Dysphoria of Adequate Care: Health Care of Incarcerated Transgender Individuals in American Prisons and Courts

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I. INTRODUCTION

Our society's default assumption is that a person's gender is determined by their genitalia at birth. Although transgender people have

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historically existed across cultures throughout the world, deviation from normative gender roles has resulted in experiences of stigma and the devaluation of a transgender person's social status. Society's treatment of transgender individuals has been ingrained in the American justice system's operation, but the traditional binary assumption and definition of gender is no longer sufficient in contemporary legal cases. Many transgender plaintiffs lack basic legal protections because of the ambiguity surrounding their transgender status. Gender non-conformity often leads to confusion, discomfort, and dismissal in the American legal system. No matter how well a transgender plaintiff argues their case, they are likely to face harsher criticism by the court because of their identity's status.

The incarceration of transgender individuals provides courts and policy makers with another difficult challenge. Concepts of gender identity and gender classification have a direct impact on an incarcerated transgender individual's access to protections and care while in prison. Prison resources are often limited and transgender individuals require access to mental health and physical treatments to meet their general and gender-affirming medical needs. Legislatures, prison officials, and courts have had to balance resources with the medical needs of transgender inmates. The American correctional system has inadequately addressed the issue of transgender, nonbinary, and gender non-conforming individuals, and is beginning to recognize the gender binary is inadequate to form medical conceptions of inmate health. Incarcerated transgender individuals suffering with gender dysphoria have increasingly turned to the courts to seek medical relief under the Eighth Amendment's cruel and unusual punishment framework. However, courts have not come to a consensus on whether the denial of gender confirmation surgery for transgender inmates constitutes deliberate indifference of medical needs.[1]

The goal of this Comment is to explore the health care of transgender individuals and transgender inmates incarcerated in the United States prison system, as well as the foundation for relief under the Eighth Amendment in cases involving access to adequate care. Part II of this Comment provides medical background information on gender dysphoria and gender dysphoria treatment options. Part III examines the

1. *See* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019), cert. denied, 140 S. Ct. 653 (2019); Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019); Kosilek v. Spencer, 774 F.3d 63, 72, 89 (1st Cir. 2014).

challenges and discrimination transgender inmates encounter because of their gender identity and gender dysphoria. Part IV provides an overview of the traditional Eighth Amendment cruel and unusual framework requirements. Part V analyzes the Eight Amendment framework against other legal approaches to transgender inmate medical care cases.

II. DEFINING GENDER DYSPHORIA AND TRANSGENDER HEALTH CARE

A large portion of the incarcerated transgender individuals who file Eighth Amendment claims seek injunctive relief for gender dysphoria treatment.[2] This Part provides a medical background of gender dysphoria and treatments transgender individuals seek to treat their gender dysphoria. Determinations of Eighth Amendment and deliberate indifference claims often rely on factual findings of medical issues and definitions of gender dysphoria in the medical field and public policy.[3] It is critical to understand the medical diagnosis of transgender people, their medical care needs, and place in public policy in order to understand the decision-making process of the courts.

A. Gender Dysphoria in Medicine and Public Policy

While transgender people are underrepresented in media and are often overlooked in public policy, transgender individuals constitute a significant portion of the American population. Around 1.4 million adults in the United States identify as transgender. This number may be higher in reality, as population estimates tend to underreport minority groups.[4]

Medical professionals draw heavily on psychiatry to develop definitions for transgender individuals. According to the American Psychological Association (APA), transgender and gender non-conforming people are those who possess a gender identity that does not

2. *See*, e.g., Lopez v. Swaney, 741 Fed.Appx. 486, 487-88 (9th Cir. 2018); *Kosilek*, 774 F.3d at 69; Farmer v. Brennan, 511 U.S. 825, 839-40 (1994); Chance v. Armstrong, 143 F.3d 698, 702-04 (2nd Cir. 1998).

3. *Farmer*, 511 U.S. at 839-40.

4. *See* Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States*?, WILLIAMS INST., 2 (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf; *see also Abuse and Neglect of Transgender People in Prisons and Jails: A Lawyer's Perspective*, LAMBDA LEGAL, (Nov. 25, 2015), https://www.lambdalegal.org/blog/20201125_transgender-people-prisons-jails.

fully align with their assigned sex at birth.[5] The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) identifies gender dysphoria in adolescents and adults as "a marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration,"[6] which is manifested by at least two of the following criteria:

> 1. A marked incongruence between one's experienced/ expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
> 2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
> 3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
> 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
> 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
> 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).[7]

These feelings are also accompanied by "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[8]

Beyond the areas of medicine and psychiatry, legal definitions of "transgender" in state and federal legislation directly impact how transgender people are cared for. For example, on April 6, 2021, Arkansas became the first state to outlaw gender-affirming treatment for

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5. *Am. Psych. Ass'n, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 832 (2015), https://www.apa.org/ practice/ guidelines/transgender.pdf; *see generally Fact Sheet: Transgender & Gender Nonconforming Youth in School*, SYLVIA RIVERA L. PROJECT, https://srlp.org/ resources/fact-sheet-transgender-gender-nonconforming-youth-school.

6. AM. PSYCH. ASS'N, DIAGNOSTICS AND STATISTICAL MANUAL FOR MENTAL DISORDERS 452 (Am. Psych. Publ'g 5th ed. 2013).

7. *Id.*

8. *Id.*

transgender people under the age of eighteen.[9] The state representative who introduced the bill falsely positioned transgender and nonbinary identities as a "choice," and her supporters argued the measure would protect children from medical treatment they might regret in the future.[10]

The case in Arkansas illustrates some of the issues transgender individuals have historically encountered. Society often accuses transgender people of faking or "choosing" their identity for attention, and frequently assumes that most will regret their transitions. Beyond the societal stigma that comes with gender non-conforming identities and behaviors, the transgender community faces a heightened level of scrutiny and intolerance when cisgender[11] leaders define transgender desires, needs, and identities with disregard to actual transgender voices. This implicitly influences people with power over transgender people, such as doctors and politicians, to ignore the vocalized needs of the transgender community. The common misconceptions perpetuated by public policy and coverage regarding transgender individuals is integral to the treatment of transgender inmates by correctional staff and prison doctors.

B. Medical Consensus on Transgender Health Care

For transgender individuals, health care goes beyond basic medical treatments and extends to tailored treatments and mental health care that can help express their gender identity.[12] Gender affirming treatments can help improve a transgender person's psychological wellbeing and living experience. Medical studies have increasingly demonstrated that transgender individuals experience higher levels of self-harm and suicidal ideations.[13] Appropriate treatment for gender dysphoria can help

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9. Devan Cole, *Arkansas Becomes First State to Outlaw Gender-Affirming Treatment for Trans Youth*, CNN (Apr. 6, 2021), cnn.com/2021/04/06/politics/arkansas-transgender-health-care-veto-override/index.html.

10. *Id.*

11. Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People*, 101 CALIF. L. REV. 813, 816 n.12 (2013).

12. ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 22-34 (7th ed. 2012), https://perma.cc/W3C6-XU9V.

13. *See* Tracy A. Becerra-Culqui et al., *Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers*, 141(5):e20173845 PEDIATRICS 1, 7-9 (2018); *see also* Larry Nuttbrock, Sel Hwahng, Walter Bockting, Andrew Rosenblum, Mona Mason, Monica Macri & Jeffrey Becker, *Psychiatric Impact of Gender-Related Abuse Across the Life Course of Male-to-Female Transgender Persons*, 47 J. SEX RSCH. 12, 12-23 (2010).

save transgender lives.[14] Gender confirmation surgery has been found to reduce levels of suicidal ideations from twenty to thirty percent to less than two percent after treatment.[15]

The World Professional Association for Transgender Health (WPATH), an international professional association committed to advancing transgender health, articulates several options for treating individuals with gender dysphoria: (1) changes in gender expression and role consistent with gender identity; (2) hormone therapy; (3) surgery to change primary and/or secondary sex characteristics; and (4) psychotherapy.[16] WPATH encourages an individualized approach to medical care to determine which treatment option is the best for each patient.[17] A customized approach can include one to all four treatment options.[18]

A large number of transgender individuals seek physical therapies (hormone therapy and surgery) for treatment of gender dysphoria. Cross-sex hormone therapy involves injecting a transgender patient with hormones that do not correlate with their biological sex and are not naturally produced by their body.[19] Transgender men use exogenous testosterone to suppress feminizing characteristics and induce masculine features, while transgender women use exogenous estrogen and anti-androgens to help feminize their characteristics and suppress masculinizing features.[20]

Although hormone therapy is not necessary for all transgender individuals in their transitioning process, it is a well-established medical practice to prescribe hormone therapy to consenting transgender patients.[21] Immediately blocking or stopping hormone treatment can

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14. *See* Position Statement, *World Pro. Ass'n for Transgender Health, Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, (Dec. 21, 2016) (online at https://www.wpath.org/newsroom/medical-necessity-statement).

15. D. Morgan Bassichis, *"It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons*, SYLVIA RIVERA L. PROJECT (2007) at 28, https://srlp.org/files/warinhere.pdf.

16. Eli Coleman et al., *supra* note 12, at 9-10.

17. *Id.* at 58.

18. *Id.* at 9-10.

19. Cécile A. Unger, *Hormone Therapy for Transgender Patients*, 5(6) TRANSNAT'L ANDROLOGY & UROLOGY 877, 877 (2016).

20. *Id.*

21. *Id.*

cause potentially life-threatening damage to a transgender patient.[22] Some of the risks involved with abruptly stopping hormone therapy include hypertension, diabetes, muscle wasting, osteoporosis, and heart failure.[23] This issue can be incredibly dangerous for transgender inmates, who often do not have access to their hormones once incarcerated.[24]

Many transgender patients also seek gender affirmation surgery (formerly called sex reassignment surgery) to physically change their sexual characteristics. While some transgender patients choose not to undergo gender affirmation surgery, the procedure can help transgender patients transition both physically and socially, and alleviate stress caused by gender dysphoria.[25] Gender affirmation surgical procedures include breast/chest (top) surgery, genital (bottom) surgery, and facial reconstructions.[26]

Before an individual receives genital reconstruction surgery, which is usually the last step in gender dysphoria treatment, WPATH recommends that an individual meet the following criteria:

> 1. Persistent, well-documented gender dysphoria;
> 2. Capacity to make a fully informed decision and to consent for treatment;
> 3. Age of majority in a given country;
> 4. If significant medical or mental health concerns are present, they must be well controlled;
> 5. Twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual);
> 6. Twelve continuous months of living in a gender role that is congruent with their gender identity.[27]

Importantly, WPATH emphasizes that the standards of care apply to all individuals regardless of imprisonment, articulating people should not

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22. Kathryn Doyle, *Stopping Hormone Therapy May Have Its Own Risks*, REUTERS, (May 1, 2013), https://www.reuters.com/article/us-hormone-therapy/stopping-hormone-therapy-may-have-its-own-risks-idUSBRE9400H320130501.

23. *See id.*; Melissa Moore, *For Many Women, Stopping Hormone Replacement Therapy (HRT) May Involve Significant Medical Risk, Recent Research Has Found*, MD NEWS, (May 1, 2016), https://mdnews.com/peril-quitting-assessing-risk-ending-hormone-replacement-therapy.

24. *E.g.*, Fields v. Smith, 712 F.Supp.2d 830 (E.D. Wis. 2010); Brooks v. Berg, 270 F.Supp.2d 302, 310 (N.D. N.Y. 2003); Phillips v. Mich. Dep't of Corr., 731 F.Supp. 792, 794 (W.D. Mich. 1990).

25. Coleman et al., *supra* note 12, at 54-58.

26. *Id.* at 57.

27. *Id.* at 60.

be discriminated against in their access to adequate health care based on where they live or their situation in life.[28] WPATH also argues that for the purposes of mental and physical health, people must be able to freely express their gender identity.[29] This advocacy is important for the medical needs and claims of incarcerated transgender individuals.

III. ACKNOWLEDGING TRANSGENDER INMATES

Currently, the number of transgender inmates is uncertain.[30] There are no statistics available that identify the number of transgender inmates in the federal prison system, and studies of the general population have been unable to account for the transgender population.[31] However, researchers estimate that nearly one in six transgender Americans will go to prison in their lifetimes.[32] This number is stagnantly higher for Black transgender Americans, who have a fifty percent chance of going to prison at least once in their lives.[33] Structural societal stigma around transgender individuals creates barriers to employment and secure housing.[34] This can force transgender people to participate in illegal economies, including sex work and substance abuse, which then places them at risk for arrest and incarceration. Once incarcerated, transgender individuals are placed in either male or female facilities according to their genitalia.[35] This Part seeks to illustrate the difficult situations transgender individuals experience while incarcerated. From systemic victimization of gender non-conforming individuals in hierarchical

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28. World Pro. Ass'n Transgender Health, *WPATH Identity Recognition Statement* (Nov. 15, 2017), https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf.

29. *Id.*

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

31. *Id.*

32. *See* NAT'L GAY AND LESBIAN TASK FORCE AND NAT'L CTR. FOR TRANSGENDER EQUALITY, National Transgender Discrimination Survey (2011).

33. *Id.*

34. *See* Justin Stabley, *"For Transgender People, Finding Housing has Become Even Harder During the Pandemic"* NPR (Mar. 12, 2021), https://www.pbs.org/newshour/economy/for-transgender-people-finding-housing-has-become-even-harder-during-the-pandemic; Julie Moreau, *"'Laughed Out Of Interviews': Trans Workers Discuss Job Discrimination*," NBC NEWS (Oct. 6, 2019), https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041.

35. Jae Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 INT'L J. PRISON HEALTH 1, 32 (2017).

prison structures,[36] lack of correctional staff education and training surrounding transgender needs,[37] and depleted medical resources in prisons,[38] incarcerated transgender individuals consistently are denied adequate care.[39]

A. Victimization of Transgender Inmates

Transgender individuals experience higher rates of victimization and violence, substance abuse, mental health issues, and suicide attempts than cisgender individuals.[40] Incarceration exacerbates these issues for transgender inmates in the U.S. prison system. The hardships transgender inmates experience while in prison are nearly impossible to justify. Transgender inmates experience victimization through inmate-on-inmate violence, correctional staff ignorance, and inadequate medical services.[41]

Just as with a large portion of the American population, there is little training given to prison guards and staff surrounding the issues transgender people face.[42] Without this education, prisons are ill-prepared to accommodate the needs of transgender inmates. Lack of education and the gender classification process both contribute to the potential victimization of transgender inmates by other inmates and correctional staff.[43] The rates of inmate-on-inmate violence varies by facility[44] but can be a common experience for many. Violence and victimization can be attributed to numerous factors, such as the environment's culture, inmate population characteristics, and the prison's administration.[45]

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36. Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates,* U.S. DEP'T JUST. 2 tbl.1 (2014).

37. Ashley Hurst, Brenda Castaneda & Erica Ramsdale, *Deliberate Indifference: Inadequate Health Care in U.S. Prisons*, 170 ANNALS INTERNAL MED. 563, 563 (2019).

38. *Id.*

39. *Id.*

40. Mei-Fen Yang et al., *Stigmatization and Mental Health in a Diverse Sample of Transgender Women*, 2 LGBT HEALTH 4, 306 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4716648/.

41. Douglas Routh et al., *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 6, 645, 649, 651-52 (2017).

42. *Id.*

43. *Id.* at 650.

44. *Id.*

45. *Id.*

The standard prison environment is also a large contributing factor. Most prisons operate within a hierarchical hypermasculine culture.[46] In a men's prison, a transgender inmate who expresses feminine characteristics or identifies as female is at a higher risk of being victimized than an inmate who acts according the hypermasculine culture.[47] Because the prison system does not take into account gender identity during housing placement, inmates who present feminine gender expressions and identities are often beaten, raped, and forced to be subservient to other inmates in men's prisons.[48]

Prison guards and staff also contribute to the victimization of transgender inmates. Transgender inmates are often placed in administrative segregation or protective custody.[49] While the purpose of protective custody is to protect transgender inmates from victimization, correctional staff tend to perpetuate transgender inmate abuse.[50] Being locked away in solitary confinement worsens the mental health issues an inmate may be experiencing. In *Farmer v. Moritsugu*, Farmer, a transgender inmate, claimed the use of protective custody violated the Eighth Amendment's cruel and unusual clause.[51] Farmer experienced psychological trauma while in isolation, requested she be removed from isolation, and was repeatedly ignored by correctional staff.[52] The prison environment was protected over Farmer's injury, however. The court ruled that the prison's penological interest and duty to maintain order and safety outweighed Farmer's experience of trauma while in isolation.[53] This logic continues to be practiced by the American legal system and the current structure of prisons and protective custody is upheld at the expense of inmate care.

In addition to the trauma of isolation, correctional staff are required to perform mandatory strip searches and pat downs on inmates before they enter or leave protective custody.[54] While this task is invasive and dehumanizing for all inmates, transgender inmates are more likely to experience traumatizing humiliation as most correctional staff are aware

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 651.
51. Farmer v. Moritsugu, 163 F.3d 610, 612 (D.C. Cir. 1998).
52. *Id.* at 614.
53. *Id.*
54. Routh et al., *supra* note 41 at 651.

of a transgender inmate's identity or gender expression. These searches can become acts of sexual harassment when correctional staff focus on certain bodily areas for extended periods of time or press the transgender individual against a wall with their bodies.[55]

The physical harassment and abuse committed against transgender inmates is intensified by derogatory comments made by both fellow inmates and correctional staff regarding their identity. Transgender inmates and individuals are constantly accused of choosing their gender identity disorder, and most inmates and correctional staff refuse to refer to transgender inmates by their preferred pronouns.

Finally, incarcerated transgender individuals are unintentionally victimized by prison health care services. Health professionals in prison treatment settings are confronted with few and decreasing resources and are often challenged by the conflicting approaches to care versus punitive custody in correctional systems, and many find themselves underqualified to treat gender dysphoria.[56]

B. Gender Dysphoria and Incarceration

Incarceration is an adverse and antitherapeutic condition, and prisoners develop health conditions that reflect that. Under the Eighth Amendment, incarcerated individuals have a constitutional right to health care.[57] However, medical services do not come free of charge, despite around eighty percent of prison populations falling below the poverty line.[58] Most states require inmates to make copayments for medical care, making any health care prohibitive.[59] With the populations of prisons rising in the United States and the limited availability of medical access, many prisoners cannot receive the medical treatments they need.[60] This situation is only exacerbated within the transgender inmate population.

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55. *Id.*

56. Michelle Andrews, *Even in Prison, Health Care Often Comes with a Copay*, NPR (Sept. 30, 2015), https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-health-care-often-comes-with-a-copay.

57. *See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (noting that deliberate indifference to serious medical needs of incarcerated individuals violates the Eighth Amendment).

58. Michelle Andrews, *Even in Prison, Health Care Often Comes with a Copay*, NPR (Sept. 30, 2015), https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-health-care-often-comes-with-a-copay.

59. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays.

60. Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUBLIC HEALTH 666 (2009), https://www.ncbi.nlm.nih.gov/pmc/

Transgender inmates consistently do not receive adequate or gender-affirming care while incarcerated. Many prisons lack official policy for the care of incarcerated transgender individuals, and when policy exists, it usually works to refuse hormone therapy and gender confirmation surgery for treatment of gender dysphoria.[61]

Even access to mental health professionals capable of issuing an accurate gender dysphoria diagnosis is difficult to obtain while incarcerated. For example, the New York State Department of Corrections and Community Supervision has contracted with only one doctor over a five-year period capable of diagnosing inmates with gender dysphoria.[62] The average wait time to see this doctor is six months, which further delays inmate treatment.[63]

Nineteen states do not have policies that address treatment for incarcerated transgender individuals.[64] Some states implement "freeze frame" policies that freeze treatment options for transgender inmates at the level of treatment they received just prior to their incarceration.[65] While the Federal Bureau of Prisons rejected these policies at a national level in 2011,[66] state prisons are not compelled to follow these guidelines.

Beyond gender-affirming care, it is more difficult for transgender individuals to receive medical attention for high rates of HIV/AIDS,

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articles/PMC2661478/; David H. Cloud et al., *Addressing Mass Incarceration: A Clarion Call for Public Health*, 104 AM. J. PUBLIC HEALTH 389 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953768/; Dora M. Dumont et al., *Public Health And The Epidemic Of Incarceration*, 33 ANN. REV. PUB. HEALTH 325 (2012), https://pubmed.ncbi.nlm.nih.gov/22224880/.

61. Nat'l Ctr. for Transgender Equal., *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* 15 (2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehind Bars.pdf.

62. Mik Kinkead & Juana Paola Peralta, *Testimony from the Sylvia Rivera Law Project: Public Hearing on Healthcare in New York Correctional Facilities*, SYLVIA RIVERA L. PROJECT 3 (Oct. 30, 2017), https://srlp.org/wp-content/uploads/2018/12/Testimony-from-SRLP-10.30.17.pdf.

63. *Id.*

64. Morgan S. Mason, Note, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 VAND. L. REV. En Banc 157, 172 (2018).

65. Pierre Bienaime, *How Trans Inmates Are Getting Each Other Access to Treatment Inside*, VICE (July 1, 2019), https://www.vice.com/enus/article/8xz3m3/trans-prisoners-treatment-hormone-therapy.

66. Memorandum from the U.S. Dep't of Just. B.O.P. Assistant Dir. of Health Services Div. and Assistant Dir. of Correctional Programs Div. to the Chief Exec. Officers (May 31, 2011), https://www.glad.org/wp-content/uploads/2011/09/2011-gid-memo-final-bop-policy.pdf.

sexually transmitted infections, depression, mental illness, and other serious health concerns inmates may experience in prison.[67] Medical treatment that does not alleviate potentially life-threatening medical conditions should not be considered adequate.

Medical treatment for incarcerated transgender individuals is unlikely to gain public support, given the financial cost of treatment, the discrimination and stigma transgender individuals face, and the argument that adequate health care does not exist for many incarcerated populations.[68] Even outside of prison, transgender individuals struggle to obtain sufficient health care. Currently, thirty states allow health insurance plans to exclude care for transgender individuals from coverage.[69] As a result, transgender patients are less likely to be insured than the general U.S. population and often are unable to find appropriate medical care.[70]

Because many facilities lack official policies for the care of incarcerated transgender individuals, "what constitutes adequate medical attention is not well established and can mean a variety of outcome for incarcerated individuals."[71] As a result, transgender inmates are not receiving proper care, and court records are filled with stories of transgender inmates attempting self-castration or suicide due to mental anguish.[72]

IV. THE EIGHTH AMENDMENT AS A LEGAL APPROACH TO ADEQUATE HEALTH CARE FOR INCARCERATED TRANSGENDER INDIVIDUALS

This Part provides a review of the traditional legal means for securing transgender inmates' rights: (1) arguing that transgender persons constitute a suspect class, (2) arguing the limitations on transgender persons constitute a violation of their fundamental right to sexuality, and (3) arguing a violation of the Eighth Amendment. Transgender inmates

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67. Bassichis, *supra* note 15, at 13-14.

68. Chastity Blankenship & Lisa M. Carter, *The Incarceration of Gender: Assessing, Managing, and Treating the Needs of Transgender Inmates*, *in* THE POLITICS OF GENDER 93, 102 (Adrienne M. Trier-Bieniek ed., 2018).

69. Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2019), https://www.npr.org/sections/health-shots/2019/03/12/ 701510 605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage.

70. Megan Lane et al., *Trends in Gender-Affirming Surgery in Insured Patients in the United States,* 6 PLASTIC RECONSTRUCTION SURGERY GLOB. OPEN 1, 1 (Apr. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5977951/.

71. Blankenship & Carter, *supra* note 68, at 101.

72. *See* Diamond v. Owens, 131 F. Supp. 3d 1346, 1353 (M.D. Ga. 2015).

most commonly seek relief from the courts under the Eighth Amendment framework, claiming that medical treatment that does not alleviate self-harm and suicidal ideations associated with gender dysphoria should not be considered adequate health care.[73] While this approach has proven the most effective approach, incarcerated transgender individuals are often still unsuccessful at securing relief under this doctrine.

A. Transgender Identity as a Suspect Classification

Several attempts have been made to define transgender identity within the parameters of a suspect classification in order to gain protections under the Fourteenth Amendment's Equal Protection Clause. Some states have enacted civil rights laws that consider transgender individuals a protected class on the basis of disability protections.[74] However, most transgender people and advocates are not in support of using disability laws to gain protection, as transgender identity is not an illness or handicap as many anti-transgender rights individuals believe it is. Advocates instead argue for protecting transgender persons through the use of statutory protections afforded to individuals on the bases of "sex" and "gender."[75] As these advocates point out, transgender individuals are discriminated against on the basis of gender, in that they are discriminated against because they fail to conform to stereotypes and expectations about gender.[76]

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73. *See Gibson*, 920 F.3d at 216 (5th Cir. 2019); *Edmo*, 935 F.3d at 757 (9th Cir. 2019); *Kosilek*, 774 F.3d at 72, 89.

74. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, *in* TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang, Shannon Price Minter, eds., 2006).

75. *See*, e.g., Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 955 (W.D. Wis. 2018) (granting injunctive relief to two Medicaid enrollees who were denied surgical procedures for gender dysphoria by the State of Wisconsin). Claims of this nature are likely to grow given the Supreme Court's recent Title VII ruling, which recognizes that Title VII's protections against discrimination on the basis of sex in the workplace include protections for homosexual or transgender individuals. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020). As Justice Samuel Alito noted in dissent: "Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery. Similar claims have been brought under the Affordable Care Act (ACA) . . . " *Id.* at 1781 (Alito, J., dissenting); *see also* Walker v. Azar, 480 F.Supp.3d 417, 430 (E.D.N.Y. Aug. 17, 2020) (upholding a stay and preliminary injunction to prevent the Department of Health and Human Services from enacting rules that would exclude gender identity from the ACA's prohibitions on discrimination in light of *Bostock*).

76. *See* Brief of the Southern Poverty Law Center, Children's Defense Fund, Dēmos, Economic Policy Institute, National Association of Social Workers, National Center for Law and

Transgender individuals would also most likely not constitute a suspect classification with strict or intermediate scrutiny. In *Romer v. Evans*, the United States Supreme Court analyzed whether homosexual people were entitled to a higher level of scrutiny under the Equal Protection analysis.[77] In that case, the Court suggested that an elevated form of judicial review exists for homosexual individuals, but this elevated review does not rise to the level of intermediate or strict scrutiny.[78] Considering the outcome in *Romer*, transgender individuals would most likely fall within the same level of strict scrutiny as homosexual individuals.

While treating transgender identity as a suspect classification would likely advance the treatment of incarcerated transgender individuals, it is unlikely that this change would have a direct impact on the medical care of transgender inmates. Incarcerated individuals currently have the right to access adequate health care. Defining transgender individuals as a suspect classification without strict or intermediate scrutiny would not make hormone therapy or gender confirmation surgery any more adequate or medically necessary.

B. Gender Identity as a Fundamental Right

In contrast to the Equal Protection approach, the application of the Due Process Clause of the Fourteenth Amendment as a means of securing adequate care for transgender inmates would most likely not benefit transgender inmates. While courts would likely recognize a fundamental right to autonomy and self-identity, prison allows for the deprivation of fundamental rights.[79] The general test used to determine whether infringement of a fundamental right in the prison context is two-pronged: (1) whether the right is fundamentally inconsistent with incarceration, and (2) whether the prison regulation abridging that right is

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Economic Justice, Poverty & Race Research Action Council, and 9to5, National Association of Working Women as Amici Curiae in Support of the Employees, *Bostock v. Clayton County*, No. 17-1618, *5-14 (SPLC filed July 3, 2019); Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae in Support of the Employees, Bostock v. Clayton County, No. 17-1618, *11-17(filed July 3, 2019).

77. Romer v. Evans, 517 U.S. 620, 620 (1996).

78. *Id.*

79. The U.S. Supreme Court has held and maintained that incarcerated individuals retain their First Amendment rights in prison as long as the government cannot justify its regulation as promoting a legitimate interest in prisoner rehabilitation or prison security. Turner v. Safley, 482 U.S. 78, 89-90, 95 (1987).

reasonably related to legitimate, penological interests.[80] Although no case has addressed the issue of whether gender identity can be infringed using this two-part test, an incarcerated transgender individual could succeed in demonstrating that gender identity is not fundamentally inconsistent with incarceration or a prison environment and there is no legitimate or penological interest to suppress one's gender identity.

However, opponents of this framework claim that gender identity falls into the realm of the First Amendment, not the Fourteenth Amendment.[81] Gender affirming health care is more about an individual's expression of gender identity than it is about relational rights. Although the Court has admitted that there is no absolute bar on the exercise of free speech in prisons, most First Amendment claims that have proceeded to the U.S. Supreme Court have been unsuccessful. A First Amendment claim arguing freedom of speech and expression in relation to an incarcerated transgender individual's gender identity in the form of medical treatment would therefore have little to no legal weight.

C. Eighth Amendment Cruel and Unusual Framework Claims

While the Eighth Amendment's cruel and unusual punishment framework is the most common argument made by plaintiffs in adequate care cases, transgender inmates face difficulty in obtaining relief under this framework because of circuit court division on the interpretation of the framework's second requirement. This section lays out the legal standard that allows incarcerated transgender individuals to seek redress for their medical needs under the Eighth Amendment and the two ways circuit courts address the issue.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[82] Courts have held that the Amendment requires the government to "protect an inmate's right to humane treatment by preventing the needless suffering as a result of serious illness or injury," including through adequate health care.[83] An

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80. *Id.*

81. *See* Shaw v. Murphy, 532 U.S. 223, 229 (2001) (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)); *see* Log Cabin Republicans v. United States, 658 F.3d 1162, 1165 (9th Cir. 2011) (discussing sexual orientation as a First Amendment and Due Process Clause issue).

82. U.S. Const. amend. VIII.

83. Lindsey Gilbert, Comment, *Crossing the Line: Examining Sex Reassignment Surgery for Transsexual Prisoners in the Wake of* Kosilek v. Spencer, 23 S. Cal. Rev. L. & Soc. Just. 29, 47-48 (2013).

inmate's right to health care is limited, however, and the degree of care required is a matter of judicial discretion.[84]

In the 1976 case *Estelle v. Gamble*, the United States Supreme Court established a framework to guide courts in determining whether an Eighth Amendment violation has occurred.[85] The Court ruled that deliberate indifference to the serious medical problems of incarcerated individuals constitutes cruel and unusual punishment.[86] Deliberate indifference amounts to "unnecessary and wanton infliction of pain" the Eighth Amendment prohibits.[87]

To prevail on a deliberate-indifference claim, incarcerated transgender plaintiffs must show (1) that their medical need is serious and (2) that the prison officials possess the subjective intent to refuse or deny care.[88] Section III.c.i. examines court interpretations of gender dysphoria as a serious medical need. Section III.c.ii. addresses the difficult obstacle transgender plaintiffs face when trying to prove an official subjectively acted with deliberate indifference toward a patient's medical need, and the circuit courts' interpretive split.

1. Serious Medical Need

In order to present a case under the Eighth Amendment's cruel and unusual framework, a transgender plaintiff must first show that their gender dysphoria constitutes a serious medical need.[89] The Court recognized in *Estelle* that medical needs requiring medical attention under the Eighth Amendment range from "lingering death"[90] to "less serious cases" resulting from "denial of medical care," and which could cause "pain and suffering" that serves no penological purpose.[91]

Since *Estelle*, several circuit courts have relied on the standard that a serious medical need is "one that has been diagnosed by a physician as

84. *Id.* at 48.
85. *Estelle*, 429 U.S. 97 (1976).
86. *Id.* at 104.
87. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
88. *See e.g.*, *Kosilek*, 774 F.3d at 82-83; Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1186 (11th Cir. 1994); *see also Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346-47 (3d Cir. 1987).
89. *See Kosilek*, 774 F.3d at 82-83; *Hill*, 40 F.3d at 1186; *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d at 346-47 (outlining the burden of proof for transgender plaintiffs to succeed on deliberate-indifference claims).
90. *Estelle*, 429 U.S. at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).
91. *Id.* at 103 (citing *Gregg*, 428 U.S. at 170-74).

mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[92]

This standard is made more difficult to meet because of federal legislation that limits a prisoner's ability to find relief in the legal system.[93] In 1996, Congress enacted the Prison Litigation Reform Act (PLRA).[94] The PLRA was designed to decrease prisoner litigation in federal courts by establishing specific conditions that inmates needed to meet to bring a claim against correctional facilities.[95] The PLRA requires incarcerated individuals to demonstrate physical injury before pursuing civil action, including in cases of mental and emotional injuries.[96] Courts now differ on how to approach the serious-medical-need standard and whether gender dysphoria treatments are "medically necessary" or merely "cosmetic."[97]

Although the U.S. Supreme Court has not weighed on whether gender dysphoria is a serious medical need, arguments based on medical issues such as psychological distress, suicidal ideation, the dangers of stopping hormone treatment, and threats of self-harm has led to some victories in Eighth Amendment claims made by transgender inmates.[98]

For example, in *De'Lonta v. Angelone*, a transgender inmate claimed prison officials and doctors had denied her adequate medical treatment for her gender dysphoria in violation of the Eighth Amendment right.[99] After the prison discontinued her hormone therapy, the transgender plaintiff began compulsively self-harming herself to the

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92. Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990) (citing *Monmouth Cnty. Corr. Institutional Inmates)*; 834 F.2d at 347; Hendrix v. Faulkner, 525 F. Supp. 435, 454 (N.D. Ind. 1981)); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977).

93. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 162 (2015).

94. *Id.* at 153.

95. Routh et al., *supra* note 4139, at 653.

96. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (42 U.S.C. § 1997e(e) (2018)) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury . . .").

97. Laura D. Smolowe, Comment, *Rejecting the Cosmetic Label to Revive the Eighth Amendment*, 23 YALE L. POL'Y REV. 357, 358 (2005); Know Your Rights: The Prison Litigation Reform Act (PLRA), ACLU, https://www.aclu.org/sites/default/files/images/ asset_uploadfile79 _25805.pdf.

98. "Medically necessary" under the Eighth Amendment generally means a medical need so obvious that an ordinary person would recognize that it warrants treatment by a doctor. *See* Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990); Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977).

99. De'lonta v. Angelone, 330 F.3d 630, 634 (4th Cir. 2003).

knowledge of the correctional staff.[100] When prison officials and doctors failed to help her, she brought a claim against the prison staff.[101] The First Circuit ruled in her favor, holding that a transgender inmate's need for protection against continued self-harm constituted an objectively serious medical need under the Eighth Amendment.[102]

In 2005, the Wisconsin legislature passed a law that barred prison doctors from prescribing their transgender patients any type of hormone therapy or gender affirmation surgery while in state custody.[103] In *Fields v. Smith*, transgender inmates serving time in Wisconsin prisons brought action against the state after they were denied access to the hormone therapy they had been receiving for years.[104] The Seventh Circuit Court of Appeals ruled in favor of the plaintiffs.[105] Noting that medical experts agree that blocking patients from continuing hormone treatment is dangerous and could lead to life-threatening conditions, the court recognized gender dysphoria as a serious medical condition and held that it is a violation of the Constitution's guarantee against cruel and unusual punishment and right to equal protection to bar transgender inmates from access to individualized medical care for treatment of gender dysphoria.[106]

While circuit courts have come to the general consensus that gender dysphoria constitutes a serious medical need and the treatment of the effects of gender dysphoria is medically necessary,[107] the subjective inquiry into deliberate indifference has proven far more challenging for transgender plaintiffs to establish.

2. Subjective Deliberate Indifference

In addition to showing serious medical need, transgender plaintiffs must also demonstrate that prison officials meet the subjective-intent requirement of deliberate indifference in order to obtain relief under the

100. *Id.*
101. *Id.* at 630, 634.
102. *Id.* at 634.
103. Fields v. Smith, 653 F.3d 550, 553 (7th Cir. 2011).
104. *Id.*
105. *Id.* at 559.
106. *Id.*
107. O'Donnabhain v. C.I.R., 134 T.C. 34, 62 (U.S. Tax Ct. 2010); Kothmann v. Rosario, 558 F. 907, 912 (11th Cir. 2014); *Kosilek*, 774 F.3d at 86; *Gibson*, 920 F.3d at 219.

Eighth Amendment.[108] Unsurprisingly, circuit courts have differed in their interpretations of the subjective deliberate indifference portion of *Estelle*'s Eighth Amendment claim requirements.[109]

In *Farmer v. Brennan*, the Supreme Court adopted the "subjective recklessness" standard for testing deliberate indifference.[110] Dee Farmer, the plaintiff in the case, was a transgender woman who was placed in men's prison and was raped and abused as a result.[111] Farmer claimed that the prison officials were aware of her gender identity and failed to protect her safety by housing her in a penitentiary with a history of violent assaults.[112] She argued that this lack of protection amounted to deliberate indifference to her health and safety.[113]

The Court ruled that the prison officials had a responsibility to prevent incarcerated individuals from inflicting harm on one another and established a standard for the subjective element of deliberate indifference that requires knowledge.[114] Under the test, a prison official cannot be found liable "unless the official *knows of and disregards* an excessive risk to inmate health or safety; the official *must both be aware of facts from which the inference could be drawn* that a substantial risk of

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108. *See*, e.g., *Kosilek IV*, 774 F.3d 63, 82-83 (1st Cir. 2014); Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1186 (11th Cir. 1994); Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 346-47 (3d Cir. 1987).

109. For example, the Seventh Circuit has focused on victim credibility when determining the subjective portion of deliberate indifference cases. *See* Riccardo v. Rausch, 375 F.3d 521, 526-28 (7th Cir. 2004) (Despite the jury verdict that found deliberate indifference on the part of Rausch, the Seventh Circuit found that no reasonable juror could have concluded that the guard, Rausch, recognized the substantial risk by placing a new cellmate with Riccardo, stating that "a prisoner's bare assertion is not enough to make the guard subjectively aware of a risk, if the objective indicators do not substantiate the inmate's assertion"). The Tenth Circuit requires plaintiffs to show the defense's subjective knowledge amounted to more than an inference or severe negligence. *See* Verdecia v. Adams, 327 F.3d 1171, 1175-77 (10th Cir. 2003) (The court held that the plaintiff was unable to show the defendants were subjectively aware of alleged risk to him in a cell with Latin Kings gang members who were known to be violent and assaulted the plaintiff because of his Cuban nationality). The Fourth Circuit has been more lenient with their interpretation and allows plaintiffs to establish the subjective component by demonstrating a defendant's deliberate indifference. *See* Griffin v. Mortier, 837 Fed. Appx. 166, 170-71 (4th Cir. 2020) (the court found that the plaintiff proved the subjective components of the claims by plausibly alleging the nurse defendant was deliberately indifferent to his serious medical conditions).

110. Farmer v. Brennan, 11 U.S. at 829, 839-44.

111. *Id.* at 825.

112. *Id.*

113. *Id.*

114. *Id.* at 839-40.

serious harm exists, and *he must also draw the inference*."[115] The Court clarified that "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; *it is enough that the official acted or failed to act despite his knowledge* of a substantial risk of serious harm."[116] The Court further held that an Eighth Amendment claim is still viable if the harm suffered by the incarcerated individual is to occur at some point in the future.[117]

The Supreme Court has not yet ruled on whether a prison official's denial of gender confirming surgery can constitute deliberate indifference to a transgender inmate's medical needs. As a result, circuit courts have had to set the standard for what level of care is required to reject a transgender inmate's Eighth Amendment claim for access to gender confirmation surgery.

V. CURRENT CIRCUIT APPROACHES TO EIGHTH AMENDMENT CLAIMS FOR TRANSGENDER INMATE MEDICAL CARE

The first federal circuit court case to have decided the issue of access to gender confirmation surgery using the Eighth Amendment framework was *Kosilek v. Spencer* in 2014.[118] The First Circuit held that the prison did not violate the Eighth Amendment's deliberate-indifference standard by failing to provide Michelle Kosilek access to gender confirmation surgery.[119] In the case, plaintiff Michelle Kosilek was convicted of first-degree murder for the strangulation of her wife in 1992.[120] Kosilek was sentenced to life imprisonment without parole and was incarcerated in a male prison.[121] While incarcerated, Kosilek did not attempt self-harm in relation to her gender dysphoria, but had attempted self-castration in the past and had attempted suicide twice before her conviction.[122] Kosilek filed suit, arguing that the "supportive therapy" she received for her gender dysphoria was inadequate, alleging that this

115. *Id.* at 837 (emphasis added).
116. *Id.* at 842 (emphasis added).
117. *Id.* at 853.
118. *Kosilek*, 774 F.3d at 96.
119. *Id.*
120. *Id.* at 68-69
121. *Id.*
122. *Id.* at 69.

provision, as opposed to direct, fuller treatment through gender confirmation surgery, amounted to an Eighth Amendment violation.[123]

The First Circuit recognized Kosilek's objectively serious medical need, but ultimately disputed that the care provided to her was inadequate and that the Department of Corrections (DOC) subjectively knew or should have known that Kosilek's provided treatment was inadequate.[124] In their decision, the First Circuit heavily relied on testimony given by medical doctors that gender dysphoria treatment is still evolving and gender confirmation surgery is not yet appropriate for incarcerated transgender individuals.[125]

The First Circuit also found that Kosilek's access to hormone therapy, facial hair removal, clothing, and regular mental health treatment constituted as adequate care, and a "significant time" had passed since Kosilek's attempts at suicide or self-castration.[126] Furthermore, the court found that the DOC employed a competent plan to minimize Kosilek's risk of future harm.[127]

Relying on the medical testimonies regarding the ambiguities of gender dysphoria treatments, Koselik's current access to treatment, and the DOC's preventative plans for Koselik ultimately led the court to conclude that Koselik could not fulfill the subjective-intent requirement of deliberate indifference.[128]

Four years later, the Fifth Circuit ruled on a similar Eighth Amendment claim by a transgender individual in *Gibson v. Collier*.[129] While the Fifth Circuit also denied Eighth Amendment relief to the plaintiff under the deliberate indifference prong, the court's application split from the First Circuit's in *Koselik*.[130] *Gibson* centered on plaintiff Lynn Gibson, an incarcerated transgender woman diagnosed with gender dysphoria and experienced severe physical and psychological suffering.[131] Gibson requested gender confirmation surgery for treatment of her gender dysphoria but was refused by the Texas Department of Criminal Justice (TDCJ), as it was not part of TDCJ's treatment policy.[132]

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123. *Id.*
124. *Id.* at 91.
125. *Id.* at 78.
126. *Id.* at 90.
127. *Id.*
128. *Id.* at 91-92.
129. *Gibson*, 920 F.3d at 220-21.
130. *Id.* at 217.
131. *Id.* at 216-18.

Similar to *Kosilek*, the defendants recognized Gibson's gender dysphoria as a serious medical need, but claimed they were not subjectively or deliberately indifferent to Gibson by refusing to evaluate her for surgery.[133]

The Fifth Circuit ruled in favor of the defendants, holding that a "state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate."[134] However, unlike the First Circuit in *Koselik*, the Fifth Circuit did not evaluate the plaintiff's individual medical circumstances, such as self-castration and attempted suicide, or investigate advanced medical opinions regarding gender dysphoria treatments.[135] The Fifth Circuit reasoned that because gender confirmation surgery is still debated in the medical community, evidence of Gibson's individual need was not relevant, and the court could not find that TDCJ was deliberately indifferent to such need despite its policy against gender confirmation surgery.[136]

Just a few months after *Gibson* was decided, the Ninth Circuit disagreed with the First and Fifth Circuits' outcomes.[137] *Edmo v. Corizon* marks the first case where a federal appellate court has ordered a state's DOC to provide gender confirmation surgery to a transgender inmate based on a deliberate indifference claim.[138] The case involved plaintiff Andree Edmo, a transgender woman with gender dysphoria incarcerated in a men's prison in Idaho.[139] Like Kosilek and Gibson, Edmo had twice attempted self-castration, which led the state to agree that she had objectively experienced severe distress from her gender dysphoria.[140] However, Edmo was only provided hormone therapy, although she had requested gender confirmation surgery as medically necessary.[141] The Ninth Circuit relied on expert testimony about the plaintiff's medical needs and the WPATH Standards of Care to find that prison officials were deliberately indifferent when they denied gender confirmation surgery to Andree Edmo.[142]

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132. *Id.* at 219.
133. *Id.* at 215.
134. *Id.* at 217-218.
135. *Id.* at 224.
136. *Edmo*, 935 F.3d at 797 (9th Cir. 2019).
137. *Id.*
138. *Id.* at 772.
139. *Id.* at 773-74, 785.
140. *Id.* 773-74.
141. *Id.*

The court began its analysis of subjective deliberate indifference by examining the prison officials' knowledge of and attention to Edmo's medical needs in light of their understanding of the plaintiff's severe distress from gender dysphoria.[143] The court stated that "it is enough" that the state's doctor "knew of and disregarded an excessive risk" to Edmo's health by rejecting her gender confirmation surgery and refusing to reevaluate her care plan.[144] Because one of the state's doctors knew about Edmo's attempts to castrate herself and did not reevaluate her treatment plan, the court reasoned that the state was put on notice of Edmo's suffering and risk of future harm.[145]

The Ninth Circuit's analysis of subjective deliberate indifference was similar to that of the First Circuit.[146] Both courts compared the specific symptoms of gender dysphoria each plaintiff experienced, but differed in their opinions over the appropriateness of gender confirmation surgery.[147] The Ninth Circuit found that denying gender confirmation surgery constituted deliberate indifference due to Edmo's significant distress, whereas the First Circuit found that the DOC's plan specifically created and tailored for Kosilek was sufficient and did not constitute deliberate indifference.[148]

Following the Ninth and First Circuits' holdings, the determination of subjective deliberate indifference requires taking a fact-specific approach in each case. Despite matching the First Circuit's holding, the Fifth Circuit's determination of deliberate indifference represents a substantive split from the legal standard of *Kosilek* by mounting a categorical ban on gender confirming surgery. The court refused to consider Lynn's specific factual circumstances and relied on outdated medical testimony of doctors in *Kosilek* to construct its own record.[149]

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142. *Id.* at 793.

143. *Id.*

144. *Id.*

145. As with the *Kosilek IV* court, the *Edmo* court began its analysis of subjective deliberate indifference by examining the prison officials' knowledge of and attention to the plaintiff's medical needs in light of the existing medical consensus. *Id.* at 794; *see also Kosilek IV* 774 F.3d 63, at 82 (analyzing subjective deliberate indifference by examining the prision official's knowledge of and attention to the plaintiff's medical needs in light of the existing medical consensus).

146. *Edmo*, 935 F.3d at 803; *Kosilek IV*, 774 F.3d at 96.

147. *Id.*

148. *Gibson*, 920 F.3d at 222-24 (recounting testimony from *Kosilek* and concluding that "[a]ny evidence of [Lynn]'s personal medical need would not alter the fact that sex reassignment surgery is fiercely debated within the medical community").

Supposedly following *Kosilek*, the Fifth Circuit stated, "We see no reason to depart from the First Circuit. To the contrary, we agree with the First Circuit that the WPATH Standards of Care do not reflect medical consensus, and that in fact there is no medical consensus at this time."[150] The court's reasoning here contradicts the fact-specific approach to deliberate indifference established in *Kosilek*, where the First Circuit evaluated Kosilek's serious, individual medical circumstances when determining the DOC had the subjective intent to be deliberately indifferent for refusing gender confirmation surgery.[151] In contrast, the court in *Gibson* rejected Lynn's request for medical evaluation, despite the fact that the symptoms of Lynn's gender dysphoria matched those of *Kosilek*.[152] Unlike *Kosilek*, Lynn was not afforded the opportunity to prove the medical necessity of her deliberate indifference claim.

In addition to ignoring Lynn's individual medical circumstances, the Fifth Circuit differed from the Ninth and First Circuits by taking an originalist approach to the Eighth Amendment. By deciding that Lynn could not state a claim for cruel and unusual punishment "under the plain text and original meaning of the Eighth Amendment, regardless of any fact [she] might have presented."[153] From the court's understanding, prison polices that ban gender confirmation surgery cannot be "unusual" if most prisons follow that policy.[154] Under the Fifth Circuit's approach, the Eighth Amendment does not require individualized assessments of requested remedies for medical needs.[155] In effect, a categorical ban on medical treatment is appropriate as long as that ban aligns with other prison policies that question the value of a certain treatment.

The Fifth Circuit's decision in *Gibson* drastically redefines the cruel and unusual provision of the Eighth Amendment and raises the burden of proof for transgender inmates. Under the Fifth Circuit approach, incarcerated transgender claimants must demonstrate universal acceptance of gender confirmation surgery to satisfy the subjective prong of deliberate indifference. This standard undermines the medical considerations of transgender individuals and allows discriminatory

149. *Id.* at 223.
150. *Id.* at 238-39; *Kosilek IV*, 774 F.3d 63, 90 (1st Cir. 2014).
151. *Kosilek IV*, 774 F.3d at 69; Petition for Writ of Certiorari at 4, *Gibson v. Collier,* 140 S. Ct. 653 (2019).
152. *Gibson*, 920 F.3d at 228.
153. *Id.* at 226.
154. *Id.* at 222-23.

prison policies to exist without being struck down by the Eighth Amendment.

With its disregard of specific case facts and originalist interpretation of the Eighth Amendment, the Fifth Circuit in *Gibson* set itself in opposition to the courts in *Kosilek* and *Edmo*. By doing so, the Fifth Circuit created a split among the courts as to the appropriate legal standard required in Eighth Amendment claims.

VI. CONCLUSION

The concepts of gender and gender identity have a profound effect on the legal statuses and protections transgender individuals will have in the American judicial system. Medical and legal definitions of gender have a direct role in the classification process for incarcerated transgender individuals, who are often placed in facilities whose populations do not match their gender identity. Once incarcerated, transgender individuals are provided with additional challenges regarding their identity, including access to medical care.

The United States lacks policies that address access to transgender health care and incarcerated transgender inmates are especially ignored by Congress and the courts. While the Eighth Amendment is the most successful legal framework for transgender inmates to receive medical relief, transgender plaintiffs still have difficulty meeting the legal requirements of the Amendment's cruel and unusual provision. In order to succeed on a cruel and unusual claim, an incarcerated transgender individual must demonstrate that they have a serious medical need and prison officials have shown subjective deliberate indifference in the failure or refusal to treat the medical need.[156]

Courts have consistently held that access to hormone treatment falls within the Eighth Amendment's cruel and unusual framework.[157] However, courts have not resolved whether gender confirmation surgery qualifies as a necessary therapy for the treatment of gender dysphoria under the Eighth Amendment.[158] When future courts inevitably address inmate claims for access to gender confirmation surgery, courts should

155. *Estelle*, 429 U.S. 97, 104 (1976).

156. *See, e.g.,* Fields v. Smith, 653 F.3d, 550 (7th Cir. 2011); Kothmann v. Rosario*,* 558 Fed. Appx. 907 (11th Cir. 2014); Lynch v. Lewis, 2015 WL 1296235 (M.D. Ga. 2015); Hicklin v. Precynthe, 2018 WL 806764 (E.D. Mo. 2018).

157. *See, e.g.*, Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019); Campbell v. Kallas, 936 F.3d 536 (7th Cir. 2019); Edmo v. Corizon, Inc., 949 F.3d 489 (9th Cir. 2020).

follow the *Kosilek-Edmo* framework by determining the needs of an incarcerated transgender individual on a case-by-case basis.

When compared to the decisions in *Kosilek* and *Edmo*, the Fifth Circuit's ruling in *Gibson* represents a split in the deliberate indifference doctrine pertaining to transgender inmates' requests for gender confirming surgery. The Fifth Circuit's approach in *Gibson* redefines the cruel and unusual punishment provision of the Eighth Amendment and raises the burden of proof for subjective deliberate indifference. The Fifth Circuit's legal reasoning enables prisons to institute categorical bans on gender confirmation surgery without considering an incarcerated individual's factual circumstances and the evolving medical knowledge of gender dysphoria. This approach allows prisons to evade medical knowledge and recommendations of gender dysphoria and the medical needs of transgender inmates.

Future courts should ultimately recognize the health care needs of all incarcerated people, including those who identify as transgender or nonbinary and require different health care treatments. Courts and prison health officials should utilize the WPATH Standards of Care for medical assessments and individualize care based on an inmate's particular needs. The adoption of this method will ensure all incarcerated individuals, regardless of gender or gender identity, are well cared for.