars such as Hiroshi Motumura suggest that the decision likely has little relevance beyond education and children.[113]

Yet a body of case law and scholarship exists suggesting that *Plyler* may have viability beyond its immediate context. For instance, a federal district court used *Plyler* when considering California Proposition 187—a voter initiative that denied public education to undocumented migrant children.[114] *Plyler* seizes on an argument set out in *San Antonio v. Rodriguez*, in which Justice Marshall's dissenting opinion advocates view-

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104 *Id.*

105 *Id.* at 219 n.19.

106 *Id.* at 220.

107 *Plyler*, 457 U.S. at 224 (1982).

108 *See, e.g.*, Hiroshi Motomura, Forward to the Past: The Many Meanings of *Plyler v. Doe* on Its 25th Anniversary 3–6 (Apr. 14, 2007) (unpublished manuscript), *available at* http://www.law.berkeley.edu/files/Hiroshi_MotomuraFINAL.pdf.

109 *Id.* at 3.

110 487 U.S. 450 (1988).

111 *Id.* at 459.

112 Plyler v. Doe, 457 U.S. 202, 243 (1982) (Burger, C.J., dissenting).

113 *See* Motumura, *supra* note 108, at 6 ("It was apparently the unique combination of education and children in *Plyler* that triggered a finding of constitutional rights."); *see also* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1731 (2010) ("The Court's equal protection rationale—especially its application of intermediate judicial scrutiny—relied so heavily on the involvement of children and education that no court has ever used it to overturn a statute disadvantaging unauthorized migrants outside the context of K–12 public education.").

114 League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244, 1255–56 (C.D. Cal. 1997).

ing the relationship between equal protection and due process as a "spectrum" in which the intensity of review depended on the importance of the constitutional interest and the invidiousness of the classification.[115] This formulation is often described as "sliding-scale" review.[116]

Kenneth Karst argues that a purely categorical approach to understanding the Fourteenth Amendment fails to consider the complexity of equal protection and due process analyses.[117] Instead, the Court does not engage a strict three-tiered review, and "despite the emerging rhetoric of categories, the actual decision of cases had resulted from an exceedingly fluid inquiry in which the level of justification demanded of the government varied with the importance of the interests invaded and the degree to which the government had imposed burdens on disadvantaged groups."[118] Similarly, in studying *Lawrence v. Texas* and its effects on due process analysis, some scholars have argued that there is more elasticity and flexibility in substantive due process, rather than a rigid classificatory framework.[119] Consequently, rather than viewing it as an outlier in a strain of cases applying a constrained system of classification, *Plyler* is emblematic of a shifting terrain, in which the Court's evaluation of rights can recognize the intersection of due process and equal protection interests.

B. Application of Plyler *to the Present Case*

The right to hormone therapy in prisons for transgender persons likely fits into the paradigm established in *Plyler*, in that it represents the intersection between a quasi-fundamental right and a quasi-suspect class. There are important reasons to resolve the problem of transgender rights in this manner. Although transgender individuals likely would not be considered a suspect class, they might represent a class that closely approximates a suspect class, based on the prongs that courts ordinarily consider to make such a determination.[120] Further, as noted earlier, the right to sexual autonomy in self-definition, though not a fundamental right, implicates important factors that suggest that it should be considered a quasi-fundamental right.[121]

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115 San Antonio v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); *see also* Kenneth Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 138 (2007) (describing Marshall's view of equal protection analysis).

116 *See, e.g.*, Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 472 (2005).

117 Karst, *supra* note 115, at 138.

118 *Id.*

119 *See, e.g.*, Nad D. Hunter, *Living with* Lawrence, 88 MINN. L. REV 1103, 1118 (2004).

120 *See infra* Section III.B.1.

121 *See infra* Section III.B.2.

There are several reasons why resolving the conflict with this solution is ideal. First, this solution avoids the obvious problem of considering the issue only through the lens of suspect classification, since transgenderism likely would not be considered a suspect classification. Further, this solution also resolves the problem of considering autonomy in sexual identity a fundamental right—a legal argument that may not even provide a solution for hormone therapy because prison officials may not even be required to respect this right. Importantly, while prisons are not required to respect all fundamental rights, courts require more stringent obedience to the Fourteenth Amendment's Equal Protection Clause.[122] Finally, unlike appeals made based on the Eighth Amendment, this approach does not utilize the language of deformity or abnormality.

1. Why Does Transgenderism Constitute a Quasi-Suspect Classification?

Traditionally, in order to determine whether or not a given group should be considered a suspect class, courts have looked to whether there is a history of discrimination,[123] whether the trait described is visible,[124] whether the characteristic is immutable,[125] whether the difference is a "real difference" (meaning a difference that relates to the ability to "perform or contribute to society"),[126] whether the group described is a discrete and insular minority,[127] whether stereotypes regarding the group exist,[128] whether the group is underprivileged,[129] and whether there is gross unfairness in the classification.[130] While it is clear that transgender persons fulfill a great many of these factors, they fail to fulfill all of them, suggesting that transgender persons qualify as a quasi-suspect class.

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122 *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'") (quoting Lee v. Washington, 390 U.S. 333, 334 (1968)).

123 *See* Watkins v. U.S. Army, 875 F.2d 699, 724 (9th Cir. 1989).

124 *See, e.g.*, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 496 (1998) (noting the importance of visibility in determinations of suspect classifications).

125 *See id.* at 725.

126 *See id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

127 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

128 *See id.*

129 *See* San Antonio Indep. School. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (asking, to determine whether a group is a suspect class, whether it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

130 *See id.* at 724.

First, there is a history of discrimination against transgender persons. This is clear because, even in the present day, transgender persons face many legal obstacles. Workplace discrimination of transgender individuals is common, and many transgender individuals are fired when they transition on the job.[131] Throughout the twentieth century, transgender individuals have also faced housing discrimination and have been the victims of hate crimes.[132]

In addition, transgender individuals fulfill several other relevant factors. The group clearly constitutes a discrete and insular minority: one in eighteen thousand males and one in fifty-four thousand females are estimated to be transgender.[133] Furthermore, stereotyping about transgender individuals is prevalent in American society. Seen both as abnormal and threatening the sexuality of straight men, the gender transgression of transgender persons often makes them the subject of jokes in the public media.[134]

The underprivileged status of transgender persons is well-documented. As noted above, transgender persons are overrepresented in the prison population.[135] Moreover, prejudice against transgender persons often presents significant barriers to obtaining necessary medical care.[136] The prevalence of HIV in the transgender community is high, compared to the general population,[137] as is the prevalence of other health-related problems.[138] Further, transgender persons have difficulty finding

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131 *See* Broadus, *supra* note 41, at 93.

132 *See How Do Transgender People Suffer from Discrimination?*, HUM. RTS. CAMPAIGN, http://www.hrc.org/issues/1508.htm (last visited Feb. 23, 2011).

133 Seil, *supra* note 29, at 100.

134 *See, e.g.*, *Human Rights Campaign Sends Letter Condemning CBS Late Show with David Letterman Skit, Asks for Apology*, HUM. RTS. CAMPAIGN, Jan. 6, 2010, http://www.schaap.hrc.org/news/13903.htm (discussing skit making fun of Amanda Simpson, a transgender woman appointed to a senior position in the U.S. Department of Commerce); *see also* Regine Labossiere, *Media Image of Transgendered Evolves*, SEATTLE TIMES, June 21, 2007, http://seattletimes.nwsource.com/html/living/2003755693_transgender21.html (noting the presence of the "Jerry Springer phenomenon," where transgendered people were "portrayed as freak shows").

135 *See supra* note 13 and accompanying text.

136 Emily Newfield et al., *Female to Male Transgender Quality of Life*, 15 QUALITY OF LIFE RES. 1447, 1448 (2006) (demonstrating diminished quality of life in female-to-male (FTM) transgender persons in comparison with the general population).

137 *See* Gretchen P. Kenagy, *Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia*, 30 HEALTH & SOC. WORK 19, 20 (2005).

138 *Cf. id.* (including violence, depression, and lack of access to health care).

work[139] and experience disproportionate levels of harassment and abuse.[140]

The question, however, of whether transgenderism is visible and mutable is more difficult to answer. The trait is visible to the extent that one makes it visible: if one decides to manifest "felt gender"[141] by cross-dressing and taking hormones, then felt gender is perceptible to the public. Alternatively, if a transgender individual never manifests felt gender through any external expression, then transgenderism is not visible. Mutability is even more complicated than the question of visibility. To the extent that transgender persons can change their physical appearance, transgender identity is indeed mutable. However, the definition of being transgender is not in the physical appearance that one manifests but, arguably, in the gender that one feels that one is. Thus, to the extent that transgender persons cannot eliminate feelings that their body is contrary to their actual gender, the characteristic is immutable. Recent evidence suggests that feelings that one's body does not comport with one's felt gender may be biological, meaning that such feelings are themselves immutable.[142] The question of mutability, then, is decidedly complex and requires carefully evaluating what the examined class is.

After examining the factors the courts prescribe, it appears that transgender persons satisfy some but not all of the characteristics of a suspect class.[143] As a practical matter, *Romer* suggests that transgender persons likely would not be considered a suspect class,[144] given the treatment of homosexuals. As a result, the most likely home that transgender individuals might find in the Equal Protection regime is as a quasi-suspect class.

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139 *See* David Valentine, *"The Calculus of Pain": Violence, Anthropological Ethics, and the Category Transgender*, *in* LOCAL ACTIONS: CULTURAL ACTIVISM, POWER, AND PUBLIC LIFE IN AMERICA 89, 90 (Melissa Checker & Maggie Fishman eds., 2004) (noting the difficulty that transgender persons have in finding work in New York).

140 *See id.* at 92 (describing a recent survey by the Gender Public Advocacy Coalition that found that almost sixty percent of transgender-identified people surveyed had experienced some form of harassment or abuse).

141 The Author uses "felt gender" as a short-hand to refer to the gender that a transgender person feels, believes, or knows is his or her true gender. Felt gender is distinct from one's biological gender at birth.

142 *See* Frank P.M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2034 (2000).

143 *See supra* notes 123–142 and accompanying text.

144 *See supra* Section III.A.

2. Why Does Transgenderism Constitute a Quasi-Fundamental Right?

As noted above,[145] several aspects of the fundamental rights regime are applicable when considering the right to determine one's gender. In *Lawrence*—which struck down a Texas statute that banned homosexual sodomy as unconstitutional—the Court noted the importance of sexual autonomy, stating that the law should respect sexuality, as "overt[ly] express[ed] in intimate conduct with another person."[146] This formulation, in concert with the language of *Casey* upholding the right to "define one's own concept of existence" as a part of the fundamental rights regime, suggests that the Court may recognize the concept of a fundamental right to self-definition in gender identity.[147] However, given the nature of the holding in *Lawrence*, which expressed the fundamental right to sexual privacy in terms of a relationship to another,[148] the ground upon which to stake a claim to sexual self-definition is more tenuous. Syllogistically, *Lawrence* combined with *Casey* suggests that a fundamental right to sexual self-definition exists, meaning that, in practice, the Court would likely recognize the existence of such a right as a quasi-fundamental right.

3. Why Is Sliding Scale Review an Appropriate Home for Transgender Rights?

Sliding scale review[149] is the level of review that makes the most sense when dealing with issues of transgender rights. Transgender persons may claim status as a quasi-suspect class because they are marginalized in a myriad of ways, including in the workplace, social settings, and in medical contexts.[150] Equal protection under the Fourteenth Amendment exists, in large, part to protect discrete and insular minorities,[151] a designation that includes the transgender prisoner population.[152] Moreover, transgender persons rely on the case law establishing fundamental rights precisely because they are interested in a right to autonomy rather than a claim of medical need, suggesting that the fundamental rights re-

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145 *See supra* Section III.B.

146 Lawrence v. Texas, 539 U.S. 558, 567 (2003).

147 *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

148 *See* Plyler v. Doe, 457 U.S. 202, 224 (1982).

149 Sliding scale review is described at *supra* note 107 and accompanying text. In the context of the intersection of a quasi-suspect class and a quasi-fundamental right, sliding scale review involves asking whether a regulation furthered "some substantial goal of the state" when a case involves the intersection of a quasi-suspect class and a quasi-fundamental right. Plyler v. Doe, 457 U.S. 202, 224 (1982).

150 *See supra* Part III.B.1.

151 *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

152 *See supra* notes 133 and 134 and accompanying text.

gime is more appropriate than the Eighth Amendment as a source for transgender prisoners' protection.[153] Finally, from a tactical perspective, including suspect classification and fundamental rights together is important for the transgender rights movement: while the prison context is less protective of fundamental rights, courts have a lengthy history of requiring a high level of scrutiny when Equal Protection is involved in the prison context.[154]

C. Positive Obligations on the Part of the State

If transgender prisoners in need of hormone therapy constitute a quasi-suspect class, does this impose an affirmative duty on the prison to provide prisoners with hormone therapy? Traditional analysis of due process and fundamental rights does not create positive rights to government aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[155] However, the prison context imposes different standards of care on prison officials for the inmate population compared with ordinary civilian life. In the prison context, "when the State takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[156] The reasoning behind this duty is that a state exceeds the substantive boundaries of the Due Process Clause and the Eighth Amendment when "by affirmative exercise of its power [the state] so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety."[157] Thus, the question remains as to why prison officials, given this stringent standard, should be required to *provide* hormone therapy to prisoners who require it, given that it does not rise to the level of a basic human need.

The exercise of religious rights in prison, and prison officials' affirmative duty to provide materials to do so, may prove instructive in analyzing the case of hormone therapy. An instructive parallel to hormone therapy in prisons is found in *Cruz v. Beto*.[158] In *Cruz*, the Court examined the case of a Buddhist who was denied access to use the prison

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153 *See supra* Part III.

154 *See supra* notes 49 and 118 and accompanying text.

155 *See* DeShaney v. Winnebago Cnty. Dep't. of Soc. Serv., 489 U.S. 189, 196 (1989); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 124–25 (1996) (noting that "[i]n numerous cases . . . the Court has held that government 'need not provide funds so that people can exercise even fundamental rights'").

156 *DeShaney*, 489 U.S. at 199–200.

157 *Id.* at 200.

158 405 U.S. 319 (1972).

chapel even though inmates belonging to other religious sects were given permission to use it.[159] Though *Cruz* pre-dates *Plyler*, it is analogous because it involves the interaction between a fundamental right and a suspect class in the prison context—the exercise of religion by one religious group as compared to other religious groups. Significantly, like hormone therapy in prisons, *Cruz* also involves the affirmative provision of an entitlement, in this case, the use of the prison chapel. The Court found that if Cruz, as a Buddhist, was denied a reasonable opportunity afforded to fellow prisoners who adhered to more conventional precepts, then the state discriminated on religious grounds.[160]

One lingering question remains: does the ruling in *Cruz* survive the apparent policy shift that *DeShaney*'s holding regarding prison officials' obligations to inmates represents? Some district court cases suggest the continuing viability of *Cruz*. In *Rouser v. White*,[161] the court denied defendants' summary judgment motion where the plaintiff alleged a constitutional violation of the First Amendment when prison officials provided amenities to other faith groups but failed to provide the plaintiff with a Wiccan chaplain and a copy of a Witches' Bible.[162] Perhaps more instructively, in *Ward v. Walsh*,[163] the Ninth Circuit held that while a prison had no affirmative duty to provide a Jewish prisoner with an orthodox rabbi, it might be required to provide kosher meals if, under the appropriate analysis, the district court found on remand that the *Turner* prongs did not support the abridgement of the right.[164]

As a consequence, there are circumstances in which, despite *DeShaney*, prison officials are required to affirmatively provide prisoners with certain goods and services, and the determination as to whether they are required to do so is folded into the *Turner* inquiry that accompanies

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159 *Id.*

160 *Id.* Another analogous example in which prison officials were required to provide a service was in *Bounds v. Smith*, where the court noted that the fundamental constitutional right of access to the courts required prison authorities to provide adequate law libraries in order to assist inmates in the preparation and filing of meaningful legal documents. 430 U.S. 817, 817 (1977). The nature of this holding and its applicability to the present situation, however, is limited in that *Bounds*, although dealing with access to a privilege based on fundamental constitutional rights, dealt with the provision of a service essential to the defense of a prisoner, which imports different considerations than denial of a fundamental right wholly detached from the duration or cause of imprisonment itself. *See id.*

161 630 F. Supp. 2d 1165 (E.D. Cal. 2009).

162 *See id.* at 1165.

163 1 F.3d 873 (9th Cir. 1993).

164 *See id.* at 877–81. Note that the *Turner* prongs being referred to here are: (1) whether there is a logical connection between the policy and the legitimate governmental interest that justifies it, (2) whether the prisoner has alternative means to secure the right, (3) the impact accommodation will have on guards and other prisoners, and on the allocation of resources generally, and (4) whether there are ready alternatives to the prison's current policy that would accommodate the inmate at *de minimis* cost to the prison. *See id.* at 876.

fundamental rights analysis.[165] Thus, the inquiry under sliding scale review, as it applies in the prison context, would likely resemble the *Turner* inquiry, which determines whether a fundamental right will be honored or abridged. As a result, while imposing a positive obligation on prison officials may be a difficult task; precedent establishes that in some cases, prison officials may be affirmatively required to supply a good in order to secure the realization of certain rights.

CONCLUSION

The problem of transgender inmates' access to hormone therapy has expressive effect beyond the confines of the prison. While hormone therapy in the prison context has important implications for the inmate population, within the broader context of the transgender community, the way in which advocates frame legal arguments for hormone therapy will shape society's perspective on transgender identity. While aligning most closely with the traditional discourse of the transgender rights movement, appeals to status as a suspect class or to access to hormone therapy as part of a fundamental right are likely to fail. In addition, arguments that rest on the grounds of medical need or handicap compromise autonomy in self-definition.

While legality is often divorced from theory, this Note seeks to square the theoretical underpinnings of transgenderism with the self-conceptualization of the community, and to connect that framework to the problem of transgender inmates' access to hormone therapy. This Note began by providing a justification to analyze the problem and a background on the scope of the problem presented. Part II evaluated various approaches to transgender rights and addressed their application to the prisoners' rights context, before concluding that different problems are inherent in each model. That section began by examining the ways in which treating transgender identity as a suspect classification might help the cause of transgender prisoners' rights to hormone therapy but ultimately concluded that laws challenged by transgender individuals are unlikely to receive more than rational basis scrutiny. The section next analyzed the issue of fundamental rights, concluding that while courts would likely consider autonomy in sexual self-definition a fundamental right, the prison context affords only limited protection for the exercise of fundamental rights. Finally, the section addressed the most common doctrine applied to the problem of hormone therapy in prisons: the Eighth Amendment. The section noted the problems with securing hormone therapy through reliance on a theory that describes transgender identity as the consequence of a mental disorder.

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165 *Id.*

Part III provided a novel solution to the problem of transgender rights that effectively combined the three alternative approaches examined in Part II. This approach involves picking up the mantle of *Plyler v. Doe* to describe transgender identity as an intersection of quasi-fundamental rights and quasi-suspect classification that best reflects the marriage of the transgender community's ideal self-definition and the law as it exists today. The overall expressive effect of such an approach, based not in language of deformity or disability but in the language of protection from prejudice and access to rights, comports with the mission of the transgender rights movement. Moreover, such an approach can greatly affect other issues in the transgender rights movement, including access to employment opportunities, protection from discrimination, marriage rights, and name changes. Thus, sliding scale review can provide a solution both to transgender prisoners' rights to hormone therapy and the larger problem of finding a home for transgender rights in constitutional law.