CONSTITUTIONAL LAW — EIGHTH AMENDMENT — SEVENTH CIRCUIT INVALIDATES WISCONSIN INMATE SEX CHANGE PREVENTION ACT. — *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

Although transgender prisoners with medical needs related to their gender identity have experienced increasing success litigating their claims in courts,[1] Wisconsin's passage of the Inmate Sex Change Prevention Act[2] promulgated a novel threat to this progress.[3] The statute prohibited "the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery."[4] Because prisoners in Wisconsin may receive medical care only from physicians within the prison system, the statute had the effect of denying all such treatment to transgender prisoners.[5] Recently, in *Fields v. Smith*,[6] the Seventh Circuit affirmed a district court order striking down the Wisconsin statute as unconstitutional under the Eighth Amendment.[7] In doing so, the Seventh Circuit laid the foundation for a powerful restriction on legislatures' ability to enact prohibitions of medical treatments, a restriction that may apply not only to legislation affecting prisoners but also, via an analogous Fourteenth Amendment due process right, to legislation impacting the general public.

Before enactment of the Inmate Sex Change Prevention Act, the Wisconsin Department of Corrections (DOC) had provided hormone treatments to Jessica Davison, Andrea Fields, and Vankemah Moaton, who had each received a Gender Identity Disorder (GID) diagnosis from doctors within the prison system.[8] On January 12, 2006, pursuant to the new statute, the DOC took steps to discontinue those treatments.[9] Like all DOC inmates, Davison, Fields, and Moaton

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

[2] WIS. STAT. § 302.386(5m) (2009–2010).

[3] *See* 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); Arthur S. Leonard, *Federal Appeals Court Holds that State May Not Refuse Hormone Therapy for Transsexual Prison Inmates*, LEONARD LINK (Aug. 6, 2011), http://newyorklawschool.typepad.com/leonardlink/2011/08/federal-appeals-court-holds-that-state-may-not-refuse-hormone-therapy-for-transsexual-prison-inmates.html (describing the act as "one-of-a-kind"); Cole Thaler, *Putting Transgender Health Care Myths on Trial*, LAMBDA LEGAL, http://www.lambdalegal.org/our-work/publications/page-32007335.html (last visited Oct. 29, 2011) (calling the law "a particularly egregious example of the barriers to health care many transgender people face").

[4] WIS. STAT. § 302.386(5m)(b).

[5] *See* Fields v. Smith, 653 F.3d 550, 554 (7th Cir. 2011).

[6] 653 F.3d 550.

[7] *See id.* at 559.

[8] *Id.* at 553.

[9] *See id.* at 554 & n.2.

were disallowed access to medical assistance outside prison walls even if they could afford it, resulting in withdrawal complications, which typically include "dysphoria and associated psychological symptoms" as well as "muscle wasting, high blood pressure, and neurological complications."[10] The inmates sued several DOC officials,[11] alleging violations of the prohibition of cruel and unusual punishment under the Eighth Amendment and of the right to equal protection under the Fourteenth Amendment.[12] On January 27, 2006, the plaintiffs obtained a preliminary injunction reversing the discontinuation of hormone treatments.[13]

Chief Judge Clevert of the U.S. District Court for the Eastern District of Wisconsin held the Inmate Sex Change Prevention Act to be unconstitutional.[14] Addressing the plaintiffs' as-applied Eighth Amendment claim, the court stated that each plaintiff needed to demonstrate "1) that his medical need was objectively serious; and 2) that the state official acted with deliberate indifference to the prisoner's health or safety."[15] The court held that the plaintiffs' GID satisfied the first prong of this test.[16] The court then held that "enforcement of [the statute] against these plaintiffs constitutes deliberate indifference to their serious medical needs"[17] because it "prevents DOC doctors from providing the treatment that they have determined is medically necessary to treat the plaintiffs' serious conditions."[18] Turning to the plaintiffs' facial challenge to the statute under the Eighth Amendment,[19] the court held that the statute had no constitutional application because, first, it applied exclusively to inmates with GID for whom hormone therapy or sex reassignment surgery was necessary (and thus for whom the statute would be invalid as applied); second, it had no relevance to other individuals;[20] and third, "prison officials may not substitute their judgments for a medical professional's prescription."[21] Finally, the court

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[10] *Id.* at 554.

[11] *Id.* at 553.

[12] *See* Fields v. Smith, 712 F. Supp. 2d 830, 834 (E.D. Wis. 2010).

[13] *See Fields*, 653 F.3d at 554 n.2.

[14] *See Fields*, 712 F. Supp. 2d at 834.

[15] *Id.* at 855 (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994); Chapman v. Keltner, 241 F.3d 842, 845 (7th Cir. 2001)).

[16] *See id.* at 862. Chief Judge Clevert observed that several other courts had held similarly. *See id.* (citing Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 411–13 (7th Cir. 1987); Wolfe v. Horn, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991)).

[17] *Id.*

[18] *Id.* at 863.

[19] *See id.* at 864.

[20] *See id.* at 864–65.

[21] *Id.* at 866. The court added: "Of course they cannot." *Id.* (quoting Zentmyer v. Kendall County, 220 F.3d 805, 812 (7th Cir. 2000)) (internal quotation marks omitted).

held that the statute infringed the Fourteenth Amendment right to equal protection both on its face and as applied to the plaintiffs[22] because, pursuant to the statute, the entire class of inmates with GID who needed hormone therapy, including the plaintiffs, received different treatment from other inmates with serious medical needs,[23] and such treatment bore no rational relationship to a legitimate state interest.[24]

The U.S. Court of Appeals for the Seventh Circuit affirmed.[25] Writing for the court, Judge Gottschall[26] held that the statute violated the Eighth Amendment as construed in *Estelle v. Gamble*,[27] and she affirmed the Eighth Amendment test used by the lower court: "Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they display 'deliberate indifference to serious medical needs of prisoners.'"[28] The DOC officials argued on appeal that the statute raised no constitutional problems "because the state legislature has the power to prohibit certain medical treatments when other treatment options are available"; they also reiterated their view that the law furthered a legitimate state interest in prison safety.[29] In refuting the officials' arguments, the court distinguished two of its prior decisions.[30] *Meriwether v. Faulkner*[31] and *Maggert v. Hanks*[32] each suggested in dicta that, although prisoners have a general right to medical treatment, they have no right to particular treatments, such as hormone therapy or sex reassignment surgery.[33] The court distinguished those cases on the ground that the evidence in *Fields* showed that hormone therapy was the only treatment that would sufficiently

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[22] *See id.* at 869.

[23] *See id.* at 867. The court explained:

> The evidence establishes that GID is the only medically necessary condition for which mental health treatments are barred by law or regulation within the DOC. [The statute] requires the DOC to withdraw hormone therapy only from inmates who are using it to treat their GID. Moreover, there is no evidence of any other Wisconsin laws banning medical treatment for inmates or any DOC policies that ban necessary medical treatment for inmates.

Id.

[24] *See id.* at 868. The court rejected the defendants' contention that withholding hormone therapy would enhance prison safety in part because their expert witness acknowledged that "connecting [hormone treatments and sexual assault] was 'an incredible stretch.'" *Id.*

[25] *Fields*, 653 F.3d at 559.

[26] District Judge Gottschall, sitting by designation, was joined by Judges Rovner and Wood.

[27] 429 U.S. 97 (1976); *see Fields*, 653 F.3d at 556.

[28] *Fields*, 653 F.3d at 554 (quoting Greeno v. Daley, 414 F.3d 645, 652–53 (7th Cir. 2005) (quoting *Estelle*, 429 U.S. at 104)) (internal quotation marks omitted).

[29] *Id.* at 555.

[30] *See id.* at 555–56.

[31] 821 F.2d 408 (7th Cir. 1987).

[32] 131 F.3d 670 (7th Cir. 1997).

[33] *See Fields*, 653 F.3d at 555.

address the plaintiffs' GID.[34] Because "[i]t is well established" that the Eighth Amendment, as construed by the Supreme Court in *Estelle*, "does not permit a state to deny effective treatment for the serious medical needs of prisoners,"[35] the fact that the Wisconsin statute allowed ineffective treatments did not absolve the officials.[36] Indeed, the court called enforcement of the statute "torture"[37] and likened the statute to a hypothetical one permitting only "therapy and pain killers" to treat inmates with cancer, which "this court would have no trouble concluding . . . was unconstitutional."[38]

The court then addressed the defendants' argument that *Gonzales v. Carhart*,[39] in which the Supreme Court upheld a statutory ban on a late-term abortion procedure, permits legislatures to bar certain medical procedures.[40] The court distinguished *Carhart* on the grounds that "safe abortion alternatives to the prohibited procedure appeared to exist" in that case, whereas no such alternatives existed with regard to the treatment of GID.[41] Furthermore, even though *Carhart* mentioned "medical uncertainty" regarding the relative safety of abortion methods, the uncertainty surrounding what *causes* GID was of no matter.[42]

Focusing on the facial Eighth Amendment challenge,[43] the court rejected the defendants' argument that the statute could lawfully apply to prisoners who did not require surgery or hormone therapy.[44] Although the court acknowledged that facial challenges prevail only if the statute is never valid,[45] it also noted that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[46] Because DOC physicians "prescribe hormones only when the treatment is medically neces-

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[34] *See id.* at 556. Although the court emphasized that the demonstrated unavailability of sufficient substitutes was the "[m]ore important[]" distinction between *Fields* on the one hand and *Maggert* and *Meriwether* on the other, *id.*, the court also distinguished these precedents on the ground that the factual record in *Fields* refuted the "empirical assumption[] [in *Meriwether* and *Maggert*] that the cost of these [hormone therapy and surgical] treatments is high" compared to the expense of other medical services that the DOC provides, *id.* at 555.

[35] *Id.* at 556.

[36] *See id.*

[37] *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976)).

[38] *Id.*

[39] 550 U.S. 124 (2007).

[40] *See Fields*, 653 F.3d at 556–57.

[41] *Id.* at 557 (citing *Carhart*, 550 U.S. at 164).

[42] *Id.* (quoting *Carhart*, 550 U.S. at 163) (internal quotation marks omitted).

[43] The court never explicitly stated when or if it was analyzing the as-applied challenge, but presumably its reasoning up to this point affected the as-applied as well as the facial challenge because it ultimately upheld the lower court's decisions on both challenges. *See id.* at 559.

[44] *See id.* at 557.

[45] *See id.*

[46] *Id.* (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992)) (internal quotation marks omitted).

sary," the law had no relevance to prisoners who did not need such treatment.[47] For that reason, the statute had no constitutional application.[48] The court also rejected an argument that the statute furthered the state's legitimate interest in prison security.[49] Finally, the court declined to reach the Fourteenth Amendment issue.[50]

Whereas prior cases addressed prison policies and the actions of prison personnel,[51] *Fields* represents a leap forward in the federal judiciary's post-*Estelle* "deliberate indifference" jurisprudence through its novel[52] invalidation of a state *statute*.[53] Taken to its logical conclusion, *Fields* supports the view of several scholars that the Due Process Clause of the Fourteenth Amendment limits legislatures' ability to restrict access to medical treatments even outside prisons.[54]

Before *Fields*, the applicability of *Estelle* to statutes was not obvious.[55] *Estelle* held "that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[56] Both the Supreme Court and commentators have recognized that a state's constitutional duty to provide adequate medical care to prisoners derives from the *custodial* relationship between the state and the prisoners.[57] Thus, *Estelle* appeared to address principally the executive branch (of either federal or state government) — that is, the prison officials who serve as prisoners' caretakers.[58] Indeed, *Estelle* stated that "[a]n inmate

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47 *Id.* (citing Fields v. Smith, 712 F. Supp. 2d 830, 866 (E.D. Wis. 2010)).

48 *See id.*

49 *See id.* The defendants claimed "that hormones feminize inmates and make them more susceptible to inciting prison violence." *Id.* One of the defendants' expert witnesses, however, "testified that it would be 'an incredible stretch' to conclude that banning the use of hormones could prevent sexual assaults." *Id.* (quoting *Fields*, 712 F. Supp. 2d at 868).

50 *See id.* at 559.

51 *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 829–32 (1994); Wilson v. Seiter, 501 U.S. 294, 296 (1991); Whitley v. Albers, 475 U.S. 312, 314–18 (1986); Estelle v. Gamble, 429 U.S. 97, 99–101 (1976); Cuoco v. Moritsugu, 222 F.3d 99, 103–05 (2d Cir. 2000).

52 *See* Brief & Appendix of Defendants-Appellants, Cross-Appellees at 20, *Fields*, 653 F.3d 550 (Nos. 10-2339 & 10-2466), 2010 WL 6019675, at *20.

53 *See Fields*, 653 F.3d at 552–53.

54 *See, e.g.*, Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2210–12 (2011) (arguing that this right exists); *id.* at 2212 n.9 (citing the works of other scholars who have suggested the same).

55 *See* Brief & Appendix of Defendants-Appellants, Cross-Appellees, *supra* note 52, at 19–20, 2010 WL 6019675, at *19–20.

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

57 *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citing *Estelle*, 429 U.S. at 103); Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of* Estelle v. Gamble, 21 VT. L. REV. 379, 398 (1996); Kenneth R. Wing, *The Right to Health Care in the United States*, 2 ANNALS HEALTH L. 161, 163 (1993).

58 *See Estelle*, 429 U.S. at 104–05 (suggesting that deliberate indifference may be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once pre-

must rely on *prison authorities* to treat his medical needs."[59] However, it is one thing to suggest, as *Estelle* did, that a state, through its executive branch, has a positive obligation[60] to provide lawful medical treatment to prisoners and quite another to imply, as *Fields* did, that prisoners have a negative right limiting the state's ability to determine, through its usual legislative process, which treatments are lawful in the first place.[61]

Although an Eighth Amendment case, *Fields* logically implies a due process restriction on legislatures because, within the custodial context, the Supreme Court has already found the duty articulated in *Estelle* to have a Fourteenth Amendment due process equivalent.[62] In its analysis of a Fourteenth Amendment due process claim in *Youngberg v. Romeo*,[63] the Supreme Court stated that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed . . . in unsafe conditions."[64] Similarly, in *City of Revere v. Massachusetts General Hospital*,[65] the Court held that the government's due process duty to provide pretrial detainees with medical care is "at least as great as the Eighth Amendment protections available to a convicted prisoner."[66] In *DeShaney v. Winnebago County Department of Social Services*,[67] the Supreme Court explicitly connected *Youngberg* and *City*

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scribed" (footnotes omitted)); *see also, e.g.*, Lewis v. Casey, 518 U.S. 343, 350 (1996) (suggesting that, under *Estelle*, providing "adequate medical care in prisons" is the duty of the executive branch); Williams v. Mussomelli, 722 F.2d 1130, 1132 (3d Cir. 1983) (calling *Estelle* a restriction on the executive branch); *cf.* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 148 n.133 (2004) (citing *Estelle* as an application of "the [Eighth] Amendment to the executive's implementation of punishments").

[59] *Estelle*, 429 U.S. at 103 (emphasis added).

[60] *See* Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe — and for the United States*, 32 TULSA L.J. 1, 2–3 (1996) ("A positive liberty is a right to demand a service from the government. A negative liberty is a right not to be interfered with by the government, or . . . by anyone else."); *see also* Moncrieff, *supra* note 54, at 2228 (describing Judge Posner's view of this distinction as reflecting that "negative rights are restrictions while positive rights are obligations").

[61] *See* Brief & Appendix of Defendants-Appellants, Cross-Appellees, *supra* note 52, at 15–21, 2010 WL 6019675, at *15–21 (arguing that the Constitution distinguishes legislative "regulation" of prison medical personnel from "a prison official simply disregarding a doctor's recommendation for a legal and medically necessary treatment option," *id.* at 20, 2010 WL 6019675, at *20). Indeed, *Estelle* emphasized the "contemporary standards of decency as manifested in modern *legislation*." *Estelle*, 429 U.S. at 103 (emphasis added) (citing legislation in twenty-two states).

[62] *See, e.g.*, *DeShaney*, 489 U.S. at 198–200; *cf.* Genty, *supra* note 57, at 398–401 (arguing that *Estelle* itself should have been decided as a due process case, not as an Eighth Amendment case).

[63] 457 U.S. 307, 314–19 (1982).

[64] *Id.* at 315–16.

[65] 463 U.S. 239 (1983).

[66] *Id.* at 244 (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16, 545 (1979)).

[67] 489 U.S. 189.

of Revere to *Estelle*,[68] observing that *Youngberg* had "extended [*Estelle*'s] analysis beyond the Eighth Amendment setting."[69] While courts have continued after *DeShaney* to assert that the Eighth Amendment protects convicts exclusively,[70] these courts typically have held that the Fourteenth Amendment affords nonconvicts in state custody either equivalent protection[71] or higher protection.[72]

Importantly, although *DeShaney* made clear that governments' positive duties under the Constitution do not extend beyond the custodial setting,[73] *Fields*'s restriction on legislatures[74] embodies a mere negative right. Even though it intuitively makes little sense for convicted prisoners to have rights that are unavailable to the general public,[75] individuals in government custody do have positive rights that other people do not, including state-sponsored medical care, housing, and sustenance.[76] To resolve this ostensible contradiction, one might look to Judge Posner's suggestion that, in certain situations, otherwise negative rights must take on positive forms in order to be "meaningful."[77] Under this theory, the freedom to pursue food, health care, and shelter is a negative right held by all persons, including prisoners,[78] but because custody renders individuals unable to seek these things in the absence of government assistance, a positive obligation on the gov-

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[68] *See id.* at 198–200. *DeShaney* referred to an "*Estelle-Youngberg* analysis." *Id.* at 201.

[69] *Id.* at 199.

[70] *See, e.g.*, Wernert v. Greene, 419 F. App'x 337, 338 n.3 (4th Cir. 2011) (O'Connor, J.) (citing Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008)); King v. County of Gloucester, 302 F. App'x 92, 96 (3d Cir. 2008) (citing Hubbard v. Taylor, 399 F.3d 150, 164, 166 (3d Cir. 2005)); Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996).

[71] *See, e.g.*, Sawyer v. County of Creek, 908 F.2d 663, 666 (10th Cir. 1990), *abrogated on other grounds by* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Keehner v. Dunn, 409 F. Supp. 2d 1266, 1272 (D. Kan. 2005); Richardson v. Nassau County, 277 F. Supp. 2d 196, 201 (E.D.N.Y. 2003).

[72] *See, e.g.*, Telfair v. Gilberg, 868 F. Supp. 1396, 1409 (S.D. Ga. 1994), *aff'd*, 87 F.3d 1330 (11th Cir. 1996).

[73] *DeShaney*, 489 U.S. at 201.

[74] *See Fields*, 653 F.3d at 557.

[75] *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) ("[I]t would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted."), *overruled on other grounds by* Graham v. Connor, 490 U.S. 386 (1989); Eugene Volokh, Essay, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1820 (2007) ("[T]he constitutional rights of prisoners are far more limited than are those of nonprisoners.").

[76] *See DeShaney*, 489 U.S. at 200; *see also, e.g.*, Ramos v. Lamm, 639 F.2d 559, 568 (10th Cir. 1980); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 61–62 (1992); Wing, *supra* note 57, at 162–63.

[77] Posner, *supra* note 60, at 4.

[78] *Cf., e.g.*, B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 503 (2009) ("[T]he Supreme Court's abortion jurisprudence suggests the existence of a negative right to health . . . ."); Moncrieff, *supra* note 54, at 2210–12 (arguing for the existence of a "constitutional freedom of health," *id.* at 2212, that is explicitly "negative," *id.* at 2211).

ernment is necessary to ensure that these individuals' rights are not worthless.[79] As a corollary, a positive right in the prison setting implies an equivalent negative right among the general citizenry.[80] In sum, the existence of some positive rights inside but not outside the custodial context poses no problem for the survival of *Fields*'s implied negative due process right both inside and outside custody.

Fields's holding that "the legislature . . . cannot outlaw the only effective treatment for a serious condition"[81] thus applies not just to individuals in custody but to everyone. Some advocates for transgender rights may have reservations about *Fields*'s logic because it characterizes transgender issues as essentially medical ones.[82] However, *Fields*'s ultimate due process implications actually emphasize the humanity of transgender individuals and reinforce that their gender identity does not nullify their basic rights.[83] While statutes like the Inmate Sex Change Prevention Act should prove to be rare,[84] when they appear, *Fields* may help ensure that they are properly struck down as affronts to human dignity.[85]

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[79] *See, e.g.*, *DeShaney*, 489 U.S. at 200 ("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." (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)) (internal quotation marks omitted)); *Estelle*, 429 U.S. at 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)) (internal quotation marks omitted)); *see also* Posner, *supra* note 60, at 4; *cf.* Moncrieff, *supra* note 54, at 2229–30 (stating that negative rights "are all meaningless without a concomitant obligation for the government to enforce them," *id.* at 2230).

[80] In fact, Professor Frank Cross argues that such rights among prisoners should not even receive the "positive" label because "[t]he government could fulfill the rights by releasing" the prisoners. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 870 (2001).

[81] *Fields*, 653 F.3d at 557.

[82] *See, e.g.*, Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS 274, 275–76 (Paisley Currah et al. eds., 2006); Jonathan L. Koenig, Note, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 644–45 (2011); Samantha J. Levy, Comment, *Trans-forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 165–67 (2002); Maruri, *supra* note 1, at 821–22, 828–29. *But see* Alvin Lee, Student Article, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 450 (2008) (arguing that "such a medicalized conception is both justified and compelled by unique aspects of the prison context").

[83] *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that one's sexual orientation does not abridge the due process right to "intimate conduct with another person").

[84] *See* Leonard, *supra* note 3 (*Fields* "may be cited as a potential trump card should legislators in other states propose similar restrictions."); *cf. Fields*, 653 F.3d at 554 ("The doctors testified that they could think of no other state law or policy . . . that prohibits prison doctors from providing inmates with medically necessary treatment.").

[85] *Cf. Lawrence*, 539 U.S. at 567, 573–76.