TRANSGENDER MILITARY INMATES' LEGAL AND CONSTITUTIONAL RIGHTS TO MEDICAL CARE IN PRISONS: SERIOUS MEDICAL NEED VERSUS MILITARY NECESSITY

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† I would like to express my sincere appreciation to Professor Jordan Blair Woods for his enthusiastic support, encouragement, and feedback. Thanks as well to Professor Sharon Dolovich for direction and resources. Finally, my heartfelt gratitude goes to Leslie Schafer, for her intelligent questions, her amazing proofreading skills, and everything else.

> "The military constitutes a specialized community governed by a separate discipline from that of the civilian."[1]

INTRODUCTION

The military prisoner formerly known as Private Bradley Manning created global controversy by exposing United States military secrets to Wikileaks.[2] A military court martial convicted Manning on charges including espionage, theft, and fraud,[3] and sentenced her to thirty-five years of confinement.[4] Subsequent to conviction, Manning created a second controversy when she came out as a transgender woman[5] and announced that she had chosen the name Chelsea.[6] There is a firestorm of controversy surrounding the debate about appropriate medical treatment for Manning's gender dysphoria.[7] Manning has brought national attention to an issue long

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1. Loving v. United States, 517 U.S. 748, 773 (1996) (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953)) (deferring to Congress's regulation of the military in delegating power to the President to prescribe aggravating factors for the imposition of the military death penalty).

2. *Manning Heads to Notorious Fort Leavenworth Prison to Serve Sentence*, RT (August 23, 2013, 5:02 AM), http://rt.com/usa/manning-leavenworth-prison-877.

3. Luis Martinez & Steven Portnoy, *Bradley Manning Guilty on Most Charges, But Not Aiding Enemy* (July 30, 2013), http://abcnews.go.com/Blotter/bradley-manning-guilty-charges-aiding-enemy/story?id=19797378.

4. *Manning Heads to Notorious Fort Leavenworth Prison to Serve Sentence*, *supra* note 2.

5. The term *transgender* refers to "individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth." PAISLEY CURRAH ET AL., TRANSGENDER RIGHTS, xiii, xiv (Paisley Currah et al. eds., 1st ed. 2006).

6. *Manning Heads to Notorious Fort Leavenworth Prison to Serve Sentence*, *supra* note 2. This is not meant to suggest that Manning chose to be transgender; merely, she chose the timing and method of her public announcement. This Article refers to Manning by her preferred gender pronouns (female) throughout.

7. *See, e.g.*, Chris Geidner, *Meet the Trans Scholar Fighting Against The Campaign For Out Trans Military Service*, BUZZFEED NEWS (Sept. 9, 2013, 5:03 PM), http://www.buzzfeed.com/chrisgeidner/meet-the-trans-scholar-fighting-against-the-campaign-for-out ("[T]he right wing will have a field day with questions about . . . whether government money should pay for gender-related health care . . . .").

ignored or belittled by the media: appropriate medical treatment for incarcerated transgender persons, or persons with gender dysphoria. [8]

Manning's case is unique in the military prison context, because the U.S. military, even subsequent to the repeal of Don't Ask Don't Tell,[9] does not allow transgender persons to openly serve.[10] In fact, Manning is the first known transgender prisoner the military has incarcerated.[11] Manning first

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8. Gender dysphoria is the term used for people whose sex assignment at birth is at odds with the gender with which they identify. *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf (last visited Dec. 1, 2014). The American Psychiatric Association's DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition) replaced the term "Gender Identity Disorder" with "Gender Dysphoria" in May 2013 in order to reduce the stigma attached to the prior terminology. Jack Drescher, M.D., *Controversies in Gender Diagnoses*, 1 LGBT HEALTH 10, 12 (2014). Previously, the DSM-4, and thus the bulk of legal and news articles as well as court decisions, used the term Gender Identity Disorder (or GID). Additionally, "[w]hile gender identity disorder was pathologized as an all-encompassing mental illness, gender dysphoria is understood as a condition that is amenable to treatment." PALM CENTER, REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 10 (Mar. 2014) (citing Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Non-Conforming People, Version 7*, INT'L J. OF TRANSGENDERISM 13, 168 (2011)) *available at* http://www.palmcenter.org/files/Transgender%20Military%20Service%20Report_2.pdf. It is unclear if courts will interpret the two terms differently, but unless or until they do, I treat the two terms as synonymous for the purposes of this legal analysis.

9. Don't Ask Don't Tell was the legal framework under which gay, lesbian, and bisexual military personnel were ostensibly allowed to serve, but not openly.

10. Francine Banner, *"It's Not All Flowers and Daisies": Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of "Don't Ask, Don't Tell"*, 24 YALE J.L. & FEMINISM 61, 76 (2012). Despite the prohibition, an estimated 140,000 transgender persons alive today, or one in five, are veterans of the U.S. military. *Honoring the Service of all Veterans,* ADVANCING TRANSGENDER EQUALITY (Nov. 11, 2013), http://transgenderequality.wordpress.com//11/11/honoring-the-service-of-all-veterans.

11. Manning was sexed male at birth but identifies as female gendered. For the purposes of this Article, I use the term "sex" to refer to a person's physical embodiment, i.e., genitalia and secondary sex characteristics. Sex for our purposes refers to persons whose bodies are identified as male or female. There are also intersex persons whose bodies at birth do not conform to the artificial sex binary of male or female, but Manning is not intersex. I use the term "gender" to refer to the social role persons play in our society. Persons are generally categorized both by themselves, and by those around them, in the artificial gender binary of male and female. There are many persons who reject the gender binary. *See* Julia C. Oparah, *Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA WOMEN'S L.J. 239, 244 (2012). For the purposes of this Article, however, it is simpler to work within the binary construct of male/female, using sex as a physical characteristic and gender as a social role. *See* Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 562 (2000) (stating that "[t]he Court views the male/female binarism as a discrete, never-intermingled set of independent categories"). There is an additional question about whether Manning is in fact suffering from gender dysphoria, given that at the time of her sentencing she was not diagnosed as such. *But see id.* at 566 (stating that all persons have a right to determine their gender identify without need for medicalization or compulsory gendering by others). For the purposes of this Article, analyzing a transgender military inmate's Eighth Amendment claim to appropriate medical care, it is assumed that Manning is experiencing gender dysphoria. Also, for the purposes of this Article, the terms transgender and gender dysphoria are used interchangeably.

announced that she intended to pursue appropriate medical treatment for her gender dysphoria while incarcerated in August 2013,[12] including hormone therapy,[13] to which the U.S. military responded quickly and publicly that they would not provide Manning with gender dysphoria treatment while she remains incarcerated.[14] Manning then stated that she was willing to take legal action[15] and followed up her words in the fall of 2014 with a lawsuit.[16] Such cases are typically filed under the Eighth Amendment as a violation of an inmate's right to be free of cruel and unusual punishment.[17]

After years of losses, inmates in civilian prisons with gender dysphoria have recently won important court victories at the district and circuit court levels,[18] although, according to a survey of U.S. Supreme Court Eighth Amendment jurisprudence concerning conditions of confinement post *Estelle v. Gamble*,[19] the Court has yet to weigh in on the issue. A transgender inmate's Eighth Amendment claim rests on the premise that all inmates are entitled to basic medical care while incarcerated.[20] The

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12. Susan Heavey & Ian Simpson, *Bradley Manning Wants to Live as a Woman Named Chelsea*, REUTERS (Aug. 22, 2013, 4:40 PM), http://www.reuters.com/article/2013/08/22/us-usa-wikileaks-manning-idUSBRE97J0JI20130822. Also, it is important to note that not all transgender persons need or desire any kind of medical gender confirmation treatment, including hormones or sex reassignment surgery. Kylar Broadus, *Intersection of Transgender Lives and the Law: The Criminal Justice System and Trans People*, 18 TEMP. POL. & CIV. RTS. L. REV. 561, 570 (2009).

13. Some transgender persons use "cross-sex hormones (estrogens in male-bodied people and androgens in female-bodied people) to balance gender [i.e.,] induce or maintain the physical and psychological characteristics of the sex that matches the [person's] gender identity." *Hormone Administration*, CTR. OF EXCELLENCE FOR TRANSGENDER HEALTH, http://transhealth.ucsf.edu/trans?page=protocol-hormones (last visited Dec. 8, 2014).

14. Sarah Kliff, *Manning Wants Hormone Therapy in Prison. Will it Happen?* WONKBLOG (Aug. 22, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/22/manning-wants-hormone-therapy-in-prison-will-it-happen/.

15. Trudy Ring, *Chelsea Manning Willing to Go to Court for Gender Procedures*, ADVOCATE.COM (Nov. 1, 2013), http://www.advocate.com/politics/military/2013/11/01/chelsea-manning-willing-go-court-gender-procedures.

16. Manning filed a complaint with the United States District Court for the District of Columbia on September 23, 2014, alleging that the Department of Defense is violating her Eighth Amendment right to medical treatment. *See* Complaint for Declaratory and Injunctive Relief, Manning v. Hagel, No. 1:14-cv-01609 (D.D.C. Sept. 23, 2014), *available at* http://documents.latimes.com/chelsea-manning-sues-federal-government-medical-treatment/.

17. Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 819 (2011).

18. *See, e.g.*, Kliff, *supra* note 14 ("Adams filed a lawsuit in 2009 after her prison denied treatment. That suit was settled outside of court two years later, with one prong of the settlement being a change to prison policy, allowing hormone therapy treatment to start in prison.").

19. Estelle v. Gamble, 429 U.S. 97 (1976). Survey conducted by the author.

20. *Gamble*, 429 U.S. at 103 ("[E]lementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the

argument is framed as follows: Prison officials have a duty to provide basic medical care for inmates.[21] Gender dysphoria is a medical condition for which treatments exist,[22] and untreated gender dysphoria can lead to negative health outcomes such as severe mental anguish, suicidality, and autocastration.[23] Therefore, prison officials should have a duty to provide adequate medical care for gender dysphoria based on an individual's medical needs.[24]

Activists and legal scholars have debated both the narrower point regarding whether Manning is likely to receive treatment in military prison,[25] as well as the broader claims regarding whether medical treatment is required for transgender inmates.[26] Many interested parties seem to assume that the same constitutional legal rules that apply to civilian prisons

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worst cases, such a failure may actually produce physical 'torture or a lingering death' . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose." (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890) (citing Gregg v. Georgia, 428 U.S. 153, 182–83 (1976))).

21. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921 (2009) [hereinafter Dolovich, *Cruelty*].

22. *See* AM. MED. ASS'N, HOUSE OF DELEGATES RESOLUTION 122 (2008), *available at* http://www.tgender.net/taw/ama_resolutions.pdf (stating that gender dysphoria "is a serious medical condition" for which "[a]n established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with [gender dysphoria]").

23. *See infra* Part II.B.

24. *See* Memorandum, Fed. Bureau of Prisons, RADM Newton E. Kendrig, Ass't Dir. Health Servs. Div. & Charles E. Samuels Jr., Ass't Dir. Corr. Programs Div., to Chief Exec. Officers, Gender Identity Disorder Evaluation and Treatment (May 31, 2011), *available at* http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy.pdf (stating that "inmates in the custody of the Bureau with a possible diagnosis of [gender dysphoria] will receive a current individualized assessment and evaluation" and "[a]ll appropriate treatment options prescribed for inmates with [gender dysphoria] in currently accepted standards of care" will be considered on an individual basis).

25. For example, the author engaged in conversations with LGBT rights litigators at the 2013 Lavender Law Conference.

26. *Compare Constitution Requires That Manning Should Receive Medical Care at Ft. Leavenworth*, LAMBDA LEGAL (August 22, 2013), http://www.lambdalegal.org/news/us_20130822_constitution-requires-manning-should-receive-medical-care (stating that "[i]t would be a shame if the U.S. military prison system held itself to a lower standard than civil prisons," but failing to discuss the differences between military and civilian imprisonment), *and* Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?*, 61 CLEV. ST. L. REV. 957, 958–60 (2013) (arguing that inmates like Manning should have appropriate medical treatment while imprisoned, but failing to discuss the military context of her imprisonment), *with* Rena Lindevaldsen, *A State's Obligation to Fund Hormone Therapy and Sex-Reassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 LIBERTY U. L. REV. 15, 46 (2012) (criticizing courts who have held that inmates have a right to appropriate medical gender dysphoria treatment, and accusing the courts of usurping God's role in determining who is male and who is female, but also neglecting to address the military context of Manning's imprisonment).

also apply to military prisons.[27] This perspective overlooks the fact that military personnel are under the control of the military penal system, not the civilian penal system.[28] Military prisons are run under the auspices of the U.S. Department of Defense (DOD) rather than the Federal Bureau of Prisons (BOP).[29] The military court system runs parallel to the federal court system,[30] and military courts look to precedent within the military courts rather than outside courts—with the exception of the U.S. Supreme Court.[31]

That being said, unique aspects of the military system support the need to revisit how scholars and practitioners are framing the legal issues surrounding transgender inmates' right to obtain medical treatment in military prisons. For example, military inmates cannot file civil rights claims for damages in federal or state courts,[32] and may only possibly file claims for injunctive relief, depending on the jurisdiction in which they file.[33] Accordingly, the best avenue for relief for military inmates may be to pursue condition of confinement claims through the military criminal

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27. *See, e.g.*, Kliff, *supra* note 14. ("'Where inmates have been denied care, courts have said that's unconstitutional,' says Jennifer Levi, director of the Transgender Rights Project at Gay and Lesbian Advocates and Defenders. 'I don't know of any cases that have been brought yet against military prisons. But they would have the same obligation to provide adequate medical care.'").

28. *Five Major Differences in Military vs. Civilian Law*, LAWGURU ARTICLES (Jan. 18, 2012), http://www.lawguru.com/articles/law/miscellaneous-legal-topics/five-major-differences-in-military-vs-civilian-law.

29. Kliff, *supra* note 14.

30. Chappell v. Wallace, 462 U.S. 296, 303–04 (1983) (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

31. *See, e.g.*, United States v. Wise, 64 M.J. 468, 479 (C.A.A.F. 2007) (Effron, C.J., dissenting) (citing United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)) (relying on *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), to allocate the relative burdens of the parties on the merits of a prison conditions claim).

32. *Chappell*, 462 U.S. at 304; *cf.* Carlson v. Green, 446 U.S. 14, 23–25 (1980) (holding that the widow of a federal inmate could sue federal prison officials under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), for damages associated with an Eighth Amendment claim).

33. There are no U.S. Supreme Court cases that explicitly allow military inmates the right to injunctive relief for an Eighth Amendment claim. However, there are circuit court cases that infer this right by allowing other military prisoner constitutional claims. *See, e.g.*, Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (stating that a military inmate may bring an "'allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations'" to the federal courts after first exhausting military remedies (quoting Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971))). "Without categorical guidance by the Supreme Court on this issue, it appears that the precise scope of equitable relief available to military personnel in civilian courts will remain entirely unsettled." Christopher G. Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 720–21 (2005).

appeals process,[34] rather than filing civil rights claims through 42 U.S.C. § 1983 or through a *Bivens* action—the main avenues of relief for inmates in civilian state and federal prisons.[35] The substantive law governing military inmate confinement, however, may be more protective than the substantive law governing civilian inmates;[36] military personnel may not be protected by the Eighth Amendment, but can seek relief for "cruel and unusual punishment" through Article 55, which is in many ways coextensive with the Eighth Amendment, but also provides broader protections in some areas.[37] Further, when military inmates suffer unconstitutional conditions of confinement, they may have their sentences reduced or dismissed[38]—a remedy unheard of in the civilian context. Additionally, the purpose of the military justice system is different than that of the civilian criminal justice system.[39] The civilian justice system's legitimate penological goals are deterrence, punishment, rehabilitation, and retribution.[40] "The purpose of military justice is to maintain good order and discipline in the armed services and to promote efficiency and effectiveness

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34. *See, e.g.*, United States v. Roth, 57 M.J. 740, 741–42 (A. Ct. Crim. App. 2002) ("This court does have jurisdiction to determine under Article 66, UCMJ, whether the adjudged and approved sentence of a court-martial is being executed in a cruel or unusual manner in violation of the Eighth Amendment or Article 55, UCMJ, 10 U.S.C. § 855" (citing United States v. Erby, 54 M.J. 476 (2001)), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003). One downside of this restriction is that when an inmate's criminal appeal is exhausted, she loses any legal avenue to contest the conditions of her confinement.

35. *See Bivens*, 403 U.S. at 397 (holding that an individual may sue a federal official for alleged violation of her rights under the U.S. Constitution). Inmates in federal prisons have filed Eighth Amendment claims under a variety of jurisdictional theories, including under 28 U.S.C. § 1331. *See, e.g.*, Simmat v. U.S. Bureau of Prisons, 413 F. 3d 1225, 1231 (10th Cir. 2005) (noting that federal courts have jurisdiction under 28 U.S.C. § 1331 to decide federal constitutional questions).

36. United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953) (stating that Congress "intended [Article 55] to grant protection covering even wider limits" than that afforded by the Eighth Amendment).

37. United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000) (citing *Wappler*, 9 C.M.R. at 26).

38. *See, e.g.*, Martinez & Portnoy, *supra* note 3 (stating Manning's attorneys would argue for dismissal of Manning's case based on conditions of confinement in pretrial custody); *Article 13 and PFC Bradley Manning*, THE LAW OFFICES OF DAVID E. COOMBS (Dec. 21, 2010), http://www.armycourtmartialdefense.info/2010/12/article-13-and-pfc-bradley-manning.html ("If a military judge determines that a service member has been illegally punished prior to trial, she has substantial discretion to grant administrative credit, usually in the form of additional pretrial confinement credit, or even grant an outright dismissal of the charges"); United States v. Fulton, 55 M.J. 88, 89–90 (C.A.A.F. 2001) (holding that the military judge has the authority to dismiss charges as a remedy for unlawful pretrial punishment).

39. Lieutenant Commander Rich Federico, *The Unusual Punishment: A Call for Congress to Abolish the Death Penalty under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses*, 18 BERKELEY J. CRIM. L. 1, 11 (2013).

40. Harmelin v. Michigan, 501 U.S. 957, 959 (1991) ("[T]here are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation.").

in the military establishment."[41] The difference in penological purposes between the two systems affects any analysis involving a military necessity argument by prison officials. Finally, should Manning's (or any other transgender military inmate's) case reach the U.S. Supreme Court, which military inmate cases very rarely do,[42] the Court's substantial deference to Congress when regulating the military likely will impact its analysis as well.[43]

This Article provides a new analysis through the lens of military law regarding whether the military is legally or constitutionally required to provide transgender military inmates medical treatment for gender dysphoria, such as the treatment that Manning requests. Manning's case is an example of the challenges any military inmate with gender dysphoria will face in attempting to obtain appropriate medical care. While many articles have discussed a transgender inmate's claim to appropriate medical treatment in the civilian context,[44] to date, no article has analyzed an inmate's claim for gender dysphoria treatment through the lens of military confinement.[45] As this Article explains, it is important to understand the military criminal appeals system, the substantive law applicable to military personnel as it differs from civilians, and the significant judicial deference afforded to the military when addressing the Eighth Amendment in the military context.[46] Given the potential argument by the military that the

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41. Federico, *supra* note 39, at 11 (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, ¶ 3 (2012)).

42. The U.S. Supreme Court has the power to review military criminal appeals in a limited set of circumstances: only if the highest military court of appeals chooses to hear the case. Uniform Code of Military Justice, 10 U.S.C. § 867a (2012). Based on a review by the author of U.S. Supreme Court cases, it seems that the Court has not granted cert to any military inmate's conditions-of-confinement case.

43. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 301 (1983) (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981)) (giving deference to Congress in military affairs).

44. *See, e.g.*, Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INTEREST L.J. 133, 133 (2010) (discussing the appropriate housing and medical care for civilian incarcerated transgender persons); Travis Cox, Comment, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 342 (2009) (arguing for greater medical treatment for civilian prisoners with gender dysphoria); Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 186–89 (2006); Maruri, *supra* note 17, at 809 (arguing for access to hormone therapy for transgender civilian inmates).

45. *See, e.g.*, Bendlin, *supra* note 26; Lindevaldsen, *supra* note 26. Both articles purport to discuss Manning's case, but neither one grounds the Eighth Amendment inquiry in the unique military context.

46. This Article will not discuss the complex military trial court system but instead focuses on the military appeals court system.

competing interest of military discipline outweighs a transgender inmate's need for medical treatment, the differing goals of military prisons versus civilian prisons, the lack of controlling U.S. Supreme Court precedent, and the extreme deference shown to claims of military necessity, it is likely that a military court would rule on the side of the prison.[47] It is also highly likely that the U.S. Supreme Court would deny *certiorari*, thus rendering the inmate's claim dead.

Part I of this Article examines the gendered structure of the U.S. military prison system and Manning's confinement therein. Part II discusses appropriate medical treatments for persons with gender dysphoria, the harms associated with failure to give appropriate medical treatment, and the treatment the U.S. military has stated Manning will receive. Part III explores the evolution of Eighth Amendment jurisprudence regarding civilian inmate claims to treatment for gender dysphoria. Part IV analyzes the structure of the military criminal appeals system, the substantive law governing military conditions of confinement, and judicial deference to claims of military necessity. The Article concludes that, while the harms associated with lack of appropriate medical treatment for gender dysphoria have led federal courts to require such treatment for civilian inmates, Manning is less likely to obtain medically prescribed gender dysphoria treatment[48] through the courts than a civilian inmate, and therefore, that her best option for relief may be through transfer to the federal prison system or through the political process,[49] rather than through the courts.

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47. *See infra* Part.IV.B–C.

48. Any argument that gender dysphoria should not be seen as a medical diagnosis due to the stigma it projects onto transgender persons is relevant and normatively important, but beyond the scope of this Article. The fact remains that access to hormone therapy and sex reassignment surgery for inmates currently lies through medical diagnosis. *See, e.g.*, Alvin Lee, Comment, *Trans Models in Prisons: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008); *see also* Chad Ayers, *The Need for Change: Evaluating the Medical Necessity of Gender Reassignment Through International Standards*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 351, 365 (2011) (stating that for persons requiring insurance coverage in order to obtain hormones or surgery, "the outcome is dependent on whether courts view transition-related care as medically necessary").

49. *See* PALM CENTER, *supra* note 8, at 3 (recommending that "[t]ransgender [military] personnel should be treated in accordance with established medical standards of care, as is done with all other medical conditions").

I. THE STRUCTURE OF MILITARY PRISONS

Chelsea Manning is both female and civilian.[50] Neither identity marker changes the fact that she is incarcerated in an all-male military prison, the United States Disciplinary Barracks at Fort Leavenworth (Fort Leavenworth).[51] The military has a binary view of gender.[52] Military "rules and regulations, including the language the military uses" and the differing treatment of male and female inmates, "reflect this view."[53] Because the military classifies Manning as male based upon her genitalia, she is housed in a male prison.[54] This Part first looks at the differences in confinement of female and male military inmates as they relate to Manning's circumstances of incarceration, and then discusses the safety concerns that Manning faces in military prison in general and in a male prison in particular.

A. Confinement of Female Military Prisoners

Convicted female felons from all U.S. military branches are confined at Naval Consolidated Brig (NAVCONBRIG) in San Diego, California,[55] a two-year-old carceral facility specifically designed to meet the correctional and rehabilitative needs of women.[56]

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50. Manning was separated from the Army at the conclusion of her court martial. Julie Tate, *Bradley Manning Sentenced to 35 years in WikiLeaks case*, WASH. POST (August 21, 2013), http://articles.washingtonpost.com/2013-08-21/world/41431547_1_bradley-manning-david-coombs-pretrial-confinement. *But see* Tom Vanden Brook, *VA Treats 2,500 Transgender Veterans*, USA TODAY (May 23, 2014, 5:35 PM), http://www.usatoday.com/story/nation/2014/05/23/transgender-veterans-affairs-chelsea-manning/9506075/ (claiming that Manning "will remain a soldier as long as she serves her sentence in a military prison").

51. *Welcome to the U.S. Disciplinary Barracks*, U.S. DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KAN., http://usdb.leavenworth.army.mil/main.htm (last visited Dec. 1, 2014).

52. *See* text accompanying, *supra* note 11 (discussing the gender binary).

53. SERV. MEMBERS LEGAL DEF. NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE 29 (2011 ed.), *available at* http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf.

54. Any transgender female prisoner will likely find herself in similar circumstances. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 3 n.7 (2011) [hereinafter Dolovich, *Strategic Segregation*] ("At present, most prisons and jails in the United States follow the practice of classifying detainees according to their genitalia, which means that preoperative trans women are housed with men."); Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1219 (2004) ("Genital surgery alone usually determines whether a transsexual or transgender prisoner will be classified as male or female, for the purposes of prison housing.").

55. Army News Service, *Doing Time at Leavenworth*, ABOUT CAREERS, http://usmilitary.about.com//justicelawlegislation/a/leavenworth.htm (last visited Dec. 1, 2014).

56. *A Model for Female Correctional Design*, CORRECTIONAL NEWS (Dec. 14, 2011), http://www.correctionalnews.com/articles/2011/12/14/model-female-correctional-design.

> Before DOD sent all of the female prisoners here, said NAVCONBRIG Miramar Executive Officer CDR Kris Winter, it was difficult to run successful female-specific rehabilitation programs, because there weren't enough women in any one place. By housing them in one central location, we maximize their potential to be fully rehabilitated.[57]

Rather than simply designing a men's facility and then housing women inside, as other prisons generally have done, the Navy requested special design features catering to what it believes to be the privacy, socializing, and relationship needs of female inmates.[58] The Navy believes that women have better rehabilitative outcomes, even when incarcerated for serious crimes, and are less violent than male inmates.[59] The Navy also believes that women are more sensitive and therefore more responsive to a more normative environment while incarcerated.[60] Based on this belief, the Navy built more socialization areas in NAVCONBRIG and utilized softer, more home-like materials.[61]

It is unlikely that there has ever been a transgender female military prisoner housed at NAVCONBRIG. If one starts with the assumption that the military houses inmates according to genitalia,[62] the reasoning is simple.[63] The military requires physical exams upon induction, including a genital exam.[64] The military does not allow people who have received sex reassignment surgery[65] (SRS) to join,[66] nor does it allow anyone even

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57. Rod Powers, *Inside a Military Prison*, ABOUT CAREERS, http://usmilitary.about.com/od/justicelawlegislation/a/navprison.htm (last visited Dec. 17, 2014).

58. *A Model for Female Correctional Design*, *supra* note 56.

59. *Id.*

60. *Id.*

61. *Id.*

62. This is in fact the rule, with almost no exceptions, and certainly none in the military context. *Transgender Prisoners in Crisis*, *in* LAMBDA LEGAL, TRANSGENDER RIGHTS TOOLKIT: A LEGAL GUIDE FOR TRANS PEOPLE AND THEIR ADVOCATES, *available at* http://www.lambdalegal.org/sites/default/files/publications/downloads/transgender_prisoners_in_crisis.pdf (last visited Dec. 1, 2014). A few jurisdictions are beginning to assign inmates based on gender identity rather than assigned sex, including Cook County, IL; Cumberland, ME; Denver, CO; and Washington, DC. *Id.*

63. Indeed, by categorizing Manning as male based solely on her genitalia, the military is "refus[ing] recognition of transgender existence by insisting that birth-assigned gender is the only relevant criteria for placement." Dean Spade, *Trans Formation: Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies that Adversely Affect Transgender People*, L.A. LAW. 36–37 (Oct. 2008), *available at* http://www.lacba.org/Files/LAL/Vol31No7/2525.pdf.

64. SERV. MEMBERS LEGAL DEF. NETWORK, *supra* note 53, at 29.

65. Sex reassignment surgery, also known as gender confirmation surgery, surgically remakes the genitalia to match the gender identity of the individual. I use the term sex reassignment surgery

identifying as transgender to join (surgery or not).[67] The military also discharges soldiers discovered to be transgender through either disclosure or regular medical exams.[68] As a matter of regulations, the military does not provide SRS even for discharged veterans.[69] If the military discovers that a soldier is transgender but will not relinquish custody of that person due to a sentence of confinement, not providing hormone therapy or SRS makes that

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throughout this Article, though it is not the preferred term in the transgender community, because that is the current term used in the scientific literature as well as the legal field.

66. SERV. MEMBERS LEGAL DEF. NETWORK, *supra* note 53, at 29 ("A history of genital surgery may result in a disqualification for 'major abnormalities and defects of the genitalia.'" (citing U.S. DEP'T OF DEFENSE, INSTR. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES ¶¶ E4.14(e), E4.15(l) (Apr. 28, 2010))). Furthermore, Army Regulations provide that:

> *a.* A history of, or current manifestations of, personality disorders, disorders of impulse control not elsewhere classified, transvestism, voyeurism, other paraphilias, or factitious disorders, psychosexual conditions, transsexual, gender identity disorder to include major abnormalities or defects of the genitalia such as change of sex or a current attempt to change sex, hermaphroditism, pseudohermaphroditism, or pure gonadal dysgenesis or dysfunctional residuals from surgical correction of these conditions render an individual administratively unfit.
>
> *b.* These conditions render an individual administratively unfit rather than unfit because of physical illness or medical disability. These conditions will be dealt with through administrative channels, including AR 135–175, AR 135–178, AR 635–200, or AR 600–8–24.

U.S. DEP'T OF ARMY, REG. 40-501 ch. 3-35 (2006).

67. SERV. MEMBERS LEGAL DEF. NETWORK, *supra* note 53, at 29 (citing DEP'T OF DEFENSE INSTRUCTION 6130.03, *supra* note 66, at ¶ 29(r)) ("[T]he military considers [transgenderism] to be a disqualifying psychiatric condition.").

68. *Id.*

69. Until 2013, veterans with gender dysphoria were denied all gender dysphoria related medical care at Veterans Administration (VA) facilities. *See* 38 C.F.R. § 17.38(c)(4) (2012) (excluding medical treatment for "Gender alterations" for veterans). Additionally, transgender veterans have been denied general medical treatment at the VA simply due to their transgender status. KARL BRYANT & KRISTEN SCHILT, PALM CENTER, TRANSGENDER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2001 TRANSGENDER AMERICAN VETERANS ASSOCIATION SURVEY 8 (Aug. 2008), *available at* http://www.palmcenter.org/files/TGPeopleUSMilitary.pdf. However, in February 2013, the Department of Veterans Affairs released a Directive stating that the VA will provide healthcare for transgender patients. U.S. DEP'T OF VETERANS AFFAIRS, VHA DIR. 2013–003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS 1 (2013), *available at* http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863. Additionally, the Directive states that transgender patients are entitled to care compatible with generally accepted standards of medical practice, including "hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery," but specifically precludes any sex reassignment surgeries. *Id.* at 2. It remains to be seen if this directive will change the discriminatory experiences of transgender veterans trying to access care. However, there are claims that the VA "treated 2,567 veterans with the diagnosis of gender dysphoria with transgender-specific care" in 2013. Vanden Brook, *supra* note 50.

inmate *per se* ineligible for confinement in a gender-appropriate facility: in Manning's case, at NAVCONBRIG.

B. Confinement of Maximum Security Male Military Prisoners

Fort Leavenworth is an all-male facility for service members from all branches of the U.S. military convicted by court-martial for violating the Uniform Code of Military Justice (UCMJ) and serving terms of at least ten years.[70] Fort Leavenworth has been in operation since 1875 and is the only maximum-security correctional facility [71] operated by the DOD. [72] Maximum-security facilities are intended for prisoners "requir[ing] special custodial supervision due to the seriousness of their offenses, high risk of causing injury to self or others, high escape risk, or a disposition toward or history of being dangerous [or] violent."[73]

Today's Fort Leavenworth is an eleven-year-old state of the art facility with 515 beds and inmates who are tightly regulated[74] and required to work[75] forty hours per week.[76] Strict military discipline is the norm.[77] Fort Leavenworth has been described as "clean and relatively safe compared to civilian prisons."[78]

Post conviction, Manning was summarily discharged from the military[79] but placed in custody at Fort Leavenworth until she either serves her sentence[80] or is transferred to a federal penitentiary. The military has the

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70. *Welcome to the U.S. Disciplinary Barracks, supra* note 51; Rich Montgomery, *Fort Hood Shooter Adds New Chapter to Military Prison's Rich History*, KANSAS CITY STAR (September 1, 2013), http://www.kansascity.com/2013/08/31/4450102/fort-hood-shooter-adds-new-chapter.html. Manning was discharged from the military as part of her conviction, but is still in military custody at Fort Leavenworth until she is released, unless she is transferred to a federal penitentiary. Tate, *supra* note 50.

71. Fort Leavenworth is the Army Corrections System's (ACS) maximum custody facility that provides long-term incarceration for military prisoners for all services. U.S. DEP'T OF ARMY, REG. 190-47, ch. 2-2 (2006).

72. *Welcome to the U.S. Disciplinary Barracks, supra* note 51.

73. U.S. DEP'T OF DEFENSE, INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY ¶ 7(b)(1) (March 11, 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf. Manning is likely at Leavenworth due to the seriousness of her offense.

74. *See* Jonathan Allen, *Monotonous, Rigid Military Prison Life Awaits Manning*, REUTERS (Aug. 4, 2013), http://www.reuters.com/article/2013/08/04/us-usa-wikileaks-manning-prison-idUSBRE97304F20130804 (explaining that inmate life is "monotonous and tightly structured").

75. DEP'T OF DEFENSE INSTRUCTION 1325.07, *supra* note 73, at ¶ 7(b)(1).

76. *Manning Heads to Notorious Fort Leavenworth Prison to Serve Sentence*, *supra* note 2.

77. *Id.*

78. Allen, *supra* note 74.

79. Tate, *supra* note 50.

80. *Id.*

option to confine male and female inmates in the same facility, as long as the sleeping and restroom facilities are separated.[81] However, there is no indication that that procedure has ever been followed to incarcerate a female inmate at Fort Leavenworth, nor is there any indication that Manning will be treated as female in that context (and, in fact, substantial indication exists that she will not be treated as female).[82]

C. Safety Concerns for Transgender Inmates

Manning is the first known transgender military inmate. However, based on the substantial number of transgender inmates who have been incarcerated in civilian prisons, inferences can be drawn about the experience of a transgender woman inside a male carceral facility. There are safety concerns for Manning's confinement based on her treatment before trial, the nature of her crimes, and her gender identity.[83]

1. Pre-Trial Abuse Based on Charges of Treason

Manning was physically and emotionally abused while in pre-trial custody.[84] Before any finding of guilt, Manning was subjected to solitary confinement, forced nudity, sleep deprivation, sensory deprivation and stress positions.[85] Additionally, Manning was held for nine months of her more than three-year pre-trial period in solitary confinement.[86] Solitary confinement alone can be tantamount to abuse over a long period of time.[87]

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81. U.S. DEP'T OF DEFENSE, INSTR. 1325.07, *supra* note 73, at ¶ 4(c).

82. *See, e.g.*, Kliff, *supra* note 14.

83. *See* Dolovich, *Strategic Segregation*, *supra* note 54, at 18–19 (discussing how trans women, who identify as female, are "obvious targets" for sexual assault in male prisons).

84. Martinez & Portnoy, *supra* note 3.

85. Jesselyn Radack, *How the US Military Tortured Bradley Manning*, DAILY KOS (December 1, 2012, 7:07 AM), http://www.dailykos.com/story/2012/12/01/1166253/-The-Torture-Techniques-Used-on-Bradley-Manning; *see also* Caitlin Dickson, *Extreme Solitary Confinement: What Did Bradley Manning Experience?*, DAILY BEAST (June 5, 2013), http://www.thedailybeast.com/articles/2013/06/05/extreme-solitary-confinement-what-did-bradley-manning-experience.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+thedailybeast%2Farticles+%28The+Daily+Beast+-+Latest+Articles%29 ("[D]uring [Manning's] nine-month stay, [s]he was reportedly held in solitary confinement for 23 hours a day, forced to sleep naked without pillows and sheets on [her] bed, and restricted from physical recreation or access to television or newspapers even during h[er] one daily hour of freedom from h[er] cell . . . .").

86. Editorial Board, *Bradley Manning's Excessive Sentence*, N.Y. TIMES (August 21, 2013) http://www.nytimes.com/2013/08/22/opinion/bradley-mannings-sentence-is-excessive.html.

87. *See* Dickson, *supra* note 85 ("Approximately 50 percent of all suicides at state and federal prisons across the country are carried out by the 2 to 8 percent of prisoners who are isolated. That's

The abuse was so severe that a judge reduced Manning's adjudicated sentence by several months.[88]

2. Post-Conviction: Additional Concerns Based on Gender Identity

Some military officials consider Fort Leavenworth one of the safest prisons in the world.[89] Fort Leavenworth maintains accreditation by the American Correctional Association, and therefore, must meet the same safety criteria as non-military prisons.[90] Given the nature of Manning's crimes, however, there is a possibility that she will be abused on that basis no matter where in the military prison system she serves her sentence.[91]

Additionally, there is a strong concern that Manning will be subject to attacks based on her gender identity by both fellow inmates and guards,[92] regardless of the status of her medical treatment, i.e., the extent to which Manning has transitioned.[93] "Men's prisons are hyper-masculinized in a way that is . . . inappropriate for transgender individuals."[94] Given the highly-masculinized culture of today's U.S. military, it is likely that military men's prisons are even more inappropriate for transgender persons than civilian prisons. The federal government "conservatively estimated that at least 13 percent of inmates in the United States have been sexually assaulted in prison."[95] The predominant policy of housing inmates

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because . . . the mental effects of [isolation] can range from paranoia and claustrophobia to full-blown mental illness and deterioration.").

88. Martinez & Portnoy, *supra* note 3; *see also Article 13 and PFC Bradley Manning*, *supra* note 38 ("If a military judge determines that a service member has been illegally punished prior to trial, she has substantial discretion to grant administrative credit, usually in the form of additional pretrial confinement credit, or even grant an outright dismissal of the charges."); United States v. Fulton, 55 M.J. 88, 89–90 (2001) (holding that the military judge has the authority to dismiss charges as a remedy for unlawful pretrial punishment).

89. *Doing Time at Leavenworth*, *supra* note 55.

90. *Welcome to the U.S. Disciplinary Barracks, supra* note 51.

91. *See* Allen, *supra* note 74 (stating that "some inmates may view [Manning] as a traitor" and that Manning "may encounter homophobia").

92. Charles Davis, *To the Right and Centre-Right, Chelsea Manning is a LGBTraitor*, AL JAZEERA (August 24, 2013), http://www.aljazeera.com/indepth/opinion/2013/08/201382317353284666.html (noting that "more than a third of transgender inmates report having been sexually assaulted in prison" and that "sexual abuse in US prisons . . . is rampant—and often carried out by the authorities").

93. *See, e.g.*, Fields v. Smith, 653 F.3d 550, 557–58 (7th Cir. 2011) (noting that in that case, the prison presented no evidence to support its theory that banning hormones for transgender inmates reduced their risk of sexual assault, and that, therefore, the defendants failed to show any security benefits associated with the ban). Transition is a term used to describe the physical effects of hormone therapy and SRS on a transgender person.

94. Tarzwell, *supra* note 44, at 178.

95. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2012) [hereinafter PREA].

according to their genitals leads to a greatly increased risk of assault and rape for transgender inmates.[96] Transgender prisoners in particular are at very high risk of sexual assault, with one study showing that 59% of transgender inmates have suffered sexual assault while incarcerated.[97] Additionally, more than half of the inmates at Fort Leavenworth are incarcerated for sex crimes,[98] which may not bode well for Manning's safety given her transgender status.[99]

Fort Leavenworth avers that it has "implemented risk assessment protocols and safety procedures to address high risk factors identified with the Prison Rape Elimination Act" (PREA) that should address Manning's high risk of sexual assault in the all-male facility.[100] While the PREA estimates that adherence to PREA guidelines alone will reduce incidence of prison rape by at least 1%,[101] the new facility at Fort Leavenworth is also wired with the latest technologies to monitor prisoner movements,[102] making it potentially safer than a facility simply following PREA standards.

It is also possible that Fort Leavenworth will use administrative segregation to "protect" Manning,[103] or for the "good of the larger

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96. Howell, *supra* note 44, at 144.

97. A 2007 study of inmates in California men's prisons that found that 59% of transgender inmates had experienced sexual assault while incarcerated (in contrast to 4.4% of other inmates) and that 48.3% of transgender inmates (in contrast to 1.3% of other inmates) had engaged in sexual acts that they did not view as "against their will, but [that they] nonetheless . . . would rather not do." VALERIE JENNESS ET AL., UNIV. OF CAL., CTR FOR EVIDENCE—BASED CORRECTIONS, VIOLENCE IN CAL. CORR. FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 27 (2007), *available at* http://ucicorrections.seweb.uci.edu/files/2013/06/BulletinVol2Issue2.pdf.

98. *Doing Time at Leavenworth*, *supra* note 55.

99. *See* Angela Okamura, Comment, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L.J. 109, 114 (2011) (citing ALLEN BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09, at 5 (2010)) (stating that non-heterosexual inmates are significantly more likely to be sexually abused by other inmates).

100. Julie Ershadi, *Ft. Leavenworth's FAQ on Chelsea (Bradley) Manning*, JULIE ERSHADI, http://julieershadi.com/2013/08/23/ft-leavenworths-faq-on-chelsea-bradley-manning (quoting George Marcec, Public Affairs Office at Ft. Leavenworth, Kansas) (last visited Dec. 1, 2014).

101. DEP'T OF JUSTICE, NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE, EXECUTIVE SUMMARY 10–11 (May 16, 2012), *available at* http://ojp.gov/programs/pdfs/prea_executive_summary.pdf ("The Department believes it is reasonable to expect that the [PREA] standards, if fully adopted and complied with, would achieve [a 1%] reduction in the prevalence of sexual abuse.").

102. Montgomery, *supra* note 70.

103. *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 517 (2009) ("One primary means that agencies employ and that courts endorse purportedly to increase safety in detention is solitary confinement.").

population."[104] Many jurisdictions use this policy of segregating and isolating transgender persons, but it remains a controversial practice.[105] Inmates in administrative segregation[106] generally don't have access to rehabilitative programs, religious worship, or work opportunities provided to the general population, disadvantaging those secured in administrative segregation.[107] Additionally, long-term administrative segregation has been shown to produce symptoms akin to psychological torture.[108] And finally,

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104. "[A]dministrative [S]egregation: The incarceration of a prisoner or prisoners apart from the general prisoner population done for the good of the prisoner or good of the larger population." Army Reg. 190-47 § II, Terms; *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.40, MILITARY POLICE INTERNMENT/RESETTLEMENT OPERATIONS 7-21 (Aug. 1, 2001), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/3-19-40/ch7.htm (stating that "[p]risoners may be placed in administrative segregation . . . [for] homosexual behavior" without defining what constitutes such behavior, which may include inmates exhibiting a transgender identity).

105. Whitney E. Smith, Comment, *In the Footsteps of* Johnson v. California*: Why Classification and Segregation of Transgender Inmates Warrants Heightened Scrutiny*, 15 J. GENDER RACE & JUST. 689, 690–91 (2012).

106. Administrative segregation and disciplinary segregation are equivalent in most facilities. Dolovich, *Strategic Segregation*, *supra* note 54, at 24 n.138 ("In most cases, protective custody means extended lockdown in single cells with no access to programming of any kind . . . which mimic[s] the key features of life in disciplinary segregation"); Arkles, *supra* note 103, at 540 ("Protective custody is frequently literally the same as punitive segregation.").

107. Dolovich, *Strategic Segregation*, *supra* note 54, at 3–4 (citations omitted) (stating that protective segregation "typically involves isolation in 'a tiny cell for twenty-one to twenty-four hours a day[,]' the loss of access to any kind of programming (school, drug treatment, etc.), and even deprivation of basics like 'phone calls, showers, group religious worship and visitation.'" (quoting Arkles, *supra* note 103, at 538, 541)).

108. "[T]he severe deprivation in [isolated housing] 'may press the outer bounds of what most humans can psychologically tolerate.'" *Hearing on Solitary Confinement Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary,* 112th Cong. 9 (2012) (testimony of Prof. Craig Haney) (quoting Madrid v. Gomez, 889 F. Supp 1146, 1267 (N.D. Cal 1995), *available at* http://www.judiciary.senate.gov/imo/media/doc/12-6-19HaneyTestimony.pdf. Haney describes administrative segregation as a type of isolated confinement where inmates are generally confined twenty-three hours a day in a typically windowless cell that can be no larger than a king-size bed. *Id.* at 4. "Serious forms of mental illness can result." *Id.* at 9.

> [P]risoners in solitary confinement suffer from a number of psychological and psychiatric maladies, including: significantly increased negative attitudes and affect, irritability, anger, aggression and even rage; many experience chronic insomnia, free floating anxiety, fear of impending emotional breakdowns, a loss of control, and panic attacks; many report experiencing severe and even paralyzing discomfort around other people, engage in self-imposed forms of social withdrawal, and suffer from extreme paranoia; many report hypersensitivity to external stimuli (such as noise, light, smells), as well as various kinds of cognitive dysfunction, such as an inability to concentrate or remember, and ruminations in which they fixate on trivial things intensely and over long periods of time; a sense of hopelessness and deep depression are widespread; and many prisoners report signs and symptoms of psychosis, including visual and auditory hallucinations. Many of these symptoms occur in and are reported by a large number of isolated prisoners. For example, in a

while administrative segregation may protect an inmate from other inmates, it is unlikely to protect an inmate from the predation of prison staff, who perpetrate almost half of prison sexual assaults.[109]

II. MEDICAL TREATMENT AT FORT LEAVENWORTH FOR INMATES WITH GENDER DYSPHORIA

Manning has said that she will sue to enforce her right to appropriate medical care should the military not provide her with treatment for her gender dysphoria.[110] The military announced in return that Manning would receive no specific treatment for gender dysphoria beyond the general psychological counseling available to all inmates[111] because providing such treatment is against military regulations.[112] After numerous complaints filed by Manning, the DOD has relented a tiny margin, allowing Manning to wear female undergarments, but not allowing her any other female grooming practices or any other gender dysphoria related therapy.[113]

> systematic study I did of a representative sample of solitary confinement prisoners in California, prevalence rates for most of the above mentioned symptoms exceeded three-quarters of those interviewed.

Id. at 10–11. *See also* Arkles, *supra* note 103, at 538 (citing *In re* Medley, 134 U.S. 160, 168 (1889)) (discussing the "catastrophic consequences of isolation on human beings").

109. BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2007–2008 (2011), *available at* http://www.bjs.gov/content/pub/pdf/svraca0708.pdf (finding that 46% of substantiated sexual assault incidents involved staff assaulting inmates). "Isolation can also increase vulnerability to physical violence." Arkles, *supra* note 103, at 539; *cf.* Schwenk v. Hartford, 204 F.3d 1187, 1193–94 (detailing a prison guard's multiple attempts to rape a transgender inmate even while she was in the general population). This is not to say that some inmates do not request or desire segregation for their protection, "believ[ing] it will lead to less violence against them." Arkles, *supra* note 103, at 544.

110. Ring, *supra* note 15.

111. Rebecca Greenfield, *Life as a Transgender Woman in a Military Prison: What's Ahead for Chelsea Manning*, ATLANTIC WIRE (August 22, 2013), http://www.thewire.com/national/2013/08/life-transgender-woman-military-prison-whats-ahead-chelsea-manning/68613/. "'The Army does not provide hormone therapy or sex-reassignment surgery for gender identity disorder,' [stated] Kimberly Lewis, a spokeswoman for the army prison . . . ." *Id.* Manning's experience is similar to many transgender inmates, who experience heightened levels of discrimination in prison. *See* Peek, *supra* note 54, at 1218 n.56 ("'Once imprisoned, transgendered people find fighting for their gender identity a monumental task, as they confront the gender segregation, transphobia, and limited resources of the prison system.'" (quoting Rosenblum, *supra* note 11, at 516)).

112. *Manning Heads to Notorious Fort Leavenworth Prison to Serve Sentence*, *supra* note 2.

113. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 13–14.

A. Medically Appropriate Treatment for Gender Dysphoria

There exist medically accepted, specific treatments for gender dysphoria beyond general psychological counseling.[114] The American Medical Association passed a resolution in 2008 supporting medical treatment for gender identity disorder (now known as gender dysphoria).[115] Gender dysphoria is not merely gender non-conformity.[116] Rather, a person with gender dysphoria experiences "clinically significant distress" associated with her condition.[117] Effective treatments for gender dysphoria, classified as a mental dysphoria, are nonetheless primarily physical: changing the body—the sex of the person—to match her internal perception of gender.[118]

The World Professional Association for Transgender Health (WPATH) is an international, inter-disciplinary non-profit organization devoted to advancing knowledge on health issues related to gender identity.[119] WPATH publishes the most widely used guidelines for medical treatment of persons experiencing gender dysphoria,[120] which include counseling, hormone therapy, social and legal transition to the desired gender, and sex reassignment surgery.[121] Not all persons experiencing gender dysphoria will want or require all the above types of treatment.[122]

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114. "[M]edical professionals essentially agree that treatment for [gender dysphoria] should involve some combination of psychotherapy, hormones, and gender-related surgery." Lee, *supra* note 48, at 448 (citing Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders*, *Sixth Version*, 13 J. PSYCHOL. & HUM. SEXUALITY 1 (2001); *see also* Howell, *supra* note 44, at 152–58 (discussing the medical services appropriate for transgender persons, including medications and surgeries, as well as appropriate clothing and cosmetics options).

115. AM. MED. ASS'N, *supra* note 22.

116. Gender non-conformity is behavior or appearance that does not match a person's societally assigned gender roles. Dr. Eric Anthony Grollman, *What is Gender "Non-Conformity?"*, KINSEY CONFIDENTIAL (March 8, 2011), http://kinseyconfidential.org/gender-nonconformity/.

117. *Gender Dysphoria*, *supra* note 8.

118. Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 HEALTH MATRIX 227, 235 (2012).

119. *Resources*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH ("WPATH"), http://www.hrc.org/resources/entry/world-professional-association-for-transgender-health-wpath (last visited Dec. 1, 2014).

120. *See* De'lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013) (stating that the WPATH Standards of Care "are the generally accepted protocols for the treatment of [gender dysphoria]").

121. *Gender Dysphoria*, *supra* note 8.

122. Soneeya v. Spencer, 851 F. Supp. 2d 228, 232 (D. Mass. 2012); *see also* Colopy, *supra* note 118, at 259–60 (stating that the WPATH Standards of Care are flexible and should be applied as such to meet a specific patient's medical needs).

B. Harm Associated with Transgender Persons not Receiving Appropriate Medical Treatment in Prisons

Transgender inmates face multiple obstacles to achieving appropriate healthcare. Healthcare in many prisons is grossly underfunded, and many inmates with serious medical issues never receive the care they need.[123] Transgender persons in prison have some medical needs not shared by the rest of the prison population.[124] Prison officials may be concerned about the substantial medical costs associated with inmate healthcare in relation to the overall prison budget, prejudiced against transgender persons, and not well versed in the medical science behind gender dysphoria. As a result, prison officials may perceive transgender inmate healthcare as a cosmetic procedure rather than a medically necessary one,[125] or as a burden to be avoided.[126]

Though not all transgender people choose or need to undergo medical treatment related to their gender dysphoria, those who do consider their treatment both medically necessary[127] and a central aspect to their general well-being.[128] In one comprehensive study, gender dysphoria experts reviewed the medical literature from the 1960s through the 1990s, and concluded that sex reassignment surgery "effectively resolves" gender dysphoria for those transgender persons who need it.[129] There is also evidence that cross-gender hormone therapy for persons experiencing

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123. Okamura, *supra* note 99, at 117 (citing NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION REPORT 15–16 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/226680.pdf).

124. Broadus, *supra* note 12, at 571 (citing Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation to Improve Treatment*, 15 L. & SEXUALITY 91, 107–08 (2006)).

125. SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 27 (2007), *available at* http://www.srlp.org/files/warinhere.pdf; *see also* Broadus, *supra* note 12, at 568 (quoting Spade, *supra* note 63, at 36–37) (stating that society holds three myths about transgender persons: (1) "transgender people do not exist"; (2) "trans people can only be understood or recognized through medical authority"; and (3) "trans people's gender-confirming healthcare is not legitimate medicine").

126. *See, e.g.*, Broadus, *supra* note 12, at 571 (citing Spade, *supra* note 63, at 36–37) (stating that the multitude of issues surrounding gender dysphoria makes it a difficult condition to diagnose).

127. *See* AM. MED. ASS'N, *supra* note 22 (stating that gender dysphoria "is a serious medical condition" for which "[a]n established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with [gender dysphoria]").

128. SYLVIA RIVERA LAW PROJECT, *supra* note 125.

129. P.T. Cohen-Kettenis and L.J.G. Gooren, *Transexualism: A Review of Etiology, Diagnosis, and Treatment*, 46 J. PSYCHOSOMATIC RES. 315, 327 (1999).

gender dysphoria "not only improves people's quality of life, but it actually will improve . . . adherence to treatment for chronic disease."[130]

However, "[d]espite the fact that medical experts agree that gender-related healthcare sought by transgender and intersex people is medically necessary, non-experimental, safe, and effective, these services are still routinely denied to imprisoned people."[131] A person with untreated gender dysphoria often experiences severe anxiety, depression, and other psychological disorders.[132] Autocastration, the often crude and brutal self-removal of the testes, is a potentially deadly result of failure to provide hormone therapy to a transgender female inmate.[133] Suicidal ideation, attempts, and completions are also high among this population.[134]

Dr. Nick Gorton, "a transgender health expert," described the health consequences that a lack of medically appropriate treatment can have for transgender patients:

> Numerous studies in the medical literature as well as the clinical experience of experts in the field demonstrate that denial of sexual reassignment therapies not only cause patients significant anguish and suffering but that it also results in significant morbidity and mortality. Untreated [gender dysphoria] patients have a suicidality of 20-30%, which is reduced to less than 1-2% after treatment. Delay of treatment for [gender dysphoria] patients not only exposes them to a longer duration of pain, suffering, and decreased social functionality, but also

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130. Howell, *supra* note 44, at 154 (internal quotation marks and citation omitted). This is especially relevant because at least one study shows that transgender inmates are HIV infected at a rate of 60%–80%, versus a 1.6% HIV infection rate of all inmates in the United States. Okamura, *supra* note 99, at 117–18.

131. SYLVIA RIVERA LAW PROJECT, *supra* note 125 (footnotes omitted) (citing Yolanda Louise Susanne Smith, *Sex Reassignment: Outcomes and Predictors of Treatment for Adolescent and Adult Transsexuals*, 35 PSYCHOL. MED, 89–99 (2005) ("After treatment the group was no longer gender dysphoric.")); *see generally* A. Michel et al., *The Transsexual: What About the Future?*, 17 EUR. PSYCHIATRY 353, 353–62 (2002) (discussing the importance of gender identity-related healthcare for transgender persons).

132. Fields v. Smith, 653 F.3d 550, 553 (7th Cir. 2011); *see* Lee, *supra* note 48, at 450 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 578–79 (4th ed. 2000) (explaining that such consequences constitute features associated with untreated GID).

133. Maruri, *supra* note 17, at 812 (citing George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORR. HEALTH CARE 280, 287 (2009)).

134. *Fields*, 653 F.3d at 553; *see* AM. MED. ASS'N, *supra* note 22 ("[I]f left untreated, [gender dysphoria] can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.").

> unnecessarily places their lives at risk. The longer the duration of suicidal feelings, the greater risk that a patient will be a completer. Treated [gender dysphoria] patients have a durable and sustained remission of their illness resulting in decreased psychiatric morbidity and mortality as well as improvements in well-being, social and occupational functioning, and interpersonal relationships.[135]

For the above reasons, it is important that transgender military inmates, such as Manning, receive appropriate medical care for gender dysphoria while incarcerated.

C. Treatment for Gender Dysphoria at Fort Leavenworth

Of the recommended options for treating gender dysphoria, what Manning actually receives is expected to be limited, regardless of what treatment would be most appropriate for her.[136] Relative to the above options, her treatment while in military confinement is likely to be as follows:

Counseling: Manning is receiving the same access to mental health professionals as any other soldier at Fort Leavenworth.[137] It is unclear if such counseling is focused on supporting Chelsea in her gender identity, which seems unlikely given the lack of military expertise with gender dysphoria.[138]

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135. SYLVIA RIVERA LAW PROJECT, *supra* note 125, at 28.

136. *Cf.* Colopy, *supra* note 118, at 264 (stating that an inmate with a serious medical need, such as gender dysphoria, should have access to necessary treatments).

137. Ershadi, *supra* note 100; *see also* Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 14 (describing Manning's mental health treatment at Fort Leavenworth).

138. One potential alternative therapeutic treatment may be to attempt to force Manning to identify with her assigned birth sex through conversion therapy. Such conversion therapy is considered ineffective and unethical. *See*, *e.g.*, Kelley Winters, *New Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, GID REFORM WEBLOG (Sept. 25, 2011) (internal quotation marks omitted), http://gidreform.wordpress.com/2011/09/25/new-standards-of-care-for-the-health-of-transsexual-transgender-and-gender-nonconforming-people/ ("Treatment aimed at trying to change a person's gender identity and lived gender expression to become more congruent with sex assigned at birth has been attempted in the past . . . yet without success, particularly in the long term . . . [s]uch treatment is no longer considered ethical."); *contra* Lindevaldsen, *supra* note 26, at 46 (arguing that gender dysphoria should be treated solely with psychotherapy to manage the condition, rather than "humor[ing] the patient's false sense of gender identity" by use of hormones and SRS). Additionally, both WPATH and several courts have recognized that officials can only meet a serious medical need such as gender dysphoria, if an inmate has been given the opportunity for diagnosis and treatment by an experienced medical professional with training and experience in gender dysphoria, rather than a medical professional without such expertise. Colopy, *supra* note 118, at 261–62. Moreover,

Hormone Therapy: Hormone therapy causes physiological changes in the body, making the body begin to conform to an individual's gender identity, rather than their assigned sex.[139] This is the treatment Manning requested. However, the military has explicitly stated that Manning will not receive any hormone therapy.[140]

Lived experience (social and legal transition): Lived experience includes going by a preferred name and living full time as the preferred gender. Fort Leavenworth personnel will only refer to Manning as Chelsea if she legally changes her name.[141] "The military strictly regulates uniform and grooming standards by gender,"[142] and has stated that it will not allow Manning to adhere to female regulations for grooming.[143] If Manning attempts to wear her hair longer than regulation for males, or to dress in additional female military inmate clothing beyond the female undergarments she has been allowed,[144] she will likely be disciplined,[145] up to and including disciplinary segregation.[146]

Sex Reassignment Surgery: SRS changes the body to conform to an individual's gender identity. Since Manning will not receive any hormone therapy, Manning will not receive any sex reassignment surgery.[147] In response to a query about treatment for Manning, a Fort Leavenworth official replied that Manning would not be eligible for administrative

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psychotherapy is an important first step for inmates with gender dysphoria, and may be the only necessary medical step for some, but it "is not a cure for [gender dysphoria]." *Id.* at 262.

139. *Hormone Administration*, *supra* note 13; *see also* Colopy, *supra* note 118, at 263 (stating that "[h]ormones are generally necessary" and "alleviate [gender dysphoria] symptoms").

140. Ershadi, *supra* note 100; *see also* Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 13–14 (asserting that Manning has requested—and been denied—hormone therapy).

141. Ershadi, *supra* note 100.

142. SERV. MEMBERS LEGAL DEF. NETWORK, *supra* note 53, at 29.

143. Female military inmates are not allowed many of the trappings of Western femininity, including wigs, hair extensions, acrylic nails, or painted nails, and are required to keep their hair within military regulations, but that may include long hair. U.S. NAVY CONFINEMENT REQUIREMENTS, PRISONER CLOTHING AND HEALTH AND COMFORT ITEMS (March 18, 2012), *available at* http://www.public.navy.mil/bupers-npc/support/correctionprograms/brigs/miramar/Documents/Health-Comfort%20Requirements.pdf.

144. "Commanders of ACS facilities may designate a distinctive female uniform . . . ." U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM, ch. 10-6.

145. Ershadi, *supra* note 100; *see also* Okamura, *supra* note 99, at 121 ("Often, transgender inmates end up in segregation as punishment for such indiscretions as possessing a bra or makeup . . . .").

146. U.S. DEP'T OF DEFENSE, INSTR. 1325.07, *supra* note 73, at ¶ 10(d).

147. Ershadi, *supra* note 100. According to the Standards of Care, SRS would only potentially be medically indicated after Manning received hormone therapy. *See* Colopy, *supra* note 118, at 265 (arguing that "[s]urgery is not necessary for all [gender dysphoria] cases, and the WPATH Standards of Care recommend reserving it for only the most serious cases").

separation:[148] separation (discharge) is the only alternative that Army regulations articulate as the correct response to Manning's medical needs.[149]

The "freeze-frame" approach to gender dysphoria care may also influence the military's stance on Manning's treatment. In the "freeze-frame" model, an inmate is only given continuation of treatment she has already been legally prescribed prior to incarceration, freezing her transition at that stage until her release from custody.[150] This standard artificially limits care for inmates whose gender dysphoria was untreated or incorrectly treated prior to incarceration, or whose gender dysphoria manifested after incarceration.[151]

Given the military's insistence that Manning will not receive medically appropriate gender dysphoria treatment while confined in a military prison, her only recourse may be judicial relief through her conditions-of-confinement claim. In the following Part, this Article discusses the history of such claims by civilian inmates in federal courts.

III. EIGHTH AMENDMENT JURISPRUDENCE: TRANSGENDER INMATES IN THE CIVILIAN CONTEXT

Transgender inmates advocating for adequate medical treatment most commonly argue that failure to meet their medical needs violates the Eighth

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148. Ershadi, *supra* note 100.

149. U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ch. 3-35 (Aug. 4, 2011) details:

> *a.* A history of, or current manifestations of, personality disorders, disorders of impulse control not elsewhere classified, transvestism, voyeurism, other paraphilias, or factitious disorders, psychosexual conditions, transsexual, gender identity disorder to include major abnormalities or defects of the genitalia such as change of sex or a current attempt to change sex, hermaphroditism, pseudohermaphroditism, or pure gonadal dysgenesis or dysfunctional residuals from surgical correction of these conditions render an individual administratively unfit. *b.* These conditions render an individual administratively unfit rather than unfit because of physical illness or medical disability. These conditions will be dealt with through administrative channels, including AR 135–175, AR 135–178, AR 635–200, or AR 600–8–24.

Id.

150. However, the Federal Bureau of Prisons ("BOP") recently abandoned the "freeze-frame" approach as part of a settlement in a case involving a transgender prisoner seeking medical treatment for gender identity disorder. *See Federal Bureau of Prisons Makes Major Change in Transgender Medical Policy*, GLAD (Sept. 29, 2011), http://www.glad.org/current/pr-detail/federal-bureau-of-prisons-makes-major-change-in-transgender-medical-policy/.

151. Margaret Colgate Love & Giovanna Shay, *Gender & Sexuality in the ABA Standards on the Treatment of Prisoners*, 38 WM. MITCHELL L. REV 1216, 1238 (2011).

Amendment.[152] The U.S. Department of Justice, National Institute of Corrections, released a document in November 2012 outlining appropriate treatment for transgender inmates; this document was based in part on a number of recent federal judicial decisions regarding transgender inmate medical treatment under the Eighth Amendment.[153] But despite these decisions, appropriate medical care for inmates remains an open question in most jurisdictions under Eighth Amendment jurisprudence.

The Eighth Amendment states that the government shall not inflict "cruel and unusual punishments."[154] This amendment "manifests 'an intention to limit the power'" of the state criminal justice system and was specifically "designed to protect those convicted of crimes."[155] In 1979, future U.S. Supreme Court Justice Anthony Kennedy wrote that "[t]he whole point of the [Eighth] [A]mendment is to protect persons convicted of crimes. Eighth [A]mendment protections are not forfeited by one's prior [bad] acts."[156] It is despised criminals,[157] like transgender inmates, "who are most likely to need the protection of the Eighth Amendment and its enforcement by the courts."[158]

"Punishments 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or 'involv[ing] the unnecessary and wanton infliction of pain' are 'repugnant to the Eighth Amendment.'"[159] In the United States, the federal courts have held that prisons have a constitutional duty to provide for the basic needs of individuals who are in prison, including food, housing, clothing, personal safety, and medical services.[160] It may seem unfair that inmates convicted of crimes against society would have a right to medical care, whereas the average citizen, who is presumed innocent, has no such right.[161] But this

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152. Maruri, *supra* note 17, at 819.

153. NAT'L INST. OF CORR., A QUICK GUIDE FOR LGBTI POLICY DEVELOPMENT FOR ADULT PRISONS AND JAILS (Nov. 2012), *available at* http://nicic.gov/Library/files/026702.pdf.

154. U.S. CONST. amend. VIII.

155. Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).

156. Spain v. Procunier, 600 F.2d 189, 194 (9th Cir. 1979).

157. *See* Arkles, *supra* note 103, at 523 ("[O]ur society has deeply ingrained notions that prisoners are violent, dangerous, and animalistic—less than human, in need of control, objects of fear, and deserving of contempt.").

158. Kosilek v. Spencer, 889 F. Supp. 2d 190, 204 (D. Mass. 2012).

159. Hudson v. McMillian, 503 U.S. 1, 10–11 (1992) (alteration in original) (quoting Estelle v. Gamble, 429 U.S. 97, 102–03 (1976)).

160. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 842 (1994) (personal safety); Rhodes v. Chapman, 452 U.S. 337, 364 (Brennan, J., concurring) (citing Laaman v. Heglemoe, 437 F. Supp. 269, 322–23 (D.N.H. 1977) (adequate food, clothing, shelter, and medical care).

161. *See* Bendlin, *supra* note 26, at 976 (acknowledging the disparity).

circumstance is premised on the notion that, through incarceration, the state has removed from the inmate any opportunity to provide these basic human needs for herself; therefore the state has a duty to provide such care.[162]

In *Estelle v. Gamble*, the U.S. Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'" and violates the Eighth Amendment.[163] The Court in *Farmer v. Brennan* articulated a two-part Eighth Amendment test with objective and subjective components.[164] The subjective component requires that a prison official have actual knowledge of the risk of serious harm to an inmate either through her actions or through her failure to act.[165] "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [s]he must also draw the inference."[166] If the risk is obvious, a jury may draw the inference that the official knew of the harm, but such an inference is not dispositive.[167] The objective component in the medical context, as in Manning's case, requires that there be a serious medical need.[168] Once a serious medical need is established, "[c]ourts must defer to the decisions of prison officials concerning what form of adequate treatment to provide an inmate."[169] An inmate is not entitled to the medical care of her choice, only to adequate medical care; however, it is the role of the courts to decide if the provided care is minimally adequate.[170]

In the context of an inmate with gender dysphoria asserting an Eighth Amendment claim, the key question is whether a prison's decision to provide some form of psychotherapy in lieu of cross-gender hormones or sex reassignment surgery is one that constitutes deliberate indifference to a serious medical need.[171] Interestingly, in recent high-profile cases, courts seem to be eschewing traditional deference to prison officials, and are rather focusing more on the medical community's recommendation for appropriate medical treatment of an incarcerated transgender person in

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162. Dolovich, *Cruelty*, *supra* note 21, at 921–22 (discussing the "state's carceral burden"). "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Id.* at 922 n.162 (quoting *Gamble*, 429 U.S. at 103).

163. *Gamble*, 429 U.S. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

164. *Farmer*, 511 U.S. at 834.

165. *Id.* at 837–38.

166. *Id.*

167. *Id.* at 842.

168. *Gamble*, 429 U.S. at 104 (citing *Gregg*, 428 U.S. at 173 (1976)).

169. Kosilek v. Spencer, 889 F. Supp. 2d 190, 199 (D. Mass. 2012).

170. *Id.*

171. *See* Bendlin, *supra* note 26, at 977 (stating that psychological counseling in lieu of hormone therapy and SRS for inmates with gender dysphoria is "an inadequate remedy").

order to establish the subjective knowledge of prison officials.[172] For that reason, this Article will presume that a military court will find the subjective prong of the two-part test met if the objective prong, serious medical need, is also met.[173]

A. Courts' Evolving Perspectives on "Serious Medical Need" as Applied to Prisoners with Gender Dysphoria

Inmate claims for appropriate medical care for gender dysphoria were initially unsuccessful in the United States.[174] Then, from 1987 to 2007, "[s]even of the U.S. Courts of Appeals that have considered the question . . . concluded that severe [gender dysphoria] constitutes a 'serious medical need' for purposes of the Eighth Amendment."[175] These courts found that inmates were entitled to some medical care for gender dysphoria but were not clear about the extent of the treatment.[176] The perspective that prevailed at that time was that while gender dysphoria is a serious medical need, because an inmate has no choice about the type of treatment she receives, providing mental health care is sufficient treatment and denying

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172. *See* Ryan Dischinger, Note, *Adequate Care for a Serious Medical Need:* Kosilek v. Spencer *Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria*, 22 TUL. J.L. & SEXUALITY 169, 176–77 (2013).

173. This may seem to be a risky presumption. However, the public nature of Manning's case, and other cases involving transgender inmates, would seem to tip the scales in favor of a court finding that prison officials were aware of Manning's request for medically appropriate treatment and were aware of the risk to Manning should they fail to treat her gender dysphoria appropriately.

174. *See, e.g.*, Supre v. Ricketts, 792 F.2d 958, 962–63 (10th Cir. 1986) (finding that prison's refusal to provide estrogen to transsexual inmate did not violate her Eighth Amendment rights); Long v. Nix, 86 F.3d 761, 765–66 (8th Cir. 1996) (finding that inmate with GID had not proven she had a serious medical need); *see also* Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 WL 34677, at *4 (6th Cir. Jan. 28, 1997) (unpublished table decision) (holding that inmate did not state an Eighth Amendment claim where prison officials denied her feminine cosmetics as well as hormone levels she was prescribed pre-incarceration). *Contra* South v. Gomez, No. 99-1597, 2000 WL 222611, at *2 (9th Cir. 2000) (unpublished decision) (affirming that the abrupt termination of the plaintiff's ongoing hormone therapy upon transfer from one prison to another violated the plaintiff's Eighth Amendment rights).

175. O'Donnabhain v. Comm'r, 134 T.C. 34, 62 (T.C. 2010) (citations omitted); *see also* Colopy, *supra* note 118, at 250 ("[M]edical science has progressed in the [past] fifteen years . . . and now seven U.S. Courts of Appeals . . . have recognized that [gender dysphoria] qualifies as a serious medical need requiring appropriate medical attention.").

176. *See, e.g.*, Meriwether v. Faulkner, 821 F. 2d 408, 414 (7th Cir. 1987) ("[T]he plaintiff has stated a claim under the Eighth Amendment entitling her to some kind of medical care."); Kosilek v. Maloney, 221 F. Supp. 2d 156, 195 (D. Mass. 2002) (favoring a case-by-case analysis instead of directly stating what type of medical treatment the Eighth Amendment requires for inmates with gender dysphoria).

hormones or SRS is acceptable.[177] However, the courts' perspectives evolved again, and later cases found that failure to provide hormone treatment violated the Eighth Amendment[178] under the theory that the Eighth Amendment requires the minimum treatment necessary to effectively treat the condition at issue.[179]

More recently, several federal courts have found SRS may be medically necessary for some inmates.[180] These cases followed a ruling by the U.S. Tax Court that SRS and other gender dysphoria treatments were tax deductible because they were used to treat a medical illness.[181] The following cases, all decided in the past three years, are demonstrative of the

177. This perspective still prevails in some jurisdictions. *See, e.g.*, Barnhill v. Cheery, No. 8:06-cv-922-T-23TGW, 2008 WL 759322, at *13–14 (M.D. Fla. Mar. 20, 2008) (stating that because there was disagreement among medical professionals as to whether plaintiff required hormone therapy, it was not a constitutional violation to deny her such where an individual determination had been made).

178. *Kothmann v. Rosario*, No. 13-13166, slip op. at 10–12 (11th Cir. Mar. 7, 2014), is the most recent circuit court case where a transgender inmate was found to state an Eighth Amendment claim for a prison official's failure to treat his gender dysphoria with hormones. Both parties in the case agreed that gender dysphoria is a serious medical need. *Id.* at 7 n.4. *See also* Brooks v. Berg, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003) (finding that prison officials were deliberately indifferent to inmate's serious medical needs), *vacated in part by* Brooks v. Berg, 289 F. Supp. 2d 286 (N.D.N.Y. 2003); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 800 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991); Battista v. Clarke, 645 F.3d 449, 451 (1st Cir. 2011) (finding deliberate indifference to civilly committed inmate's serious medical need where officials refused to administer prescribed hormones to inmate with gender dysphoria who was likely to engage in autocastration if not treated); Soneeya v. Spencer, 851 F. Supp. 2d 228, 244 (D. Mass. 2012) (stating that "it is well established that [gender dysphoria] may constitute a serious medical need" depending on the seriousness of the disorder).

179. Colopy, *supra* note 118, at 259.

180. On the theory that "[b]ecause it appears impossible to change the mind to fit the body, the surgery is aimed at changing the body to fit the mind," see Bendlin, *supra* note 26, at 977 n.176 (quoting Davidson v. Aetna Life & Cas. Ins. Co., 420 N.Y.S.2d 450, 452–53 (N.Y. Sup. Ct. 1979) (finding that Aetna must cover medical costs associated with a transgender person's SRS because it was medically necessary)).

181. O'Donnabhain v. Comm'r, 134 T.C. 34, 70 (T.C. 2010). O'Donnabhain sued the Internal Revenue Service (IRS) over that body's denial of her tax deduction for medical care related to her severe gender dysphoria. Under IRS guidelines, tax-deductible medical care is care that meaningfully promotes the proper function of the body, or to prevent or treat illness or disease. *Id.* at 48–49. In part, the Tax Court relied upon the notion that federal appellate courts that have considered the question generally find gender dysphoria to be a serious medical need for purposes of the Eighth Amendment. *Id.* at 62. The Tax Court reversed the IRS decision, *id.* at 77, holding that gender dysphoria is a disease under IRS regulations, *id.* at 64, and that the hormone therapy and SRS O'Donnabhain sought a tax deduction for were accepted treatments for her disease, *id.* at 70, and hence deductible medical care. IRS guidelines for deductible medical care include such treatments as "justify a reasonable belief the [treatment] would be *efficacious*." *Id.* at 69 (emphasis added). *But see* Colopy, *supra* note 118, at 266 (pointing out the difference between tax deductions, which have no cap on medically allowable expenses, and the Eighth Amendment, which only requires therapies which treat an inmate's condition while incarcerated).

evolving standards of decency as applied to civilian inmates with gender dysphoria.[182]

First, a district court in *Fields v. Smith* found that a Wisconsin statute categorically denying inmates with gender dysphoria hormone therapy and SRS violated the Eighth Amendment.[183] On appeal, the Seventh Circuit concluded that the statute precluding hormone therapy or SRS for prisoners with gender dysphoria demonstrated deliberate indifference to prisoners' serious medical needs, in violation of the Eighth Amendment.[184] The state did not contest that plaintiffs experienced a serious medical need in the form of gender dysphoria.[185] The district court's finding of deliberate indifference was predicated upon defendants' knowledge of plaintiffs' condition and lack of adequate treatment despite that knowledge. Defendants attempted to convince the court that gender dysphoria treatment was cost prohibitive, but the court rejected that defense citing the greater costs of other inmate medical conditions borne by the state.[186] Defendants also tried to show that therapy alone was a sufficient treatment for gender dysphoria, therefore justifying the categorical exclusion of hormone treatments and SRS on the basis that inmates are not entitled to choose a preferred medical treatment.[187] However, the court found that there was "no evidence of uncertainty about the efficacy of hormone therapy as a treatment," and that there was no evidence that other treatments were

182. Part of the evolving standard analysis is likely to be related to changes in other areas of law. For example, the *ABA 2010 Standards for Criminal Justice: Treatment of Prisoners* states that prisons should not follow the freeze-frame policy and instead should provide appropriate, individualized medical care for transgender inmates. Love & Shay, *supra* note 151, at 1237–38 (citing AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-6.13 (3d ed. 2011), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf. The ABA House of Delegates approved these Standards in 2010 and published them with commentary the following year. Issues relating to gender and sexuality are just a few of the human rights concerns addressed in the 2010 Standards, which include sections on health care, crowding, segregation, reentry, and access to courts. Additionally, the Patient Protection and Affordable Care Act could now require health insurers to cover procedures for persons with gender dysphoria if the company also covers the same procedure for another medical reason. *See* Nina Zhang, *Patient Protection and Affordable Care Act Could Expand Coverage for Gender Dysphoria*, HEALTH LAW., Dec. 2013, at 26, 29 ("For example, if a plan covers surgery, but not sex-reassignment surgery, which many people require for their treatment of gender dysphoria, then the plan potentially violates PPACA.").

183. Fields v. Smith, No. 06-C-112, 2010 WL 1325165, at *1 (E.D. Wis. March 31, 2010), *modified*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011).

184. Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011). The court found the statute to be unconstitutional both facially and as applied to plaintiffs.

185. *Id.*

186. *Id.*

187. *Id.* at 556.

effective in treating gender dysphoria.[188] Finally, defendants argued that the ban was justified by the state's interest in prison security, positing that inmates in male prisons with feminine characteristics were more likely to be sexually assaulted.[189] The *Fields* court cited *Whitley v. Albers*, which states that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[190] However, the *Fields* court also noted that there was no evidence presented that showed banning hormones for transgender inmates reduced their risk of sexual assault and that therefore the defendants failed to show any security benefits associated with the ban.[191]

In *Kosilek v. Spencer*, a district court in Massachusetts became the first federal court in the country to order prison officials to provide SRS to an inmate with gender dysphoria.[192] The court found that SRS is a medical necessity for some people with gender dysphoria.[193] Kosilek had a history of distress, suicidality, and attempted autocastration, which therapy and hormone therapy did not alleviate, and a physician subsequently prescribed SRS.[194] The court found that the prison was withholding gender dysphoria treatment out of a fear of public outrage, rather than any legitimate penological reason.[195] Finding that the prison's actions violated the Eighth Amendment, the court ordered the defendants to "take forthwith all of the actions reasonably necessary to provide Kosilek sex reassignment surgery as promptly as possible."[196]

In *De'lonta v. Johnson*, the Fourth Circuit became the second court in the country to find that an inmate could state a claim under the Eighth Amendment for SRS and remanded to the district court.[197] Under a prior court order, the prison was providing De'lonta with hormone and cognitive therapy and allowing De'lonta to live as a woman.[198] The Fourth Circuit found that the prison's provision of some treatment for De'lonta's gender

188. *Id.* at 557.

189. *Id.*

190. Whitley v. Albers, 475 U.S. 312, 321–22 (1986) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

191. *Fields*, 653 F.3d at 557.

192. Kosilek v. Spencer, 889 F. Supp. 2d 190, 251 (D. Mass. 2012).

193. *Id.* at 197.

194. Dischinger, *supra* note 172, at 177–78.

195. *Id.* at 179.

196. *Kosilek*, 889 F. Supp. 2d at 251.

197. De'lonta v. Johnson, 708 F.3d 520, 526–27 (4th Cir. 2013).

198. *Id.* at 522.

dysphoria was not necessarily constitutionally adequate treatment.[199] This decision was based on De'lonta's "constant mental anguish" and her "overwhelming" desire to self-castrate despite the prison's treatment.[200] On remand, the district court granted a motion by De'lonta to compel the prison to allow her to be evaluated for SRS at her own expense.

In *Fields*, *Kosilek*, and *De'lonta*, prison officials raised multiple arguments against providing adequate medical care to transgender inmates, including hormone therapy and SRS. In these cases, the courts did not afford prison officials deference by simply allowing officials to assert that other treatments, such as cognitive therapy, were sufficient to treat inmates with gender dysphoria, or that lack of appropriate treatment was essential to prison security. Instead, the courts required prison officials to provide evidence backing up their assertions, which the courts weighed against evidence presented by plaintiff inmates, including medical expert testimony on both sides, and found for the plaintiffs.

B. Blanket Prohibitions of Hormone Therapy and Sex Reassignment Surgery

Courts have found that correctional institutions may violate the Eighth Amendment by failing to adapt an established policy in order to adequately address an inmate's serious medical need.[201] To the extent that the policy articulated by the military in response to Manning's request for gender dysphoria treatment is a blanket policy for all transgender inmates, the following cases may apply.[202]

The Ninth Circuit held in *Allard v. Gomez* that denial of treatment for gender dysphoria based on a blanket prison policy, rather than individual need, may constitute deliberate indifference under the Eighth Amendment standard.[203] Similarly, the Seventh Circuit in *Fields* invalidated a Wisconsin law that prohibited the use of hormones or SRS as a treatment for inmates

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199. *Id.* at 526.

200. *Id.* at 522.

201. *See, e.g.*, Mahan v. Plymouth Cnty. House of Corr., 64 F.3d 14, 18 (1st Cir. 1995).

202. Courts in other countries have found categorical denial of SRS to inmates to be inappropriate. For example, until 2001, Canada did not provide SRS to inmates. Now it does as a result of a decision by the Canada Human Rights Tribunal. Kavanagh v. Canada Human Rights Comm'n, 2001 CHRT ¶¶ 155, 192–94, *available at* http://www.chrt-tcdp.gc.ca/ (select language; use "search decisions" function) (last visited Dec. 6, 2014). The Tribunal reasoned that the Correctional Services of Canada's Health Service Policy's "blanket prohibition on access to sex reassignment surgery" by inmates "is discriminatory on the basis of both sex and disability." *Id*. at ¶ 198.

203. Allard v. Gomez, 9 F. App'x. 793, 795 (9th Cir. 2001).

suffering from gender dysphoria, based on the state "removing even the consideration of hormones or surgery."[204] In *Brooks v. Berg*:

> [T]he District Court for the Northern District of New York also found that a "blanket denial of medical treatment is contrary to a decided body of case law," and that "[p]risons must provide inmates with serious medical needs some treatment based on sound medical judgment." The court continued: "[P]rison officials cannot deny transsexual inmates all medical treatment by referring to a prison policy . . . ."[205]

In *Kosilek*, a district court in Massachusetts found that treatment decisions concerning inmates with gender dysphoria must be based on an individualized judgment made by the inmate's medical providers instead of a blanket prison policy.[206] Another Massachusetts district court found that where a prisoner was not individually evaluated to determine appropriate treatment for her gender dysphoria, she was not receiving adequate medical care.[207]

IV. MILITARY CRIMINAL APPEALS PROCESS, JUDICIAL DEFERENCE, AND SUBSTANTIVE LAW

This Part looks at how the military court system functions in addressing conditions-of-confinement claims. The military justice system works parallel to, but separately from, the federal court system.[208] In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ)[209] by

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204. Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

205. Soneeya v. Spencer, 851 F. Supp. 2d 228, 244 (D. Mass. 2012) (quoting Brooks v. Berg, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003), *vacated in part by* Brooks v. Berg, 289 F. Supp. 2d 286 (N.D.N.Y. 2003)); *see also* Colopy, *supra* note 118, at 255 (discussing *Brooks*, 270 F. Supp. 2d at 310).

206. Kosilek v. Maloney, 221 F. Supp. 2d 156, 193 (D. Mass. 2002) ("[D]ecisions as to whether psychotherapy, hormones, and/or sex reassignment surgery are necessary to treat Kosilek adequately must be based on an 'individualized medical evaluation' of Kosilek rather than as 'a result of a blanket rule.' Those decisions must be made by qualified professionals. Such professionals must exercise sound medical judgment . . . ." (citations omitted) (quoting Allard v. Gomez, 9 F. App'x. 793, 795 (9th Cir. 2001))).

207. Soneeya v. Spencer, 851 F. Supp. 2d 228, 248 (D. Mass. 2012).

208. Chappell v. Wallace, 462 U.S. 296, 303–04 (1983) (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

209. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine,* 35 GA. L. REV. 161, 198 n.190 (2000) [hereinafter O'Connor, *Origins*]; *see generally* Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (providing analysis of the UMCJ by its principal draftsman).

authority granted under Article I of the Constitution.[210] The UCMJ provides for both "the necessary procedural provisions for the military criminal legal system as well as the substantive criminal code applicable to members of the armed forces."[211] The U.S. Supreme Court has upheld this congressional delegation of judiciary power to the military.[212]

Since Manning has already been convicted and sentenced via court martial, the trial and sentencing portions of the military judicial system are not relevant for this analysis. Rather, Manning would pursue conditions-of-confinement claims through military criminal appeal. Congress passed Article 55, a statutory provision, to protect military personnel from cruel and unusual punishments due to uncertainty about whether the Eighth Amendment applies to military personnel.[213] In recent years, military courts have also applied the Eighth Amendment to military inmate conditions of confinement.[214] This Part reviews the military criminal appeals process, the applicable substantive law governing Manning's potential claim, and U.S. Supreme Court deference in the military context.

A. Military Criminal Appeals[215]

Military personnel lack many of the constitutional protections afforded to the general citizenry, including the right in every jurisdiction to sue

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210. Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 642 nn.60, 61 (1994) (citing 10 U.S.C. §§ 801–946; U.S. CONST. art. I). "The Congress shall have the power . . . [t]o raise and support Armies . . . " U.S. CONST. art. I, cl. 12. Congress is authorized to "provide and maintain a Navy." *Id.* art. I, cl. 13. Congress also has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, cl. 14, and the power to "make all laws [that are] . . . necessary and proper." *Id.* art. I, cl. 18.

211. Lederer & Hundley, *supra* note 210, at 642.

212. *See, e.g.*, Dynes v. Hoover, 61 U.S. 65, 79 (1857) (discussing the congressional delegation of judicial powers to the military).

213. *See* Captain Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 105–06 (2005) ("The Senate subcommittee hearings pointed out Article 55's codification was required because 'apparently . . . the [E]ighth [A]mendment is inapplicable [to the military] . . . '" (citations omitted) (quoting *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings Before a Subcomm. of the Comm. on Armed Service House United States Senate*, 81st Cong. 112 (1950), reprinted in INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (U.S. Government Printing Office, 1950))).

214. United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000).

215. What follows is a brief synopsis. For a detailed review of the military appeals process, see John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175, 182–84 (2008) [hereinafter O'Connor, *Foolish Consistencies*].

superiors for unconstitutional treatment such as illegal post-trial conditions of confinement.[216] However, unlike civilian courts, military criminal courts of direct appeal may also hear claims related to conditions of confinement concurrently with a criminal appeal.[217] In most circumstances, an exhaustive criminal appeals process is required for those convicted via court martial and sentenced beyond a certain threshold.[218] Manning, with her thirty-five-year sentence, meets the criteria for mandatory appeal. Therefore, Manning's best opportunity to seek redress lies primarily within the military criminal appeals system.[219] What follows is a brief overview of the path Manning must follow with any conditions-of-confinement claim.

1. Administrative Relief—Exhaustion Required

Manning is required to file administrative grievances under Article 138 of the UCMJ[220] and exhaust her administrative remedies before filing a suit challenging the conditions of her post-trial confinement.[221] This requirement "promot[es] resolution of grievances at the lowest possible level . . . [and] ensure[s] that an adequate record [is] developed" to aid

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216. *See* Chappell v. Wallace, 462 U.S. 296, 304 (1983) (stating no *Bivens*-type damages remedy exists for military prisoners whose constitutional rights are violated by superior officers); *see also* Froelich, *supra* note 33, at 720 (discussing the "uncertainty and inconsistency" military personnel face when suing to enforce constitutional rights via injunctive relief because federal courts have failed to act with any uniformity). Also, the United States Court of Appeals for the Armed Forces has stated:

> There is no clear-cut procedure for a military prisoner to follow in order to obtain relief from illegal post-trial confinement. Unlike his or her civilian counterpart, the military prisoner is afforded no civil remedy for illegal confinement under 42 USC §§ 1983 and 1985, or the Federal Tort Claims Act, 28 USC §§ 1346 & 2671, *et seq*.

United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997).

217. *See, e.g.*, United States v. Roth, 57 M.J. 740, 740 (A. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003).

218. Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012); *see* O'Connor, *Foolish Consistencies*, *supra* note 215, at 178.

219. *See* United States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001) (pointing out the lack of any available civil remedy for military inmates for claimed constitutional violations).

220. 10 U.S.C. § 938 ("Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and [s/]he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.").

221. United States v. Wise, 64 M.J. 468, 471 (C.A.A.F. 2007) (citing *White*, 54 M.J. at 472). The exhaustion requirement is consistent with the civilian inmate exhaustion requirement under the Prison Litigation Reform Act. *See* Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, 16 CRIM. JUST. 10, 12 (2002) (discussing the civilian inmate exhaustion requirement).

appellate review.[222] Manning needed to file an administrative grievance contesting her lack of appropriate medical treatment for gender dysphoria and articulating the desired medical treatment; according to Manning's district court complaint, she fulfilled this requirement.[223]

2. Army Court of Criminal Appeals

Since Manning was not granted relief through administrative review,[224] she has the option to file a conditions-of-confinement claim along with her mandatory criminal appeal to the Army Court of Criminal Appeals (ACCA).[225] The ACCA, which has the authority to hear her criminal appeal, has "jurisdiction to determine under Article 66, UCMJ, whether the adjudged and approved sentence of a court-martial is being executed in a cruel or unusual manner in violation of the Eighth Amendment or Article 55."[226] Manning would likely claim, as a legal error for the court's consideration, that she is being subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article 55.[227]

3. Court of Appeals for the Armed Forces

Congress vested the Court of Appeals for the Armed Forces (CAAF) with "unfettered power" to determine the constitutionality of military prison issues.[228] "[A]n appellant who asks [the CAAF] to review prison conditions, a matter normally not within our appellate jurisdiction, must establish a clear record demonstrating both the legal deficiency in administration of the prison and the jurisdictional basis for our action."[229] If Manning does not achieve relief through the ACCA, it is expected that she

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222. United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997).

223. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 8–12 (explaining Manning's multiple administrative requests for relief).

224. *Id.* at 9–12.

225. *See* 10 U.S.C. § 866 (establishing the military criminal appeals courts). Since Manning has already filed a claim with the district court, she might not pursue this option. However, if the district court dismisses her claim, or Manning withdraws it voluntarily, she would still have the ability to pursue her claim in the ACCA.

226. United States v. Roth, 57 M.J. 740, 742 (A. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 239 (C.A.A.F. 2003).

227. *See, e.g.*, United States v. Vieira, 64 M.J. 524, 525 (A.F. Ct. Crim. App. 2006) (considering "[w]hether the appellant was subjected to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article 55, UCMJ, 10 U.S.C. § 855.").

228. United States v. Matthews, 16 M.J. 354, 366 (C.M.A. 1983).

229. United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 2007) (denying review where the appellant had not clearly demonstrated a legal deficiency or jurisdictional basis).

will file a claim with the CAAF along with her criminal appeal. The CAAF may grant review at its discretion.[230]

4. Select Review by the U.S. Supreme Court

Decisions made by the CAAF are subject to review by the U.S. Supreme Court by *writ of certiorari*.[231] The U.S. Supreme Court may not review by a *writ of certiorari* if the CAAF refuses to grant review.[232] For Manning's case to reach possible U.S. Supreme Court review, her case must be granted review by the CAAF, certified for review by the CAAF by the Judge Advocate General, actually reviewed by the CAAF, or otherwise provided relief by the CAAF.[233] If the CAAF rejects Manning's case, her claim is dead at the ACCA level.

B. U.S. Supreme Court Deference to the Military

By expressing deference to the military, the U.S. Supreme Court indicates that congressional or presidential action, rather than judicial intervention, best resolves any controversy or dissatisfaction with military regulations.[234] The Court has a long history of deferring to the military.[235]

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230. 10 U.S.C. § 867; *see also Miller*, 46 M.J. at 249–50.

231. 10 U.S.C. § 867a(a).

232. *See id.* (stating that the U.S. Supreme Court cannot review via a writ of certiorari any action of the military court after review by the CAAF has been denied). This is at odds with the federal appellate system, wherein a losing party has a right to be heard by an appellate court, and then the U.S. Supreme Court has discretion to hear all cases. McReynolds v. Lynch, 672 F. 3d 482, 486 (7th Cir. 2012).

233. 28 U.S.C. § 1259 (2012).

> Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:
> (1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
> (2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
> (3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
> (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

Id.; *see also* United States v. Denedo, 556 U.S. 904, 910 (2009) (stating that "relief," for purposes of U.S. Supreme Court jurisdiction to grant *certiorari* under 28 U.S.C. § 1259 (4), need not be "ultimate relief" or "complete relief").

234. O'Connor, *Origins*, *supra* note 209, at 195.

235. *See* Korematsu v. United States, 323 U.S. 214, 223 (1944) (deferring to military policy of placing all persons of Japanese ancestry living in the United States into internment camps during World War II). For a list of all military cases decided by the U.S. Supreme Court from 1918–2004, and the

"[P]erhaps in no other area has the [Supreme] Court accorded Congress greater deference" than in the organization and running of military affairs.[236] As Professor Corey Yung has noted, the Court has extended this judicial deference to the First, Fourth, Fifth, Sixth, and Seventh Amendments,[237] effectively limiting those constitutional protections for persons in the military under the theory that Congress has "broad constitutional power" to regulate the military.[238]

For example, in *Parker v. Levy*, the Court ruled that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community . . . requires a different application of those protections."[239] The *Levy* Court found that because of the "very significant differences between military law and civilian law and between the military community and the civilian community"[240] which "regulate[s] aspects of the conduct of members of the military which in the civilian sphere are left unregulated,"[241] "within the military community there is simply not the same autonomy as there is in the larger civilian community."[242] The "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[243] Therefore, "'civilian' precedent cannot control the resolution of a challenge in the military context."[244]

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disposition of those cases, see Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907, 950–52 (2006).

236. Chappell v. Wallace, 462 U.S. 296, 301 (1983) (quoting Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981)).

237. Corey Rayburn Yung, *Is Military Law Relevant to the "Evolving Standards of Decency" Embodied in the Eighth Amendment?*, 103 NW. U. L. REV. COLLOQUY 140, 145 & nn.31–35 (2008) (citing Goldman v. Weinberger, 475 U.S. 503 (1986) (First Amendment); United States v. Middleton, 10 M.J. 123 (C.M.A. 1981) (Fourth Amendment); U.S. CONST. amend. V ("The Fifth Amendment expressly limits its applicability in military settings."); Middendorf v. Henry, 425 U.S. 25 (1976) (Sixth Amendment right to counsel); United States v. Culp, 33 C.M.R. 411 (C.M.A. 1963) (Sixth and Seventh Amendment right to jury trial)).

238. Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

239. Parker v. Levy, 417 U.S. 733, 758 (1974). Levy has been referred to as the most significant military deference case of the modern era. O'Connor, *Origins*, *supra* note 209, at 226.

240. *Levy*, 417 U.S. at 752.

241. *Id.* at 749.

242. *Id.* at 751.

243. *Id.* at 758.

244. O'Connor, *Origins*, *supra* note 209, at 232–33 (citing *Levy*, 417 U.S. 756); *see id.* at 195 (stating that the President and Congress ultimately decide how military courts are run).

The Court defers to Congress regarding the military in additional constitutional matters as well, including the analysis of due process and equal protection in the military context.[245] Additionally, in *Middendorf v. Henry*, the Court applied military deference to both the Fifth and Sixth Amendment rights to counsel.[246] *Greer v. Spock* showed that the Court is willing to expand its application of military deference to limit the constitutional protection of civilians on a military installation.[247] Attorney John F. O'Connor notes that between the advent of the military deference doctrine in 1974 and the year 2000, *only one* U.S. Supreme Court decision struck down "a military regulation or practice on constitutional grounds."[248] That case, *Ryder v. United States*, was unique because there was no military necessity argument, and therefore the Court was not required to defer to the military.[249]

O'Connor further notes that *Middendorf* describes three justifications to support military deference by the courts that the U.S. Supreme Court has rearticulated in its military jurisprudence over the years.[250] Those justifications are:

> (1) the Framers explicitly had granted Congress the power to regulate the land and naval forces, making aggressive judicial intervention inappropriate; (2) courts of law are ill-equipped, as compared to Congress, to determine the effect that particular legislation might have on military readiness and morale, a relative lack of competence that arises out of Congress's greater involvement in military affairs; and (3) military society is by necessity much more regimented than the larger civilian society,

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245. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 505–07 (1975) (finding due process and equal protection violations in a military context for mandatory dismissal of men passed over for promotion twice).

246. Middendorf v. Henry, 425 U.S. 25, 42–43 (1976).

247. Greer v. Spock, 424 U.S. 828, 838 (1976).

248. O'Connor, *Origins*, *supra* note 209, at 292 (stating that *Ryder v. United States*, 515 U.S. 177 (1995), is the only decision where the Court has invalidated military regulations as unconstitutional). However, since the "War on Terror" the Court has found that a congressional statute violated foreign civilian "enemy combatant" detainees' right to habeas corpus review. *See, e.g.*, Boumediene v. Bush, 553 U.S. 782 (2008) (invalidating the Military Commission Act provision which denied federal courts the ability to hear habeas corpus actions from foreign detainees in Guantanamo accused as enemy combatants, and instead designating a single district court to hear these habeas proceedings).

249. *See* O'Connor, *Origins*, *supra* note 209, at 292 (discussing *Ryder*, 515 U.S. 177 (1995)).

250. *Id.* at 259.

> justifying a different application of certain civil liberties within the military sphere.[251]

O'Connor describes two methods courts use to defer to congressional judgment. One method is to apply a more lenient test to military law than to civilian law.[252] Another option is to apply the same test used in the civilian context, but apply that test in a more lenient fashion.[253] Since the U.S. Supreme Court has not granted *cert* to a military inmate's conditions-of-confinement claim, it is unclear which method predominates.

The Court also restricted the ability of military personnel to enforce their constitutional rights through the courts. In 1971, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* authorized individuals, including inmates,[254] to sue for damages federal officials whose actions violated their constitutional rights,[255] "even though Congress had not expressly authorized such suits."[256] However, the Court then clarified in *Chappell v. Wallace* that "Congress did not intend to subject the [federal] [g]overnment to such [damages] claims by a member of the Armed Forces."[257] Subsequently, federal courts have not handled military inmates' claims for injunctive relief with any uniformity, leaving inmates uncertain how to go about enforcing their constitutional rights.[258] Therefore, the best opportunity for relief for military inmates is to use the prison grievance system and the military criminal appeals systems.[259]

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251. *Id*. (citing *Middendorf*, 425 U.S. 38, 43, 44). Regarding the more tightly regimented military society, consider that sodomy and adultery are both still criminalized in the military where those acts are generally no longer criminalized in the civilian context. *Compare* Uniform Code of Military Justice, 10 U.S.C. § 925 (2012) ("Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct."), *with* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that consensual sodomy between adults in the home cannot be criminalized); *see also* United States v. Johnson, 38 M.J. 88, 89 (C.M.A. 1993) ("[A]dultery with the same woman at divers times and places constitutes separate offenses.").

252. *Id.* at 267 (referring to the Court's deference in Parker v. Levy, 417 U.S. 733 (1974)).

253. *See id.* (referring to the Court's deference in Rostker v. Goldberg, 453 U.S. 57 (1981) and discussing use of intermediate scrutiny as standard of review).

254. Peek, *supra* note 54, at 1231.

255. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

256. Chappell v. Wallace, 462 U.S. 296, 298 (1983) (citing *Bivens*, 403 U.S. at 388–89).

257. *Id.* at 299.

258. *See* United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997) ("There is no clear-cut procedure for a military prisoner to follow in order to obtain relief from illegal post-trial confinement.").

259. United States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001).

C. Substantive Law Governing Punishments in Military Courts

"A servicemember is entitled, both by statute [via Article 55] and the Eighth Amendment, to protection against cruel and unusual punishment."[260] However, "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[261] There is no guarantee that the military court system will interpret an Eighth Amendment claim for gender dysphoria treatment in the same manner as a civilian federal court, and there is substantial reason to believe that it will not.

1. Article 55 and the Eighth Amendment

Article 55 prohibits cruel and unusual punishments of military personnel by statute.[262] Congress passed Article 55 as a response to the belief that the Eighth Amendment was inapplicable to the military.[263] Military appeals courts have found that Article 55 protects military personnel to a greater degree than the Eighth Amendment protects civilian personnel.[264] However, military appeals courts have also recently found that the Eighth Amendment applies to military personnel,[265] though "no court explains properly how Article 55 and the Eighth Amendment complement each other."[266] Given the confusion about the Eighth Amendment's applicability and the apparent overlap, military courts have applied Eighth Amendment jurisprudence to claims raised under Article 55,[267] "except in circumstances where [the courts] have discerned a legislative intent to provide greater protections under the statute."[268]

In *United States v. Wise*, the CAAF stated that it looks to "the Supreme Court's doctrine . . . to guide the litigation of prison condition complaints in

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260. United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000) (citing United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983); Art. 55, UCMJ, 10 USC § 855).

261. *Chappell*, 462 U.S. at 301 (quoting Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953)).

262. Uniform Code of Military Justice, 10 U.S.C. § 855 (2012) ("Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.").

263. Simon, *supra* note 213, at 105–06.

264. *Avila*, 53 M.J. at 101 (citing United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).

265. *Id.*

266. Simon, *supra* note 213, at 108.

267. *Avila*, 53 M.J. at 101. "In only a select few cases did a military court address a unique military punishment and resolve it applying Article 55." Simon, *supra* note 213, at 109.

268. *Avila*, 53 M.J. at 101 (citing *Wappler*, 9 C.M.R. at 26).

the military justice system."[269] Military appeals courts have found that operating a military prison is very similar to operating a civilian prison; thus, the U.S. Supreme Court's Eighth Amendment analysis for civilian prisons may apply in the military context.[270] For conditions-of-confinement claims, "military courts [appear to] incorporate Eighth Amendment standards without deviation."[271] The following is an example of the CAAF's articulation of Eighth Amendment standards for conditions-of-confinement claims:

> To support a claim that conditions of confinement amount to cruel and unusual punishment in violation of the Eighth Amendment the appellant must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to the appellant's health and safety; and (3) that [s]he has exhausted the prisoner-grievance system and petitioned for relief under Article 138, UCMJ, 10 U.S.C. § 938.[272]

The CAAF has stated:

> Denial of adequate medical attention can constitute an Eighth Amendment or Article 55 violation . . . . However, it is not constitutionally required that health care be "perfect" or "the best obtainable." Appellant was entitled to reasonable medical care, but not the "optimal" care recommended . . . .[273]

The above articulations of Eighth Amendment doctrine by the military courts are consistent with the U.S. Supreme Court's articulation. However, the U.S. Supreme Court may not view Article 55 as more protective than the Eighth Amendment. In fact, the opposite may hold. While the Court has not ruled explicitly that the Eighth Amendment affords lesser protection in the military context, it has shown the military deference on every other

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269. United States v. Wise, 64 M.J. 468, 479 (C.A.A.F. 2007) (Effron, C.J., dissenting) (citing United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)).

270. Simon, *supra* note 213, at 108–09.

271. *Id.* at 109. The use of U.S. Supreme Court precedent by military courts includes *Estelle v. Gamble*, 429 U.S. 97 (1976), *Wilson v. Seiter*, 501 U.S. 294 (1991), *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Hudson v. McMillian*, 503 U.S. 1, 10–11 (1992). *Id.*

272. United States v. Vieira, 64 M.J. 524, 529 (A.F. Ct. Crim. App. 2006) (citing *Lovett*, 63 M.J. at 215); *see* United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997).

273. United States v. White, 54 M.J. 469, 474–75 (C.A.A.F. 2001) (citations omitted).

applicable constitutional amendment in the military context.[274] The Court has not taken up any Eighth Amendment or Article 55 conditions-of-confinement cases from the military courts, so the question of how the Court would rule on this question remains unanswered.[275]

Additionally, the Court has shown military deference in the context of Eighth Amendment claims related to capital punishment. In the context of rape[276] and child rape,[277] the U.S. Supreme Court has ruled application of the death penalty unconstitutional under the Eighth Amendment in the civilian context, while leaving in place UCMJ statutes that allow capital punishment for those crimes by military personnel.[278] This shows that, at least in the context of capital punishment, the Court's Eighth Amendment analysis is deferential to the military.[279]

The military courts may also add an additional element necessary for a military inmate to prove a conditions-of-confinement claim: pain or serious harm. The highest military court has stated in dicta that to bring an action solely on the basis of psychological pain under the Eighth Amendment, "any such claim would have to be a well-established and clinically diagnosed anxiety or depression."[280] In the context of a medical needs claim, the Air Force Court of Criminal Appeals in *United States v. McPherson*[281] cited use of force cases for the proposition that "there must be evidence of physical or psychological pain in order for the appellant to

274. Yung, *supra* note 237, at 145.

275. According to a review of all Eighth Amendment cases decided by the Court.

276. Yung, *supra* note 237, at 144.

277. *Id.* at 140 (citing National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3263 and Exec. Order No. 13,447 § 3(d), 3 C.F.R. § 278 (2008)).

278. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 945, 947 (2008) (denial of rehearing) ("[W]e need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision)."). The Court also noted that "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context." *Id.*

279. There are a handful of cases where military courts have analyzed Article 55 and Eighth Amendment conditions-of-confinement claims including *United States v. Bright*, 63 M.J. 683, 684–85 (A. Ct. Crim. App. 2006), *United States v. Kinsch*, 54 M.J. 641, 645 (A. Ct. Crim. App. 2000), and *United States v. Towns*, 52 M.J. 830, 832 (A.F. Ct. Crim. App. 2000). However, these cases all involve excessive use of force. Additionally, military criminal appeals courts have found the following cases concerning conditions-of-confinement claims not involving excessive force did not violate Article 55: *United States v. Ney*, 68 M.J. 613, 615 (A. Ct. Crim. App. 2010); *United States v. Nerad*, 67 M.J. 748, 749–50 (A.F. Ct. Crim. App. 2009), *set aside on other grounds*, *United States v. Nerad*, 69 M.J. 138 (A.F. Ct. Crim. App. 2010); *United States* v. Vieira, 64 M.J. 524, 528–29 (A.F. Ct. Crim. App. 2006).

280. United States v. Sanchez, 53 M.J. 393, 396 (C.A.A.F. 2000) (denying inmate's Eighth Amendment claim based on guard sexual harassment in part because the only pain she alleged was psychological pain including crying to her counselor and "great fear of the guards because of their position of control over her").

281. United States v. McPherson, 72 M.J. 862, 872 (A.F. Ct. Crim. App. 2013).

prevail on a claim of an Eighth Amendment violation."[282] McPherson was found to have a serious medical need because he was diagnosed with major depression and prescribed medication for that condition.[283] However, because McPherson did not prove he experienced "pain, serious harm, or a substantial risk of serious harm," his Eighth Amendment claim based on officials' failure to provide him with prescribed medication failed. Here, it seems that in order to state an Eighth Amendment claim in military court, Manning or another transgender inmate would need to show psychological pain caused by untreated gender dysphoria on par with that associated with serious diagnosed anxiety or depression. If Manning, or another transgender military inmate, can successfully argue that gender dysphoria is a serious medical need, she would still need to show that she suffered serious physical or psychological pain from the lack of treatment. As in the recent Eighth Amendment cases discussed in Part III, it is likely that under the current doctrine a military inmate would have to show that she has severe gender dysphoria accompanied by suicidality or persistent urges to autocastrate.

Regardless of whether Manning can show a serious medical need for SRS, the military's blanket prohibition of hormone or SRS treatment is at issue in her case. As previously explained, lower federal courts in the United States have found that a correctional institution's failure to adapt an established policy that adequately addresses an inmate's serious medical need may violate the Eighth Amendment.[284] By categorically denying Manning access to appropriate medical care, military officials may be violating her Eighth Amendment rights. If we presume that the military will offer the same arguments that civilian prisons offer when defending the decision not to provide adequate medical care for inmates, then Manning may have a successful claim.

However, military courts are not required to look to civilian federal courts for precedent, such as those that have decided in favor of inmates seeking appropriate medical treatment for gender dysphoria. Rather, the

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282. *Id.* at 874 (citations omitted) (denying inmate's Eighth Amendment claim for a fifteen day denial of medication because the inmate failed to claim or provide proof that he suffered "pain, serious harm, or a substantial risk of serious harm"). Some military courts seem to conflate the Eighth Amendment doctrines for excessive force and serious medical need. *Estelle* stated that "[d]eliberate indifference to serious medical needs of prisoners *constitutes* the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Estelle,* 429 U.S. 97, 103–04 (emphasis added) (quoting Gregg v. Georgia, 428 U.S. 153, 157 (1976)). Thus, deliberate indifference to serious medical need was itself sufficient for an inmate to prove a claim; there was no additional need to prove psychological or physical pain.

283. *Id.* at 873–74.

284. *See, e.g.*, Mahan v. Plymouth Cnty. House of Corr., 64 F.3d 14, 18 (1st Cir. 1995).

military courts have clearly stated that they only look to the U.S. Supreme Court when deciding Eighth Amendment claims. To date, the U.S. Supreme Court has not addressed the issue of appropriate medical care for inmates with gender dysphoria, so there is no direct precedent for a military court to follow.

2. Military Necessity

The purpose of the military justice system is different than the civilian criminal justice system.[285] The civilian justice system's legitimate penological goals are deterrence, punishment, rehabilitation, and retribution.[286] However, "[t]he purpose of the military justice system is to maintain good order and discipline in the armed services and to promote efficiency and effectiveness in the military establishment."[287] Military necessity allows the federal government broad latitude to act in order to secure national interests in the face of its enemies.[288] For this reason, military necessity "has been called 'the most lawless of legal doctrines.'"[289] The military's strongest argument against allowing appropriate medical care for transgender inmates is military discipline and military necessity.[290]

Because the military court system operates differently than the federal court system, the fact that the military exercises a great deal of control over those in its ranks will likely weigh against Manning in the analysis of a military court. A military court's analysis may very well turn on the fact that military regulations, promulgated under congressional authority, prohibit any treatment for persons with gender dysphoria while in the military, prohibit even retired and discharged veterans from receiving SRS through the VA,[291] and prohibit service by known transgender persons entirely.[292]

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285. Federico, *supra* note 39, at 11.

286. Harmelin v. Michigan, 501 U.S. 957, 959 (1991) (stating that "there are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation").

287. Federico, *supra* note 39, at 11 (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, ¶ 3 (2012)).

288. *Id.* at 15. This is also the principle behind military deference discussed in Part IV.B *supra*, and the rationalization for the internment of persons of Japanese descent in the United States during World War II, Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

289. Federico, *supra* note 39, at 15 (quoting ALAN M. DERSHOWITZ, SHOUTING FIRE 473 (1st ed. 2002)).

290. Those same arguments were used to defend Don't Ask Don't Tell before its repeal.

291. *See supra* note 69.

292. SERV. MEMBERS LEGAL DEF. NETWORK, *supra* note 53, at 29 (discussing how transgenderism is a medically disqualifying condition for military service purposes).

Additionally, some courts are very deferential to prison officials' claims that granting an inmate SRS or hormones would pose a security risk. Courts are even more deferential to the military. Here, the courts may defer not only to military officials' potential claims of a security risk, but also to claims of risk to military discipline, i.e., military necessity claims.[293] The fact that Don't Ask Don't Tell was repealed for gay and bisexual military personnel, but transgender personnel are still summarily discharged upon discovery, cuts in favor of the military's potential argument for denying Manning treatment: it is necessary for military discipline and military discipline is essential for rehabilitation and security inside military prisons.

United States v. Matthews is the only known example of the highest military court rejecting the military necessity argument in the context of the Eighth Amendment. The military utilized sentencing procedures deemed unconstitutional by the U.S. Supreme Court when it sentenced Matthews to death for committing rape and murder.[294] However, in *Matthews*, there were no characteristics distinguishing the crimes from those committed in the civilian context, and the CMA rejected the military necessity claim on that basis.[295] In Manning's case, there is a discernable difference between the civilian context and the military context. Military law specifically disallows transgender persons appropriate medical gender dysphoria treatment, while there is no comparable law in the civilian context.

The military has the power to act in ways that are unconstitutional in the civilian context. Until recently, the military had successfully banned openly gay people from its ranks. It can still sentence people to death for rape and child rape, still legally bars women from important positions, and still punishes adultery as a crime with substantial prison time.[296] Due to the military's refusal to provide medical treatment to any transgender military personnel, and given the extreme deference granted to the military by the courts, Manning's claim will likely fail.

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293. It has been suggested that the combination of Court deference to prison officials combined with Court deference to the military may create a virtual force-field around the courthouse, blocking military inmates with gender dysphoria from achieving relief through the courts. Conversation with Sharon Dolovich, Professor, UCLA School of Law, Tuesday, March 18, 2014.

294. United States v. Matthews, 16 M.J. 354, 359–61 (C.M.A. 1983).

295. *Id.* at 369.

296. Yung, *supra* note 237, at 146.

3. Avenues for Relief

Should Manning's, or any other transgender military inmate's, appeal succeed, there are at least three avenues through which the courts may enable her to receive treatment:[297]

i. Treatment and Transfer to NAVCONBRIG[298]

NAVCONBRIG in San Diego, California, houses female military felons.[299] Manning's primary request for relief may be gender conformity therapy and transfer to that women's carceral facility. However, it is unclear whether Manning will request this, despite the likelihood that Manning would be physically safer at NAVCONBRIG. Some transgender women prefer incarceration in men's facilities for a variety of reasons.[300]

ii. Treatment and Continued Confinement at Fort Leavenworth

As noted above, the military has the option to confine male and female inmates in the same facility, as long as the sleeping and restroom facilities are separated.[301] This is a less attractive but still desirable option for Manning. It is less attractive due to the increased risk of sexual abuse and rape for transgender women in male carceral facilities versus female

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297. An additional avenue would be the creation of a transgender-only carceral facility, such as Italy has done. *See* Colopy, *supra* note 118, at 269. Another additional avenue would perhaps be a facility or wing for trans-women and gay men, as the Los Angles County Jail has done to great effect for the safety of gay and transgender inmates. Dolovich, *Strategic Segregation*, *supra* note 54, at 4. *But see* Peek *supra* note 54, at 1241, 1244 (arguing "that transgender prisoners be housed 'according to their subjective gender identity, or wherever they feel safest'" (quoting Interview with Dean Spade, Staff Attorney, Silvia Rivera Law Project (Apr. 16, 2004))). Yet another additional avenue would be to simply house Manning according to her gender identity without providing any appropriate medical treatment, but this would not, by itself, be a satisfactory response to Manning's need for medical treatment. *See* Sydney Scott, *"One is Not Born, But Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities*, 15 U. PA. J. CONST. L. 1259, 1263–97 (2013).

298. Of course, this applies to trans women. For trans men, the relief would be the opposite, transfer from NAVCONBRIG to a men's facility.

299. *Doing Time at Leavenworth*, *supra* note 55.

300. In a recent survey of transgender women in California carceral facilities for men, roughly 65% of those surveyed expressed a preference for being housed in a men's prison, whereas only roughly 35% expressed a preference for being housed in a women's facility, despite the safety concerns of being housed with men. Valerie Jenness, *Agnes Goes to Prison: Sexual Assault and the "Olympics of Gender Authenticity" Among Transgender Inmates in California's Prisons,* slide 83 (Apr. 23, 2010), *available at* http://ucicorrections.seweb.uci.edu/files/2013/06/Gender-Matters-Symposium-Presentation-4-23-10.ppt.

301. U.S. DEP'T OF DEFENSE, INSTR. 1325.07, *supra* note 73, at ¶ 4(c).

facilities, but desirable because treatment would help to alleviate her gender dysphoria.

iii. Transfer to a Federal Prison for Treatment

The Secretary of the Army retains authority to transfer military prisoners out of the military prison system into a Federal Bureau of Prisons (BOP) facility.[302] Once in a BOP penitentiary, the civilian rules of that prison,[303] including any treatment for gender dysphoria, would apply to Manning. The BOP changed its guidelines for inmates with gender dysphoria in 2011, and they now include an individualized assessment for each inmate and appropriate treatment regardless of prior diagnosis or treatment, including real life experience, hormone therapy, and counseling.[304] If diagnosed with gender dysphoria, Manning could receive some appropriate medical care from the BOP that she is denied at Fort Leavenworth. Manning would also have the option to sue the BOP for sex reassignment surgery, which may have a greater chance of success in the civilian federal courts than in the military courts.

While Manning has no right to request transfer to a federal penitentiary, nor would her desire to transfer necessarily play a role in the military's decision-making process,[305] it is possible that she would qualify for transfer under the "special circumstance" condition.[306] For example, a prisoner needing inpatient psychiatric treatment may be transferred to a federal prison.[307] That being said, many inmates at Fort Leavenworth fear transfer to a male civilian prison because these prisons "are perceived as being less disciplined and more violent," making a transfer to a civilian facility more risky from a safety perspective.[308] However, there is an

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302. *Id.* ¶ 15(a).

303. Artis v. U.S. Dep't of Justice, 166 F. Supp. 2d 126, 130 (D.N.J. 2001) ("Military prisoners who are confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons sentenced by the courts of the United States. 10 U.S.C. § 858(a). Courts interpreting § 858(a) have consistently held that a military prisoner who is serving his sentence in a federal penitentiary automatically becomes entitled to any of the advantages and subject to any disadvantages that accrue to the civilian prisoner. *See e.g.*, Stewart v. United States Board of Parole, 285 F.2d 421, 421–22 (10th Cir. 1960) . . . .").

304. Kendrig & Samuels Jr., *supra* note 24.

305. *See* U.S. DEP'T OF DEFENSE, INSTR. 1325.07, *supra* note 73, at ¶ 15(a) (detailing transfer policies).

306. *See id.* ¶ 15(b)(5), (7) (considering the "nature and circumstances of the prisoner's sentence" and "[a]ny other special circumstance relating to the prisoner, the needs of the Service, or the interests of national security").

307. *Id.* ¶ 15(d).

308. Allen, *supra* note 74.

argument that if the military will not treat Manning's gender dysphoria appropriately, she should be transferred to a federal facility that would treat her appropriately.[309]

CONCLUSION

Manning has a long, uphill road ahead of her pursuing her claim for gender dysphoria treatment while incarcerated at Fort Leavenworth. A military criminal appeals court is less likely than a civilian federal court to find that a lack of medical treatment for Manning's gender dysphoria violates the Eighth Amendment because contradictory military regulations prohibit such treatment. Also, based on the U.S. Supreme Court's policy of deference to the military and claims of military necessity, the Court would likely defer to the military determination.

Given that the military has essentially prevailed in any litigation in which the military deference doctrine applies, "[a] servicemember's best prospect for redress of grievances remains—as it always has been—legislative or administrative action by Congress and the President, and not legal action seeking to have the courts impose their will upon the political branches."[310]

The military must evolve along with the country,[311] as shown by the recent repeal of Don't Ask Don't Tell, allowing gays and lesbians to serve openly. In the current political climate, it is difficult to see how military statutes allowing adequate treatment for military inmates with gender dysphoria could pass through the Congress, but that situation could change after the next election. Additionally, the President could issue an executive order allowing all transgender persons to serve in the military,[312] which might effectively take away the military's strongest argument against providing appropriate medical care for transgender inmates: military necessity. Also, perhaps a movement to have Manning transferred to a civilian federal prison could prove effective, despite the fact that there is no

309. One potential negative effect of a transfer to a federal facility: military prisoners are eligible for parole. Uniform Code of Military Justice, 10 U.S.C. § 952 (2012); *see also* U.S. DEP'T OF DEFENSE, INSTR. 1325.07, *supra* note 73, at ¶ 16 (detailing parole and clemency policies). Federal prisoners currently are not eligible for parole. *Parole in the Federal Probation System,* THE THIRD BRANCH (May 11, 2011), http://www.uscourts.gov/news/TheThirdBranch/11-05-01/Parole_in_the_Federal_Probation_System.aspx.

310. O'Connor, *Origins*, *supra* note 209, at 311.

311. Federico, *supra* note 39, at 28.

312. *See* PALM CENTER, *supra* note 8, at 21 (recommending that the President issue an executive order allowing transgender persons to serve openly in the U.S. military).

avenue to petition for such relief. Regardless, the argument that Manning has a serious medical need related to her gender dysphoria is compelling and is one the military, the courts, and Congress should take seriously. Serious harm may accrue to persons with inappropriately treated gender dysphoria while incarcerated, and inmates have no other means to care for themselves. Regardless of the decision of a military court, Manning, and any other inmate with gender dysphoria, should be provided appropriate medical care while incarcerated.