CASE NOTES

Both Cruel and Unusual: The Fifth Circuit's Denigration of Transgender Inmate Rights in *Gibson v. Collier*

I. OVERVIEW

After many pleas to an indifferent correctional staff, an attempted self-castration, and three suicide attempts while in the custody of the Texas Department of Criminal Justice (TDCJ), Vanessa Lynn Gibson asked the courts to intervene in what she considered to be cruel and unusual punishment.[1] Although Ms. Gibson had presented as female from the age of fifteen, she was not formally diagnosed with gender dysphoria until after her attempted castration at the TDCJ.[2] Soon after, she received counseling and hormone therapy but was refused an evaluation for sex reassignment surgery under TDCJ policy, not medical grounds.[3] Even though Policy G-51.11 states that transgender inmates must be "evaluated by appropriate medical and mental health professionals and [have their] treatment determined on a case-by-case basis [according] to current and accepted standards of care,"[4] Ms. Gibson's repeated requests for an evaluation by a specialist to assess whether sex reassignment surgery was medically necessary were denied.[5] The TDCJ reasoned that the aforementioned policy does not "designate [sex reassignment surgery] . . . as part of the treatment protocol for Gender Identity Disorder."[6] Moreover, the denials of her evaluation requests occurred after a physician at the TDCJ signed a clinic note requesting an evaluation for sex reassignment surgery.[7]

1. Gibson v. Collier, 920 F.3d 212, 217-18 (5th Cir. 2019).
2. *Id.* at 217.
3. *Id.* at 217-18.
4. *Id.* at 218 (internal quotations omitted).
5. *Id.*
6. *Id.* (internal quotations omitted).
7. *Id.* at 218 & n.3.

Initially proceeding pro se, Ms. Gibson sued the TDCJ's director and challenged the policy's prohibition on sex reassignment surgery as unconstitutional under the Eighth Amendment.[8] She requested injunctive relief, which required the TDCJ to conduct an individualized evaluation for sex reassignment surgery.[9] She asserted that TDCJ's policy was deliberately indifferent to her acute medical needs because she was denied a necessary medical evaluation.[10] To support her claim of medical necessity, she cited the World Professional Association for Transgender Health (WPATH), which states that sex reassignment surgery is essential and medically necessary to alleviate gender dysphoria for many transgender people.[11] While the director's motion for summary judgment on qualified and sovereign immunity grounds was rejected by the district court, the court granted summary judgment for the director on Ms. Gibson's Eighth Amendment claim.[12] After Ms. Gibson initially appealed pro se, she was appointed qualified and experienced counsel by the appellate court.[13] The United States Court of Appeal for the Fifth Circuit *held* that declining an individualized evaluation for sex reassignment surgery on policy grounds is not enough to establish deliberate indifference in violation of the Eighth Amendment because there is no medical consensus as to the necessity of sex reassignment surgery in treating gender dysphoria. *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019).

II. BACKGROUND

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment[]" on prisoners.[14] But what constitutes cruel and unusual punishment? Must it be both cruel *and* unusual to violate the Eighth Amendment? These questions have divided the federal district and appellate courts since the creation of the "evolving standards of decency" test more than sixty years ago.[15]

It has long been established that the government is required to provide medical care for prisoners.[16] The Eighth Amendment also

8. *Id.* at 218.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. U.S. CONST. amend. VIII.
15. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
16. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).

prohibits "deliberate indifference to serious medical needs of prisoners" because it is inconsistent with evolving standards of decency.[17] The Court has found deliberate indifference may be manifested by prison doctors in refusing treatment, prison guards when denying or delaying access to medical care, and staff interference with treatment once it is approved by a physician.[18] The "deliberate indifference" standard has also been found to protect inmates from future harm at the hands of prison officials.[19] In order for an inmate to show deliberate indifference, they must satisfy a two-prong test.[20]

First, an inmate must illustrate that they possess a serious medical need.[21] The United States Supreme Court only once expounded on the definition of a serious medical need and indicated that it constitutes a substantial risk of harm if not addressed.[22] However, federal appellate courts have differed when determining whether inmates have serious medical needs in some circumstances. For example, the First Circuit ruled in 2016 that a serious medical need is one that has been "diagnosed by a physician as mandating treatment."[23] Yet, the Second Circuit concluded that a serious medical need turns on the "particular risk of harm faced by a prisoner due to the challenged deprivation of care."[24] While the Fifth Circuit adopted the definition asserted by the Eleventh Circuit: a serious medical need is one for which "treatment has been recommended or for which the need is so apparent that even a laymen" would recognize it.[25]

Second, the inmate must show that they were met with deliberate indifference by prison officials in responding to the serious medical need.[26] The Supreme Court established that Eighth Amendment liability in this regard must be more than negligence, ordinary lack of due care, or an inadvertent failure to provide care.[27] The standard created in *Farmer v. Brennan* states that deliberate indifference occurs when a prison official has knowledge of "a substantial risk of serious harm" and "disregards"

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17. *Id.*
18. *Id.* at 104-05.
19. Helling v. McKinney, 509 U.S. 25, 33-34 (1993).
20. *Estelle*, 429 U.S. at 104-05.
21. *Id.* at 104.
22. Farmer v. Brennan, 511 U.S. 825, 834 (1994).
23. Miranda-Rivera v. Toledo-Davila, 813 F.3d 64, 74 (1st Cir. 2016).
24. Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003).
25. Gobert v. Caldwell, 463 F.3d 339, n. 12 (5th Cir. 2006) (citing Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994)).
26. *Estelle*, 429 U.S. at 104-05.
27. *Farmer*, 511 U.S. at 835; *Estelle*, 429 U.S. at 105.

that risk.[28] Again, federal appellate courts have differed when determining whether prison officials' acts or omissions constitute deliberate indifference. The Second Circuit does not require "wanton infliction of pain" to establish deliberate indifference, but the Fifth Circuit and Ninth Circuit adopted such a standard.[29] Courts also rely on the medical consensus surrounding a particular treatment[30] before finding deliberate indifference to such treatment. Some courts refuse to find deliberate indifference where there is no medical consensus on the treatment's efficacy.[31] Because of the deference given to these courts, a determination regarding deliberate indifference is highly fact-specific. Once deliberate indifference is established, a transgender inmate can obtain injunctive relief, an order to compel, or both in some cases.[32]

Ten of the federal appellate courts have held that gender dysphoria constitutes a serious medical need, with no other circuit courts ruling differently.[33] This illustrates that there is a strong medical consensus to support the fact that a person diagnosed with gender dysphoria has a serious medical need. Because most, if not all, transgender inmates will be able to satisfy the first prong of the deliberate indifference test as long as they have been diagnosed with gender dysphoria, the second prong is decisive when determining whether an inmate's gender dysphoria was met with deliberate indifference by the refusal to evaluate for sex reassignment surgery. It is important to note that the denial of other forms of gender-affirming care to inmates have been ruled unconstitutional under the Eighth Amendment. For example, the Seventh Circuit found that prison officials were deliberately indifferent to an inmate's serious medical need when the inmate was denied hormone therapy for gender dysphoria on policy grounds.[34] The court found that

28. *Farmer*, 511 U.S. at 837, 835-36. The Court made a narrow holding that malicious intent must be shown when addressing accusations of excessive force by prison officials and is not an appropriate showing for other deliberate indifference cases. *Id.* 835-36.

29. *Compare* Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996), *with* Gibson v. Collier, 920 F.3d 212, 219 (5th Cir. 2019), *and* Edmo v. Idaho Dept. of Corrections, 358 F.Supp.3d 1103, 1109 (D. Idaho Dec. 2018).

30. *See* Kosilek v. Spencer, 774 F.3d 63, 91-92 (1st Cir. 2014).

31. *See id.* at 89.

32. *Id.* at 86-89; De'lonta v. Clarke, No. 7:11–cv–00257, 2013 WL 4584684, at *1, *1 (W.D.V.A. Aug. 28, 2013).

33. O'Donnabhain v. C.I.R., 134 T.C. 34, 62 (U.S. Tax Ct. 2010); Kothmann v. Rosario, 558 F. App'x 907, 912 (11th Cir. 2014); *Kosilek*, 774 F.3d at 86; *Gibson*, 920 F.3d at 219.

34. Fields v. Smith, 653 F.3d 550, 557 (7th Cir. 2011).

the inmate's gender dysphoria could not be effectively treated with alternative care such as psychotherapy and antipsychotic medications.[35]

Six years ago in *Kosilek v. Spencer*, the First Circuit concluded that even if sex reassignment surgery was the only viable treatment for an inmate's gender dysphoria, prison officials must have known this fact and failed to adequately respond.[36] The court held that prison officials could not have been purposefully indifferent to the inmate's need because there was no medical consensus concerning the medical necessity of sex reassignment surgery for Kosilek, specifically.[37] In support of its holding, the court highlighted the flexible treatment options available to address gender dysphoria in *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version* 7 *(2011)* published by the World Professional Association for Transgender Health (WPATH).[38] The court also relied on the conflicting reports of gender identity specialists who disagreed about the best treatment path for Kosilek.[39] Notably, one expert relied on by the First Circuit has been subsequently called into question as an outlier regarding his views on the efficacy of sex reassignment surgery in treating gender dysphoria.[40]

However, the conclusion of the First Circuit is not a foregone one for all transgender inmates. In fact, more than forty years ago, the Minnesota Supreme Court found that "the only medical procedure known to be successful in treating [gender dysphoria] is the [. . .] sex conversion surgical procedure."[41] Although the Fifth Circuit declined to follow this ruling because it considered sex reassignment surgery an experimental surgery, in 2014 the United States Department of Health and Human Services found that sex reassignment surgery is not an experimental procedure.[42] In the year before *Gibson* was decided, the U.S. District Court for the District of Idaho held that prison officials acted with deliberate indifference when they failed to provide an evaluation for sex reassignment surgery to an inmate despite the on-

35. *See id.* at 556.
36. *Kosilek*, 774 F.3d at 91.
37. *Id.* at 96, 92 n.14.
38. *Id.* at 70 n.3.
39. *Id.* at 73.
40. Edmo v. Idaho Dept. of Corrections, 358 F. Supp. 3d 1103, 1126 (D. Idaho Dec. 2018).
41. Doe v. State, Dept. of Public Welfare, 257 N.W.2d 816, 819 (Minn. 1977).
42. Transsexual Surgery, H.H.S. Decision No. 2576, HHS (2014), http://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf.

going risk of future harm.[43] Additionally, great strides have been taken in regard to the medical necessity and consensus surrounding sex reassignment surgery as a treatment for gender dysphoria since *Kosilek*. The *AMA Journal of Ethics* recently published an article describing the consensus of the medical community regarding sex reassignment surgery.[44] Ten prominent medical associations, including the AMA, WPATH, American Psychiatric Association, American College of Obstetrics and Gynecologists, and the Endocrine Society, all endorse the medical consensus surrounding the necessity of gender-affirming surgery for transgender patients.[45] Similarly, the U.S. insurance industry and several large private employers have recognized the medical necessity of sex reassignment surgery, as have most developed countries.[46] Conversely, only three experts who testified in *Kosilek* questioned the medical necessity of sex reassignment surgery.[47] Moreover, one of those experts—Cynthia Osborne—previously assisted the DOC in Virginia and Wisconsin to defend lawsuits filed by transgender inmates.[48]

III. COURT'S DECISION

In the noted case, the Fifth Circuit Court of Appeals concluded that the TDCJ did not show deliberate indifference to Ms. Gibson's serious medical need because there was no medical consensus on the efficacy of sex reassignment surgery in treating gender dysphoria.[49] The court also concluded that the TDCJ's policy proscribing individualized evaluation for sex reassignment surgery was not violative of the Eighth Amendment because it was not both "cruel *and unusual*."[50]

First, the court addressed whether gender identity disorder was a serious medical need. The TDCJ did not contest that Ms. Gibson had a serious medical need and the Fifth Circuit did not dispute that fact based

43. *Edmo*, 358 F. Supp. 3d at 1126.

44. William Kuzon, Jr., et al., *Exclusion of Medically Necessary Gender-Affirming Surgery for America's Armed Services Veterans*, 20 AMA J. ETHICS 403, 404 (2018).

45. *Id.*

46. *Id.* at 404-05.

47. *Compare id.* (numerous medical associations affirm the medical consensus of sex reassignment surgery), *with* Kosilek v. Spencer, 774 F.3d 63, 69-74, 77 (1st Cir. 2014). A handful of physicians and mental health professionals—Dr. Chester Schmidt, Cynthia Osborne, and Dr. Stephen Levine—only some with expertise in gender identity issues, offer conflicting testimony on the efficacy of sex reassignment surgery). *Id.* at 76-80.

48. *Kosilek*, 774 F.3d at 108-09 (Thompson, J. dissenting).

49. Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019).

50. *Id.*

on her mental distress, self-castration attempt, and suicidal ideations.[51] However, the majority established, with little supporting precedent, that an inmate must show that "officials acted with malicious intent [. . .] with knowledge that they were withholding medically necessary care" in order to succeed on an Eighth Amendment challenge.[52] The court went on to state that there is no deliberate indifference or malicious intent in denying treatment where there is genuine medical debate as to the necessity of such treatment.[53] In order to prove the presence of a "sharply contested medical debate over sex reassignment surgery" the Fifth Circuit simply transposed the record and expert testimony of *Kosilek* to the noted case.[54] The majority particularly focused on the testimony of Dr. Levine, who helped author a previous version of the WPATH Standards of Care and testified in *Kosilek* that support for sex reassignment surgery lacked medical consensus and other forms of treatment would be satisfactory.[55] Because of the supposed lack of medical consensus on the issue, the court denied that a showing of individual need by Ms. Gibson would alter the result of the case and held that she failed to present a genuine dispute of material facts.[56]

The majority then addressed whether a prison policy effectively creating a blanket ban on sex reassignment surgery violated the Eighth Amendment.[57] Using an incongruous analogy, the court compared the Food and Drug Administration's (FDA) prohibition of a particular drug to TDCJ's prohibition on sex reassignment surgery.[58] The Fifth Circuit surmised that the Eighth Amendment does not require an individual assessment for an inmate who desires a drug prohibited by the FDA and, thus, Ms. Gibson was not entitled to an individualized assessment for sex reassignment surgery under the Eighth Amendment.[59]

Finally, the Fifth Circuit held that the Eighth Amendment is only violated when prison officials inflict "*both* 'cruel *and unusual*'" punishment.[60] This originalist argument was supported by several law review articles explaining that "unusual" meant "long usage" at the time

51. *Id.* at 219.
52. *Id.* at 220.
53. *Id.*
54. *See id.* at 221-23.
55. *Id.* at 222.
56. *Id.* at 224.
57. *Id.* at 225.
58. *Id.* at 216, 225.
59. *Id.* at 225.
60. *Id.* at 226.

the Framers drafted the Eighth Amendment.[61] The court also relied on the opinions of the late Associate Justice Antonin Scalia of the Supreme Court, who stated that punishment must be both cruel and unusual.[62] To drive the point home, the majority asserted that because only California had ever provided sex reassignment surgery to an inmate, the TDCJ's policy proscribing sex reassignment surgery was not unusual in the Eighth Amendment sense.[63]

The dissent strongly rebuked the majority's argument and concluded that the court improperly granted summary judgment to the director of the TDCJ.[64] Judge Barksdale noted that Ms. Gibson was not allowed discovery, not given every opportunity to offer evidence, and had the improper burden of production at summary judgment due to the fact that she was the non-movant.[65] According to the Federal Rules of Civil Procedure, the director was required to demonstrate that there was no genuine dispute of material facts because he was the moving party for summary judgment.[66] However, the director only provided Ms. Gibson's medical records, TDCJ Policy G 51.11, and Ms. Gibson's complaint records as evidence in support of his motion.[67] In response, Ms. Gibson submitted, among other documents, WPATH literature outlining the medical necessity of sex reassignment surgery for transgender persons.[68] Because the director did not submit any evidence regarding the efficacy or medical necessity of sex reassignment surgery he had not met the burden of production, a genuine dispute of material facts existed, and summary judgment was inappropriate.[69] The dissent also took issue with the majority's improper reliance of evidence from *Kosilek,* not only because the case was four years prior to the noted case, but because the court did not evaluate the facts of *Kosilek* in a light most favorable to Ms. Gibson before asserting there was no genuine dispute of material facts.[70]

Judge Barksdale further discussed more recent case law surrounding the medical consensus of sex reassignment surgery for transgender inmates.[71] Referencing *Edmo v. Idaho Department of*

61. *Id.*
62. *Id.* at 227.
63. *Id.* at 227-28.
64. *Id.* at 228 (Barksdale, J., dissenting).
65. *Id.* at 230-31.
66. *Id.* at 231.
67. *Id.* at 231-32.
68. *Id.* at 232.
69. *Id.*
70. *Id.*
71. *Id.* at 234.

Corrections, the dissent found it credible that sex reassignment surgery was medically necessary and that WPATH had a greater medical consensus than the majority or *Kosilek* asserted.[72] The dissent also sharply questioned the majority's reliance on the testimony of experts in *Kosilek* who were suspicious of the WPATH Standard of Care because those experts were "outliers in the field of gender dysphoria treatment" and were not credible in "light of their misrepresentations and refusal to subscribe to the medically-accepted [WPATH] standards of care."[73] In short, the dissent spurned the application of the holding in *Kosilek* to the noted case because it was not meant to institute a blanket ban on sex reassignment surgery for inmates and was specific to *Kosilek*.[74] The dissent determined that Ms. Gibson was denied an evaluation for sex reassignment surgery on TDCJ policy grounds because the denial was in opposition to a physician's note requesting an evaluation for Ms. Gibson.[75] The dissent also pointed out that the Fifth Circuit previously held, and the Fourth and Ninth Circuits recently affirmed, that a refusal to evaluate an inmate's serious medical needs on policy rather than medical grounds could constitute deliberate indifference.[76] Because Ms. Gibson was denied an evaluation on policy grounds, summary judgment was wholly improper in the noted case.[77]

IV. ANALYSIS

The noted case is significant because it is a substantial digression in the law, is inconsistent with the purpose of the Eighth Amendment, and creates a conflict with other circuit courts regarding the rights of transgender prisoners. First, the Fifth Circuit improperly relied on *Kosilek* in reaching summary judgment for the director of TDCJ. Second, the Eighth Amendment proscription against cruel and unusual punishment is meant to preserve human dignity and reflect evolving standards of decency.[78] Third, a recent Ninth Circuit decision not only indicates that a blanket ban on specific types gender-affirming care for inmates violates the Eighth Amendment, but a refusal to evaluate a

72. *Id.* at 234-35.
73. *Id.*
74. *Id.* at 236.
75. *Id.* at 237-38.
76. *Id.* at 239.
77. *Id.* at 242.
78. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

transgender inmate for sex reassignment surgery on policy grounds also violates the Eighth Amendment.[79]

First, the Fifth Circuit's reliance on *Kosilek* is dubious for several reasons. The majority focused almost solely on the expert testimony that cut against the medical consensus surrounding WPATH Standards of Care; some of those same experts possessed credibility that was later found lacking in court.[80] Second, as the dissent pointed out, *Kosilek* is distinguishable from the noted case because it spanned decades, had a robust evidentiary record, and was not decided by summary judgment.[81] In contrast, Ms. Gibson was able to submit only six documents into evidence as she was not allowed discovery, and the court improbably decided the merits of the case on a motion for summary judgment.[82] The Fifth Circuit's near wholesale reliance on the evidentiary record of *Kosilek* allowed the court to avoid the fact-specific analysis required to determine deliberate indifference and analyze evolving standards of decency. *Kosilek* enabled the court to circumvent the required analysis and still arrive at the conclusion that TDCJ did not violate the Eighth Amendment when denying Ms. Gibson an evaluation for sex reassignment surgery on policy grounds.

Second, although the Fifth Circuit interpreted the Eighth Amendment to prohibit *both* cruel and unusual punishment, reading the two words as separate requirements,[83] the Supreme Court has made conflicting statements when analyzing the meaning of the clause.[84] The history of the Constitution's drafting illustrates the Framers' concern that new and increasingly brutal punishments would be implemented in the future; the Eighth Amendment's Cruel and Unusual Punishments Clause would prevent such innovations from being legally employed.[85] Thus, it

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79. *See* De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) (concluding that the denial of consideration for sex reassignment surgery could be constitutionally inadequate under the Eighth Amendment); *see also* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

80. Gibson v. Collier, 920 F.3d 212, 222-23, 234 (5th Cir. 2019).

81. *Id.* at 233.

82. *Id.* at 222, 233.

83. *Id.* at 226-27 (first quoting Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778 (2011); then quoting John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008); and then quoting Stanford v. Kentucky, 492 U.S. 361, 378 (1989).

84. *Compare* Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991) ("severe, mandatory penalties may be cruel, but not unusual in the constitutional sense . . ."), *with* Graham v. Florida, 560 U.S. 48 (2011) (resting on the "evolving standards of decency" test instead of utilizing a textual analysis of the Eighth Amendment).

85. *See* Samuel L. Bray, *"Necessary AND Proper" and "Cruel AND Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 714 (2016).

is just as likely that "cruel and unusual" meant "innovatively cruel" as it did "long in usage."[86]

Despite the Fifth Circuit's assertion that denial of care violates the Eighth Amendment only when it is *both* cruel and unusual,[87] the Supreme Court held that "denial of medical care may result in pain and suffering [that is] inconsistent with contemporary standards of decency."[88] The Fifth Circuit also improperly analyzed Ms. Gibson's deliberate indifference claim under the lens of malicious intent.[89] The Supreme Court explicitly declined to hold that purposeful or knowing conduct is necessary to satisfy the mens rea requirement of deliberate indifference.[90] Deciding proper medical treatments on policy grounds alone subverts the health and well-being of transgender inmates and allows prison officials, who have no medical background, to decide what is medically necessary for those inmates. This does not comport with the requirement of medical necessity, which must obviously be made by a physician.[91] In Ms. Gibson's case, a clinic note requesting an evaluation for sex reassignment surgery was filed but the request was denied because of TDCJ policy G-51.11.[92] In granting summary judgment for the director of TDCJ, the Court not only substituted their own "evolving standards of decency" and "deliberate indifference" analyses for that of the First Circuit in *Kosilek*, but the majority also supplanted the medical judgment of TDCJ's physician for the subjective and non-medical judgment of TDCJ prison officials.[93]

Moreover, the Fifth Circuit's refusal to refer to Vanessa Lynn Gibson by her female pronouns illustrated the majority's bias against transgender individuals. Any hint of bias against a discrete class of individuals[94] does not reinforce evolving standards of decency; it denigrates human dignity. The Fifth Circuit rationalized the use of Ms. Gibson's male pronouns by citing *Frontiero v. Richardson*: an equal

86. *See id.* at 713-14.
87. Gibson v. Collier, 920 F.3d 212, 226 (5th Cir. 2019).
88. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).
89. *Gibson*, 920 F.3d at 220.
90. Farmer v. Brennan, 511 U.S. 825, 835-36 (1994).
91. Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014).
92. *Gibson*, 920 F.3d at 237.
93. *See id.*
94. *See* F.V. v. Barron, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (concluding that transgender status is a "sufficiently discernable characteristic to define a discrete minority class); *see also* Grimm v. Gloucester Cty. School Bd., 972 F.3d 586, 612-13 (4th Cir. 2020) (concluding that transgender individuals belong to a quasi-suspect class and "constitute a discrete group with immutable characteristics").

protection challenge concerning the disparate treatment of women in the military.[95] The majority implied the use of Ms. Gibson's male pronouns was proper because "sex . . . is an immutable characteristic determined solely by . . . birth."[96] However, the Fourth Circuit recently ruled that "being transgender is not a choice [. . .] it is as natural and immutable as being cisgender."[97] Similarly, the First Circuit referred to Kosilek by her female name and pronouns even though it ultimately found for the opposing party.[98] There, the First Circuit preserved Kosilek's dignity. Here, the Fifth Circuit did not.

Third, the Ninth Circuit decision in *Edmo v. Corizon, Inc.* provides a better framework to determine whether prison officials violated the Eighth Amendment when denying an evaluation for sex reassignment surgery. The Ninth Circuit held that sex reassignment surgery is the medically necessary treatment for gender dysphoria and prison officials who deny such treatment with knowledge of the inmate's suffering violate the Eighth Amendment.[99] The court properly stated that Eighth Amendment claims such as Ms. Edmo's are inherently fact specific and must be decided on the evidentiary record at hand.[100] Notable in the case is the Ninth Circuit's strong rejection of *Gibson*.[101] The court concluded that the Fifth Circuit's reliance on the evidentiary record of *Kosilek* was incorrect because the expert testimony in that case did not support the contention that sex reassignment surgery is not medically necessary, and instead was based on fact-specific circumstances particular to Ms. Kosilek.[102] "Most fundamentally," the court notes, "*Gibson* relies on an incorrect, or at best, outdated premise" that there is no medical consensus surrounding sex reassignment surgery as a treatment for gender dysphoria.[103] The Ninth Circuit also called into question the analysis of *Gibson*, concluding that the Fifth Circuit had "coopted" the record from *Kosilek*, and thus *Gibson* had scant analytical value due to the court's "anomalous procedural approach."[104]

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95. *Gibson*, 920 F.3d at 217 n.2.
96. *Id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973))
97. *Grimm*, 972 F.3d at 612-13.
98. Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).
99. Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019).
100. *Id.* at 794.
101. *Id.* at 795.
102. *Id.*
103. *Id.*
104. *Id.*

The noted case is deficient for many reasons. The bias of the Fifth Circuit against transgender persons is apparent due to its refusal to refer to Vanessa Gibson by her female pronouns.[105] The noted case also creates a sharp split between circuit courts regarding the deference given to prison officials when shaping inmate healthcare policies for transgender individuals. The decision of the Fifth Circuit is also inconsistent with the purpose of the Eighth Amendment: to prevent cruel and unusual punishment. The majority's conclusion that TDCJ policy comports with the Constitution all but ensures that Ms. Gibson will continue to face substantial mental and physical harm while incarcerated. In short, *Gibson* undermines the fair and equal treatment of transgender inmates throughout the U.S., paves the way for other Courts of Appeals to substitute their own fact-specific analysis of deliberate indifference with that of other courts, and closes the door on any successful Eighth Amendment claim for denial of an evaluation for sex reassignment surgery while incarcerated in Texas, Mississippi, or Louisiana. Thus, *Gibson* itself is *both* cruel and unusual.

Megan Holt*

105. *See id.* at 217.

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