Gender Identity Disorder in Prison: Depending on a Diagnosis
That Is Soon to Disappear?

By James Phillips, MD [6]

A recent case has caused a flurry of opposing opinions. Not surprisingly, transgender advocacy groups have praised the judge's decision that the inmate in question has an eighth amendment right requiring the state to support and pay for sex reassignment surgery.

[Editor's note: We owe an apology to Dr Paul Appelbaum, whose name erroneously appeared in a previously posted version of this article. The article now correctly includes the name of Dr Kenneth Appelbaum, a well-known figure in forensic and correctional psychiatry. Our apologies to Dr Paul Appelbaum for this unfortunate error. The author would also like to extend a personal apology to Dr Paul Appelbaum for the error in the previously posted version of the article.]

In what will count as one of the more bizarre convergences of psychiatry and the law, a Massachusetts district court ruled recently that Robert Kosilek, a convicted murderer sentenced to life, has a constitutional right to receive a sex change operation at the public's expense. Kosilek sued the Department of Corrections (DOC) over a violation of his constitutional rights because the DOC refused to pay for the operation. Judge Mark Wolf ruled in Kosilek's favor, stating, “It is the only way to treat Kosilek’s ‘serious medical need.’”¹ In his ruling Wolf noted that the Department of Correction's own medical experts testified that they believe surgery was the only adequate treatment for Kosilek. Speaking of the prisoner's anguish, Judge Wolf remarked, “[t]hat anguish alone constitutes a serious medical need. It also places him at high risk of killing himself if his major mental illness is not adequately treated.”¹

The case has caused a flurry of opposing opinions. Not surprisingly, transgender advocacy groups have praised the decision that Kosilek's Eighth Amendment rights required the state to support and pay for sex reassignment surgery. On the other hand, both Republican Senator Scott Brown and Democratic candidate Elizabeth Warren have opposed the decision. Senator Brown called the decision “an outrageous abuse of taxpayer dollars,”² and Senate candidate Warren said she didn't think the ruling was “a good use of taxpayer dollars.” A group of 50 Massachusetts legislators asked the state Department of Corrections to appeal the ruling.

In 2006, an editorial in the Boston Globe³ reflected popular sentiment at the time of the first stages of the trial: “Kosilek's case is not compelling for reasons even beyond the obvious distastefulness of a wife killer angling to serve out his sentence of life without parole in a women's prison. Private insurers rarely pay for sex-change operations . . . Kosilek, like any inmate, deserves proper mental health care, including hormone treatment and expert therapy. If he is at risk of suicide, he should be placed under constant observation. But that's sufficient.”

The role of psychiatry in the trial

Judge Mark Wolf's “Memorandum and Order on Eighth Amendment Claim,”¹ (the Memorandum) begins with a statement that points to the essential role of psychiatrists and the diagnosis of gender identity disorder (GID) in the formation of his decision:

This case is unusual because a transsexual prisoner, plaintiff Michelle Kosilek, seeks an
unprecedented court order requiring that the defendant Commissioner of the Massachusetts Department of Correction[s] . . . provide him with sex reassignment surgery to treat his major mental illness, severe gender identity disorder . . . Kosilek is serving a life sentence, without possibility of parole, for murdering his wife. Kosilek suffers from a [GID], which is recognized as a major mental illness by the medical community and by the courts. Kosilek is, therefore, a transsexual—a man who truly believes that he is a female cruelly trapped in a male body. This belief has caused Kosilek to suffer intense mental anguish. This anguish has caused Kosilek to attempt to castrate himself and to attempt twice to kill himself while incarcerated, once while he was taking the antidepressant Prozac.

In Part I of the Memorandum, Judge Wolf provides a summary of the case, explaining that inmate Kosilek's Eighth Amendment right to not undergo cruel and unjust punishment requires that he receive adequate medical care, and that for his condition, anything less than sex reassignment surgery is inadequate medical care and therefore cruel and unjust punishment. He signals in this opening summary that he relies on the Harry Benjamin Standards of Care in the development of his injunction on the State of Massachusetts to provide the sex reassignment surgery.  

In Part II, “The Applicable Standards,” Judge Wolf traces the history of court rulings on the use of feminizing hormones, psychotherapy, and sex reassignment surgery in the prison system. He also notes that in 2010 the United States Tax Court held that the costs of feminizing hormones and sex reassignment surgery are for certain individuals tax deductible as forms of necessary “medical care” for a serious, debilitating condition that is sometimes associated with suicide and self-castration, rather than non-deductible expenses for “cosmetic” treatment. He concludes this section with the statement: “To prevail in this case, Kosilek must prove that: (1) he has a serious medical need; (2) sex reassignment surgery is the only adequate treatment for it; (3) the defendant knows that Kosilek is at high risk of serious harm if he does not receive sex reassignment surgery; (4) the defendant has not denied that treatment because of good faith, reasonable security concerns or for any other legitimate penological purpose; and (5) the defendant’s unconstitutional conduct will continue in the future. If Kosilek proves that he is entitled to relief, the injunction issued must be narrowly tailored to remedy the violation of his Eighth Amendment rights and not unnecessarily restrict the discretion of prison officials.”

In Part III, “Findings of Fact and Conclusions of Law,” Judge Wolf details the first Kosilek trial in 2002 and the second—a 28-day bench trial heard by himself—in 2006, with testimony continuing until 2011. The second trial involved a major dispute among psychiatric experts. As the DOC was under contract with the University of Massachusetts Correctional Health Program, they obtained the consultation of Dr Kenneth Appelbaum from the University of Massachusetts. Dr Appelbaum arranged for GID experts from the Fenway Clinic, Drs Randi Kaufman and Kevin Kapila, to consult on the question of sex reassignment surgery for the inmate. Both testified that Kosilek suffered from severe GID for which sex reassignment surgery was the necessary and appropriate treatment.

The DOC then engaged experts from outside the University of Massachusetts—Cynthia Osborne, a licensed social worker, and Dr Chester Schmidt, a psychiatrist—both associated with the Johns Hopkins Medical School. Both testified to the effect that the surgery was not medically necessary. The plaintiff engaged Dr George Brown, a psychiatrist on the Board of Directors of the Harry Benjamin International Gender Dysphoria Association, who testified to the necessity of surgery. The court requested that Dr Appelbaum review Dr Schmidt’s testimony in order to inform the court of his opinion as to whether Dr Schmidt’s recommendations were within “prudent professional standards.” Judge Wolf expressed concern in his Memorandum that Osborne and Schmidt were under the influence of the Catholic, anti-surgery ideology of Hopkins’ ex-chair of psychiatry, Paul McHugh. (It apparently didn’t occur to Judge Wolf that the Fenway experts and the Harry Benjamin Association are also guided by their particular ideologies.) He stated, “. . . after consulting Drs Kaufman and Kapila, in whom he continued to have confidence, Dr Appelbaum concluded that ‘the recommendations of Dr Schmidt do not meet prudent professional standards.’”

The court then appointed Dr Stephen Levine as an expert witness and asked him to review Dr Schmidt’s recommendations. Dr Levine, who was chairman of the Harry Benjamin committee for the fifth version of the Standards of Care, reported that “Dr Schmidt’s view is within professional standards.” Under testimony, however, he qualified his report to the effect that Dr Schmidt’s view was prudent “only if, for some reason such as cost or the fact that Kosilek was incarcerated, sex reassignment surgery was not an option.” Now understanding the situation more clearly, he reversed the conclusion of his report. Summarizing some of this conflicting testimony, Judge Wolf writes:
On May 10, 2005, UMass wrote that, “[w]e have consistently indicated . . . that we defer to the Fenway staff regarding the propriety of sexual reassignment surgery in the case of Michelle Kosilek.” And later, on June 14, 2005, that “[b]ased on the opinions of Dr Kapila and Dr Kaufman, and notwithstanding the report of Dr Osborne, we would again suggest that solely from a clinical perspective it appears that sex reassignment surgery should be offered to Michelle Kosilek.” On September 1, 2005, Drs Brown and Appelbaum wrote to the DOC that “[f]rom what we have been told by Dr Kapila and Dr Kaufman, it is our understanding that further delay in providing the recommended treatment likely will result in continued or increased levels of distress for each afflicted individual, with the possibility of self-inflicted injury. To that extent, we also view the treatment recommendations as medically necessary.”

In the final section of Part III, titled “Eighth Amendment Analysis,” Judge Wolf reviewed the 5 conditions Kosilek would have to prove to warrant the injunction requiring surgery. Judge Wolf concludes that Kosilek has proved the five conditions. In reviewing the second condition: “Sex Reassignment Surgery is the Only Adequate Treatment for Kosilek’s Serious Medical Need,” Wolf writes:

As indicated earlier, Drs Brown, Kaufman, and Forstein who each specialize in treating individuals with gender identity disorders, all testified that sex reassignment surgery is medically necessary for some individuals suffering from severe gender identity disorders. By contrast, Dr Schmidt testified that he disagreed with the Standards of Care to the extent that they provided that sex reassignment surgery is medically necessary for some transsexuals.

The court finds the views of Drs Brown, Kaufman, and Forstein to be persuasive on the issue of whether such surgery is ever medically necessary. As previously described, the Standards of Care are accepted by prudent professionals in the community and provide that sex reassignment surgery is medically necessary for some individuals...the Fenway clinicians, Drs Kaufman and Kapila, wrote that “[g]iven her continued psychological distress, despite the treatment she has already had for GID in making a social and hormonal transition, sex reassignment surgery is the only treatment at this point that ameliorates Kosilek’s continued gender dysphoria.” Finding the opinions of Drs Kaufman and Kapila to be reliable, Dr Appelbaum concluded that sex reassignment surgery “is not only clinically appropriate and should be offered to Miss Kosilek, but...it is medically necessary.”

**Psychiatry and GID**

To say the least, the experience of psychiatry with sex related disorders has not been smooth. Problems go all the way back to 1973 when controversy over homosexuality was so intense that the question of removing the diagnosis from DSM-II was put to a membership vote. Dr Allen Frances has warned that the paraphilias are a minefield of “unintended consequences.” In reviewing his work as chair of the DSM-IV Task Force, he writes: “With one exception we made no obvious mistakes, but this one mistake was glaring and has caused great harm at the difficult boundary between psychiatry and the law. Sad to say, we did a very poor job in writing the DSM-IV paraphilia section, never anticipating that it would soon become central in determining the constitutionality of subjecting sexual offenders to lifelong psychiatric commitment. We carried over most of the already poor worded DSM-III-R text and inadvertently made it much worse with a seemingly small change (substituting an ‘or’ for an ‘and’). The unintended consequences have been disastrous.”

In the case of DSM-5, Dr Frances has focused on the dubious additions of “coercive paraphilia,” “hypersexuality,” and “hebephilia.” He may not have imagined the troubling possibilities for GID. Given that the Kosilek decision was based entirely on the conclusion that Kosilek suffers from severe GID, we begin with a first, fundamental question: is GID a psychiatric disorder? Of course it was for DSM-IV, but that is less clear for DSM-5, in which Gender Identity Disorder has been demoted to Gender Dysphoria. The context for that change is the prominent campaign, as with many sex related conditions, to destigmatize the condition by removing it from the DSM. A typical example of the argument for removal is this statement of the National Committee on Lesbian, Gay, Bisexual, and Transgender Issues (NCLGBTI) of the National Association of Social Workers (NASW):

Respectfully, the [NASW-NCLGBTI] holds a position that Gender Identity Disorder, Gender Incongruence, Gender Dysphoria, Transvestic Fetishism, and Transvestic Disorder should not be considered as mental health diagnoses and therefore should be eliminated from the Diagnostic Statistical Manual (DSM).

The NASW-NCLGBTI holds the position that the Gender Identity Disorder, Gender Incongruence, and Gender Dysphoria should be viewed and approached from the perspective of a medical model rather than that of a mental health model. Many anatomical inconsistencies now can be corrected surgically or chemically to align with the experienced true self. A medical diagnosis for transgender individuals, whose self-experienced gender does not match the sex assigned at birth and who require medical
services to align the body with the experienced self, is more appropriate and consistent with research and best practices than a mental health diagnosis.

The DSM-5 response to this campaign has been to replace GID with Gender Dysphoria, thus removing the stigma of calling it a disorder—following the same path as homosexuality in the 1970s. The DSM-5 Work Groups have been criticized (by this author among others) for creating new diagnoses and medicalizing normality; in this instance, however, they have moved in the opposite direction—that of normalizing what in DSM-IV had been labeled a psychiatric disorder. The lengthy discussion in the DSM-5 Web site of whether to remove the “disorder” label and change GID to Gender Dysphoria is a masterful exercise in equivocation, uncertainty, and confusion (cf http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=482#). But given the bewilderment over how to treat this and other sex related diagnoses, such indecisive and unsettling discussion is entirely appropriate. The DSM-5 Work Group elected to remove GID and replace it with Gender Dysphoria, but they couldn’t bring themselves to remove the condition from DSM-5 and leave it as a medical condition that could cause clinical depression. Needless to say, as with other value-laden diagnoses, there is no scientific way to decide whether GID or Gender Dysphoria is or is not a psychiatric illness.

For the proponents of removing the GID diagnosis, the challenge has been to achieve 2 potentially conflicting goals: remove GID from the DSM, but at the same time argue for reassignment surgery. Their approach has in fact been rather straightforward, as suggested in the quote from the NASW: stop thinking of GID as a psychiatric condition and treat it as any other medical condition involving an anatomical abnormality that can be corrected by surgery. Their approach is in that way different from the way in which homosexuality was dealt with. They don’t want to “demedicalize” GID: they want to “depsychiatrize” it and in fact to “medicalize” it. This approach to GID poses a real challenge to the field of psychiatry and the architects of DSM-5. The very structure of the DSM puts all disorders on some kind of equal status. Thus, Judge Wolf stands on solid DSM-IV ground when he argues that the inmate suffers from a major mental illness. But do we really think that a hallucinating schizophrenic and a person with GID have equivalent “illnesses”?

To appreciate the difference, consider the following. One person experiences hallucinations, delusions, and other symptoms of schizophrenia, but denies that he has schizophrenia or any other mental illness. We will probably continue to diagnose him as schizophrenic. Another person with symptoms of GID and the money to pay for reassignment surgery goes about correcting his anatomical/physiological problem, and he objects to our labeling him as suffering from a mental illness. Are we really going to tell him that, like the schizophrenic, he suffers from a mental illness and is just denying it? In their shift from GID to Gender Dysphoria, the DSM-5 authors have effectively removed its parity with major disorders like schizophrenia.

**Back to Kosilek**

Judge Wolf concluded that inmate Kosilek had an Eighth Amendment right to sex reassignment surgery because prominent psychiatrists argued that he suffered from a severe mental illness for which the appropriate and necessary treatment was sex reassignment surgery. The entire case was based on a putative psychiatric diagnosis, GID, which is about to be changed in DSM-5 to Gender Dysphoria, a diagnosis that for DSM-5 doesn’t warrant the label “disorder.” We can wonder, after psychiatry’s disastrous experiences with homosexuality and the violent sexual predator statutes, why the plaintiff psychiatrists would allow themselves to be sucked into this morass of another dubious, value-driven, sex-related diagnosis? Does psychiatry need to look foolish one more time for its diagnostic overreaching?

To appreciate the slippery slope onto which the psychiatrists have innocently stumbled, let’s imagine another situation. The prisoner is now someone suffering from Body Dysmorphic Disorder who is convinced that his breasts are too large and make him feel like a woman. He is distressed to the point of feeling suicidal over his inability to correct this defect surgically. Will we as psychiatrists testify that such surgery is the appropriate and necessary treatment for his condition? Or will we argue that such surgery is not medically necessary and qualifies merely as “cosmetic” surgery? Judge Wolf would probably support the latter opinion, noting in his memorandum that “the United States Tax Court held that the costs of feminizing hormones and sex reassignment surgery are for certain individuals tax deductible as forms of necessary ‘medical care’ for a serious, debilitation condition that is sometimes associated with suicide and self-castration, rather than non-deductible expenses for ‘cosmetic’ treatment.”¹ The problem with this argument is that while GID will be demoted in DSM-5 to less than a disorder, Body Dysmorphic Disorder will remain a disorder, thus enjoying higher status as a “major mental illness” than Gender Dysphoria. So if the team of
psychiatrists who testified for the medical necessity of inmate Kosilek’s surgery are called back to
court to weigh in on another prisoner’s suicidal body dysmorphic disorder, consistence may oblige
them to testify for the medical necessity of the corrective surgery.
How much cleaner it would have been for Dr Appelbaum and colleagues to say, this is a
questionable, value-driven diagnosis, for which we don’t have any final word, much less a clear
recommendation for what treatment is necessary other than to treat the man’s depression; we can’t
argue for the medical necessity of sex reassignment surgery any more than we could for the medical
necessity of forgiving a man’s mortgage because the prospect of foreclosure was making him
suicidal. They could also recommend that, given the uncertain psychiatric status of Kosilek’s
condition, it should be treated medically like any other physical abnormality—cleft pallet, club foot,
whatever—and that questions as to whether such conditions should be paid for by the state in which
the inmate is imprisoned are not the province of psychiatric expertise.
For inmate Kosilek, the bottom-line issue is whether the state has an Eighth Amendment obligation
to pay for sex reassignment surgery. In coming to his conclusion the judge relied on the opinions of
psychiatric experts and the Harry Benjamin Standards of Care. The latter are a product of the Harry
Benjamin International Gender Dysphoria Association, Inc., which supports sex reassignment surgery
for appropriately designated individuals. The standards also emphasize the need of a psychiatric
diagnosis: “The use of a formal diagnosis is an important step in offering relief, providing health
insurance coverage, and generating research to provide more effective future treatments.”¹ Thus,
like the expert psychiatrists, they depend for their recommendations on a diagnosis that is about to
disappear.
There is of course a distinction to be made between the appropriateness of care and whether it
should be paid for by insurance or other parties. As judge Wolf notes, “... the fact that an inmate is
entitled to adequate medical care does not mean that he is entitled to ideal care or to the care of his
choice.”¹ We experience this issue all the time in the question of psychotherapy, eg, whether the
psychotherapy, however appropriate, meets the insurance company’s standard of medical necessity
and thus warrants insurance company support. In general, when we (or an insurance company) seek
a standard for what should be covered and what not, we turn to Medicare and its coverage policies.
In the present discussion it is thus significant that Medicare does NOT cover sex reassignment
surgery. This was pointed out in a recent editorial in the Los Angeles Times,¹² commenting on the
Kosilek case and titled “Sex Change at Taxpayer’s Expense”:
A Massachusetts judge went too far in ruling that the state should pay for such surgery for convicted
murderer Michelle Kosilek. Though the psychiatric world recognizes and treats gender identity
disorder—defined by the National Institutes of Health¹³ as a disconnect between a person’s physical
gender and the gender the person identifies with—that recognition hasn't translated into widespread
insurance coverage for sex-change operations that some patients feel is the only solution to their
turmoil. Most private insurance and Medicaid programs do not pay for the surgery, viewing it as
elective; neither does Medicare.¹²
In summary, then, Judge Wolf has invoked the Eighth Amendment to require the State of
Massachusetts to pay for sex reassignment surgery for a sentenced murderer, basing his judgment
on a disputed psychiatric diagnosis that may disappear from the soon-to-appear DSM-5, and
requiring from the State of Massachusetts a payment policy not allowed by Medicare for ordinary
citizens. His questionable judgment is matched only by the psychiatric experts, who may again
have led psychiatry down the slippery slope of diagnostic overreaching.

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