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PERSPECTIVE

The rights of transgender prisoners

By Sanford Jay Rosen
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In August, the 9th U.S. Circuit Court of Appeals will hear oral argument in the case of Michelle-Lael Norsworthy, a California transgender prisoner seeking sex-reassignment surgery (SRS). *Norsworthy v. Beard*, 14- 00695 (N.D. Cal.). The California Department of Corrections and Rehabilitation (CDCR) psychologist assigned to her determined that this surgery is a “clinical and medical necessity for her health and well-being,” but the state has refused to provide it. Northern District Judge Jon S. Tigar issued a preliminary injunction, directing CDCR to provide the surgery to her as promptly as possible.

The experience of transgender people has entered the public consciousness in positive ways previously unimaginable. Last year, Laverne Cox was the first transgender woman to appear on the cover of *Time* magazine. This month, Caitlyn Jenner, the 1976 Olympic gold medal decathlete (then Bruce Jenner), appeared on the cover of *Vanity Fair* and provided an extensive interview about her male-to-female transition. Mainstream entertainment, including TV shows like “Transparent” and “Orange is the New Black,” is bringing thoughtful attention to the transgender community. There is growing support for allowing the estimated 15,500 transgender individuals in our country’s military to serve openly.

It remains to be seen what role the *Norsworthy* case will play in advancing the rights of transgender and other LGBT people. But the case is an important reminder that transgender people, like everyone else, deserve the common humanity of being seen and treated as individuals with unique circumstances and needs.

Tigar limited himself to deciding whether the Eighth Amendment requires CDCR to provide Norsworthy with SRS. He carefully applied the facts in the record to the Supreme Court’s mandate that prison officials must provide necessary medical treatment to any condition which, without appropriate treatment, could result in significant injury or unnecessary pain to the prisoners in their custody.

Norsworthy was assigned the male gender at birth, and has identified as a transgender woman since the mid-1990s. She was convicted of murder in the second degree in 1987 and sentenced to 17 years to life. She has been housed in California

men’s prisons since that time.

The record is clear that in 1999, a CDCR psychologist diagnosed her with gender identity disorder (or “gender dysphoria”). Norsworthy was prescribed feminizing hormones as treatment. In 2012, Norsworthy’s CDCR treating psychologist found that despite hormone therapy and mental health treatment, Norsworthy experiences severe psychological distress that can be addressed only with the surgery. The psychologist determined that SRS was a “clinical and medical necessity” for her.

The record also established that long-term hormone therapy increases risk of heart attack, stroke, liver damage, and certain types of cancer, particularly as patients age (Norsworthy is 51 years old). Norsworthy’s risk is especially acute because she has Hepatitis C, which she contracted after being raped in male prisons by other prisoners. Her Hepatitis C places her at increased risk of severe liver damage if she remains on hormone therapy (which would not be necessary once she has the surgery).

CDCR argues in its appeal that Norsworthy is not entitled to a preliminary injunction because her need for SRS is not sufficiently “urgent.” According to CDCR, the harm she currently faces does not “differ[] in kind or degree from what she has experienced” for the last fifteen years. Judge Tigar rejected this “What’s one more day?” argument, finding that the Eighth Amendment requires relief from irreparable harm, “whether this is the first month she has suffered it or the hundredth.”

CDCR also raised security concerns related to providing the surgery to Norsworthy. However, the court-appointed receiver who supervises CDCR’s medical care system reported to the court that arrangements already have been made to provide the surgery should the injunction be affirmed, and that he had “no reason to believe” that the surgery could not be safely completed.

Judge Tigar also found unpersuasive CDCR’s concerns about housing Norsworthy in a women’s facility even after her genitalia are female. CDCR can and must address any security issues that may arise after Norsworthy’s surgery, but those issues do not justify denying her medically necessary care.

CDCR has extensive and sophisticated processes to safely house tens of thousands of prisoners at various levels of risk of victimization or predation. For several

years it has housed, in a female facility, a post-SRS male-to-female transgender prisoner who had the surgery before entering the California prison system.

CDCR’s argument also ignores the real dangers Norsworthy faces in her current all-male housing unit. She was the victim of a 2009 gang rape committed by nine prisoners, lasting six hours and resulting in her contracting Hepatitis C. She has endured five other rapes in male prisons. A recent CDCR-sponsored study found that transgender prisoners in California’s men’s prisons are 13 times more likely than other prisoners to be victims of sexual assault: 59 percent of transgender prisoners reported having been sexually assaulted.

Tigar’s consideration of Norsworthy’s individual circumstances and needs is consistent not only with Eighth Amendment jurisprudence, but also with developing professional medical standards and governmental policy.

The American Medical Association, the American Psychological Association, the National Commission on Correctional Health Care, and the World Professional Association for Transgender Health have determined that treatment decisions for transgender people should be made on an individualized basis, recognizing that, for some people, SRS is an essential and medically necessary procedure.

Federal and state agencies also increasingly recognize that SRS should be provided to individuals who need it. The U.S. Department of Health and Human Services decided last year to provide Medicare coverage for SRS on a case-by-case basis. Many states, including California and New York, provide Medicaid coverage for SRS when medically necessary.

Congress too has weighed in. National correctional standards (28 C.F.R. Pt. 115), established pursuant to the unanimously passed Prison Rape Elimination Act (2003), require prison officials to make individualized, case-by-case determinations regarding transgender prisoners to ensure both their health and safety.

In its appeal, CDCR relies on a 2014 decision issued by a sharply divided 1st U.S. Circuit Court of Appeals, sitting en banc, holding that Massachusetts prison officials were not required to provide SRS to a transgender prisoner (*Kosilek v. Spencer*, 774 F.3d 63). Leaving aside whether the 1st Circuit reached the right decision on the facts of that case, all of the judges agreed that the Eighth Amendment prohibits a blanket policy barring SRS, be-

cause prison medical care decisions must be based on a person’s individual medical needs. Judge Tigar’s analysis carefully follows this core constitutional mandate.

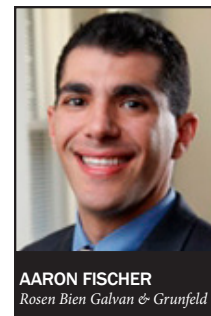
On the record before him, Tigar found that Norsworthy “is seeking access to the medical treatment prescribed by her treating provider and denied for administrative, rather than medical, reasons.” He also found that “the weight of the evidence demonstrates that for Norsworthy, the only adequate medical treatment for her gender dysphoria is SRS, that the decision not to address her persistent symptoms was medically unacceptable under the circumstances, and that CDCR denied her the necessary treatment for reasons unrelated to her medical need.”

As Justice Anthony Kennedy wrote in *Brown v. Plata*, 131 S. Ct. 1910 (2011): “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” We believe that Judge Tigar’s order got the law right and properly applied it to the facts of this case.

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