COMMENTS

Gender Identity, Incarceration, and the Eighth Amendment: Ensuring Access to Gender-Affirming Surgery

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I. INTRODUCTION

Prison is one of very few places where there is a right to receive medical care in the United States.[1] However, this right is not unlimited.[2] Furthermore, although significant changes have occurred in the recognition of legal rights within the LGBTQ+ community in recent years, discrimination remains prevalent throughout the lives of LGBTQ+ individuals, with transgender people particularly affected.[3] In prisons, transgender individuals, especially transgender women, face an elevated risk of sexual assault and mistreatment by both fellow inmates and staff.[4] Additionally, transgender individuals encounter notable healthcare disparities while incarcerated.[5]

Christina Lynch's story highlights these concerns.[6] At the age of twenty-one, Lynch was placed in an all-male prison as a transgender woman of color.[7] While incarcerated, as a transgender woman, Lynch was "physically and sexually assaulted on several occasions" and denied access to medical care.[8] Lynch had been taking hormones for two years at the time she was incarcerated.[9] However, once she entered prison, those treatments stopped because prison officials "precluded [her] access to gender-affirming care."[10] Lynch successfully sued the Georgia Department of Corrections for denial of medical treatment under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[11]

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1. *See* Jennifer Prah Ruger, Theodore W. Ruger, & George J. Annas, *The Elusive Right to Health Care under U.S. Law*, 372 NEW ENG. J. MED 2558 (2015) (stating that there is no constitutional right to healthcare in the United States).

2. *See* Brown v. Plata, 563 U.S. 493, 510 (2011).

3. Edward J. Alessi & James I. Martin, *Intersection of Trauma and Identity in* TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS, 3, 3 (Kristen L. Eckstrand & Jennifer Potter eds., 2017).

4. Erin McCauley & Lauren Brinkley-Rubinstein, *Institutionalization and Incarceration of LGBT Individuals in* TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS, 149, 155-58 (Kristen L. Eckstrand & Jennifer Potter eds., 2017).

5. *Id.* at 156.

6. *See* Christina Alicia, *I'm a Trans Woman of Color in an All-Male Prison. I Had to Fight for My Right to Gender-Affirming Care Behind Bars*, BUS. INSIDER (Mar. 21, 2023), https://www.businessinsider.com/trans-woman-of-color-male-prison-georgia-gender-affirming-care-2023-2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Lynch v. Lewis, No. 7:14-CV-24 (HL), 2015 U.S. Dist. LEXIS 35561, at *1 (M.D. Ga. Mar. 23, 2015). Lynch settled her lawsuit in July 2015, leading to a modification of "the existing policy on access to gender-affirming care." *See* Alicia, *supra* note 6. Lynch received

Lynch's story is by no means a one-off.[12] The transgender community is overrepresented in the prison population.[13] While imprisoned, transgender inmates face numerous difficulties, including physical and sexual abuse, from both other inmates and prison staff, and denial of housing that matches their gender identity.[14] Furthermore, transgender inmates are routinely denied access to gender affirming medical care, which is discussed in this Comment.[15]

This Comment examines the legal landscape surrounding claims of inadequate medical care for transgender prisoners under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[16] Part II discusses the current legal framework for incarcerated individuals' cruel and unusual punishment medical claims under the Eighth Amendment, focusing on how this framework is applied to transgender inmates throughout the Circuit Courts.[17] Part III proposes that the evolving standards of decency should allow courts to rule in favor on transgender individuals' Eighth Amendment claims when prisons fail to provide gender-affirming surgery.[18]

II. INCARCERATED INDIVIDUALS' MEDICAL CLAIMS UNDER THE EIGHTH AMENDMENT

The Supreme Court has affirmed that, because prisoners are incarcerated to be punished as a consequence of their own actions, prisoners may be deprived of some fundamental liberties.[19] However, because the Constitution recognizes some rights are inherent in every individual, there are some rights that prisoners may not be deprived of.[20] Because, when incarcerated, "society takes from prisoners the means to

access to HRT and was guaranteed laser treatment for facial-hair removal. *Id.* Lynch is currently waiting her parole in 2025. *Id.*

12. *See, e.g.*, Yvette Blake, *In a California Prison, Life After Gender-Affirming Surgery*, Prison Journal Project (June 15, 2023), https://prisonjournalismproject.org/2023/06/15/incarcerated-woman-on-gender-affirming-surgery (providing another example of a transgender woman's journey to access gender-affirming healthcare while incarcerated).

13. *See* McCauley, *supra* note 4, at 155 ("The National Center for Transgender Equality found that one in six transgender people has been incarcerated (16%), whereas the Bureau of Justice Statistics estimates that only 5.1% of all persons in the USA will be incarcerated during their life.").

14. *Id.* at 155-158.

15. *Id.* at 156.

16. *See* discussion *infra* Part II.

17. *Id.*

18. *See* discussion *infra* Part III.

19. Brown v. Plata, 563 U.S. 493, 510 (2011).

20. *Id.*

provide for their own needs, [p]risoners are dependent on the State for food, clothing, and necessary medical care."[21] The failure to provide such care "may actually produce physical 'torture or a lingering death.'"[22] When the prison fails to provide essential care, the remedy is to bring an Eighth Amendment claim against the prison, because undue suffering, unrelated to any legitimate penological purpose,[23] is considered a form of punishment as described by the Eighth Amendment.[24] The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment,[25] prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes.[26] Although the government has an "obligation to provide medical care for those whom it is punishing by incarceration," not every prison's failure to provide medical care is actionable under the Eighth Amendment.[27] One area where courts have inconsistently applied Eighth Amendment jurisprudence is cruel and unusual punishment claims brought by transgender inmates.[28]

In this Part, the first subsection describes the current legal framework for incarcerated individuals' cruel and unusual punishment medical claims under the Eighth Amendment.[29] Then, the second subsection describes how this framework has been applied to transgender incarcerated individuals throughout the Federal Circuit Courts.[30]

A. Current Legal Framework

The Supreme Court first established a standard to consider prisoners' claims that prison officials have denied them medical care in 1976 in *Estelle v. Gamble*.[31] In *Estelle*, the Supreme Court held that prison officials violate the Eighth Amendment to the U.S. Constitution when they act with "deliberate indifference" to a prisoner's "serious medical needs."[32] Therefore, it is two-prong test, where both prongs must be

21. *Id.*
22. *In re* Kemler, 136 U.S. 436, 447 (1890).
23. Estelle v. Gamble, 429 U.S. 97, 103 (1976).
24. *See* 563 U.S. 493 at 511.
25. Robinson v. California, 370 U.S. 660, 666 (1962).
26. Wilson v. Seiter, 501 U.S. 294, 296-97 (1991).
27. 429 U.S. 97 at 105.
28. *See* Edmo v. Corizon, Inc., 949 F.3d 489, 490 (9th Cir. 2020); *see also* Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014).
29. *See* discussion *infra* Section II.A.
30. *See* discussion *infra* Section II.B.
31. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
32. *Id.*

satisfied for a prisoner to establish an Eighth Amendment claim.[33] First, the prisoner must establish the objective component: the alleged injury is "sufficiently serious."[34] Second, the prisoner must establish the subjective component: "the officials act[ed] with a sufficiently culpable state of mind," which is one of deliberate indifference.[35]

With regards to the first prong, the objective component, a serious medical need can relate to "physical, dental and mental health."[36] A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain."[37] The seriousness of a medical need is determined by factors, including, but not limited to, whether the medical condition "significantly affects . . . daily activities,"[38] "the existence of chronic and substantial pain,"[39] whether "a reasonable doctor or patient would perceive the medical need in question as important and worthy of comment or treatment,"[40] or whether society considers the disputed risk to be "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk."[41] However, there is an inherent problem of defining and proving what constitutes "contemporary standards of decency."[42] In *Trop v. Dulles*, the Supreme Court stated that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[43] However, the *Trop* Court did not provide an exact framework for establishing when a condition of confinement, like denial of medical care,

33. *See* Wilson v. Seiter, 501 U.S. 294, 298 (1991); Farmer v. Brennan, 511 U.S. 825 (1994); Rhodes v. Chapman, 452 U.S. 337 (1981).

34. 501 U.S. 294 at 298.

35. *Id.*

36. Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated on other grounds by* Sandin v. Conner, 515 U.S. 472 (1995).

37. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

38. Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

39. *Id.*

40. *Id.*; *see also* Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004) (citations omitted) ("A serious medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity of a doctor's attention."); Hayes v. Snyder, 546 F.3d 516, 522 (7th Cir. 2008); Johnson v. Busbee, 953 F.2d 349, 351 (8th Cir. 1991); Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 208 (1st Cir. 1990); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980).

41. Helling v. McKinney, 509 U.S. 25, 36 (1993).

42. *Id.*

43. Trop v. Dulles, 356 U.S. 86, 101 (1958).

violates society's contemporary standards of decency; later cases provided some direction.[44] In assessing which contemporary values affect the Eighth Amendment, a court should consider how factors such as legislative enactments,[45] history and precedent,[46] and public attitudes toward a given sanction[47] reflect those values. Furthermore, once a prisoner can prove that a certain condition of confinement violates contemporary standards of decency, he or she must then provide the court with scientific and statistical data about the seriousness of the potential harm and the likelihood that the alleged harm will injure his or her health.[48] Even if the first prong is satisfied, a prisoner's Eighth Amendment is only violated if the prisoner also proves that the prison official acted with deliberate indifference to the prisoner's medical requests.[49]

With regards to the second prong, the subjective prong, an official is deliberately indifferent where he (1) "subjectively perceived facts from which to infer substantial risk to the prisoner," (2) "did in fact draw the inference," and (3) "then disregarded that risk."[50] When specifically applied to medical care and treatment, the *Estelle* Court held that this standard of indifference applies "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care."[51] Further, this deliberate indifference standard extends beyond cases of torture and death to less severe cases where denial of medical care results in pain and suffering without serving a penological purpose.[52] However, the deliberate indifference standard does not include "an inadvertent failure to provide adequate medical care" or a medical provider's negligent treatment or diagnosis.[53] The deliberate indifference standard is contextualized by the accepted standards of care for the medical

44. *See* Penry v. Lynaugh, 492 U.S. 302, 331 (1989); Coker v. Georgia, 433 U.S. 584, 594 (1977); Gregg v. Georgia, 428 U.S. 153, 173, 176-78 (1976).

45. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (finding that "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"); Coker v. Georgia, 433 U.S. 584, 594 (1977) (stating that legislative response is "most marked indication" of society's attitude).

46. *See, e.g.*, *G*regg v. Georgia, 428 U.S. 153, 176-78 (1976).

47. *See id.* at 173.

48. Helling v. McKinney, 509 U.S. 25, 36 (1993).

49. Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

50. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

51. 429 U.S. 97 at 104-05.

52. *Id.* at 103.

53. *Id.* at 106.

community.[54] Deliberate indifference is not found where two medical professionals have a difference of opinion on what constitutes appropriate care,[55] but only when both the medical opinions are medically acceptable treatments for the illness.[56] Furthermore, the court considers "the views of prudent professionals in the fields" when determining "whether the treatment decision of responsible prison authorities was medically acceptable."[57]

As noted above, courts have established that not every prisons' failure to provide medical care is actionable under the Eighth Amendment.[58] Therefore, prisoners face an uphill battle in showing that their medical claim is recognizable under the evolving standard of decency.[59]

B. The Circuit Courts Applying the Framework to Transgender Inmates

Although the Supreme Court has not yet analyzed a transgender prisoner's Eighth Amendment claim for denial of gender-affirming healthcare,[60] many lower courts have already recognized gender dysphoria as a sufficiently serious medical need triggering an Eighth Amendment analysis.[61] This subsection describes the Circuit Courts' most recent treatments of gender affirming surgery claims brought under the Eighth Amendment. As described below, the Circuits have come to varying conclusions regarding gender-affirming care.[62]

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54. Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019).

55. *See* Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012), *overruled in part on other grounds by* Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (en banc)).

56. Hamby v. Hammond, 821 F.3d 1085, 1092 (9th Cir. 2016) (quoting Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012), *overruled in part on other grounds by* Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (en banc)).

57. 935 F.3d 757 at 786.

58. *See* Estelle v. Gamble, 429 U.S. 97, 105 (1976).

59. *See* Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).

60. The Supreme Court denied the Idaho Department of Correction's writ of certiorari. *See* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019), *cert*. *denied*, Idaho Dep't of Corrections v. Edmo, 141 S. Ct. 610 (2020).

61. *See, e.g.*, 935 F.3d 757; Rosati v. Igbinoso, 791 F.3d 1037, 1039-40 (9th Cir. 2015); 774 F.3d 63 at 86; De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013); Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011); Allard v. Gomez, 9 F. App'x 793, 794 (9th Cir. 2001); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1187 (N.D. Cal. 2015); Konitzer v. Frank, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010).

62. See *infra* notes 63-105 and accompanying text.

In 2011, the Seventh Circuit Court of Appeals was the first circuit court to address transgender prisoners' access to gender-affirming surgery.[63] In *Fields v. Smith*, the Seventh Circuit struck down a Wisconsin state law, Act 105, that prohibited the Wisconsin Department of Corrections from providing gender affirming surgery and hormone therapy.[64] Three state inmates who were transgender women each been diagnosed with Gender Identity Disorder (GID), which is a psychiatric disorder according to the American Psychiatric Association.[65] To help treat GID, a doctor can prescribe hormones, which helps relieve the psychological distress that GID can cause.[66] However, the withdrawal of hormonal treatment can result in severe complications, such as the "dysphoria and associated psychological symptoms resurfac[ing] in more acute form . . . [and] physical effects such as muscle wasting, high blood pressure, and neurological complications."[67] All three inmates experienced some of these complications when the Department of Corrections (DOC) discontinued their treatment.[68]

The Court struck down Act 105 for multiple reasons.[69] First, Act 105 was not justified by the state's interest in preserving prison security because "evidence showed that transgender inmates may be targets for violence even without hormones."[70] Furthermore, although "'[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices [because] their judgment is needed to preserve internal order and discipline and to maintain institutional security,'" that "deference does not extend to 'actions taken in bad faith and for no legitimate purpose.'"[71]

The First Circuit Court of Appeals was the next circuit court to address transgender prisoners' access to gender-affirming surgery.[72] While *Fields* was the first case by a circuit court that addressed transgender prisoners' access to gender affirming care, the litigation of Michelle Kosilek, a transgender woman, against the Department of Corrections (DOC) spanned over twenty years, starting with a 1992 suit where she alleged that the DOC failed to provide treatment for her gender

63. *See* Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).
64. *Id.*
65. *Id.* at 553.
66. *Id.* at 554.
67. *Id.*
68. *Id.*
69. *See id.* at 557-58.
70. *Id.* at 557.
71. *Id.* at 557-58 (quoting Whitley v. Albers, 475 U.S. 312, 321-22 (1986)).
72. *See* Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).

dysphoria.[73] In *Kosilek v. Spencer*, the First Circuit Court of Appeals held that the denial of transgender prisoners' gender-affirming surgery is not a violation of the cruel and unusual punishment clause of the Eighth Amendment.[74] Instead of managing Kosilek's gender dysphoria with sex reassignment surgery (SRS), the DOC proscribed "psychotherapy, hormones, electrolysis, and the provision of female garb and accessories."[75] Although the Court held that gender dysphoria is a serious medical need under the first prong of the deliberate indifference standard, "the question [in this case] is whether the decision not to provide SRS—in light of the continued provision of all ameliorative measures currently afforded Kosilek and in addition to antidepressants and psychotherapy—is sufficiently harmful to Kosilek so as to violate the Eighth Amendment."[76] The First Circuit held that it is not.[77] "[W]here two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine," the law makes it clear that it is "not the place of our court to 'second guess medical judgments' or to require that the DOC adopt the more compassionate of two adequate options."[78] Therefore, because the DOC chose "one of two alternatives—both of which are reasonably commensurate with the medical standards of prudent professionals, and both of which provide Kosilek with a significant measure of relief," that does not violate the Eighth Amendment.[79] However, the First Circuit did note that it had not created a categorical rule.[80] Instead, it limited the holding to the facts of Kosilek's case.[81]

The next circuit to address a transgender prisoner's access to gender-affirming surgery in prison was the Fifth Circuit.[82] In *Gibson v. Collier*, the Fifth Circuit categorically banned gender-affirming care claims.[83] In a split decision, the Fifth Circuit held that a state does not violate the Eighth Amendment in declining to provide gender-affirming surgery to a transgender inmate.[84] Instead of relying on the World Professional

73. *Id.*
74. *Id.*
75. *Id.* at 86
76. *Id.* at 86, 89.
77. *Id.* at 89.
78. *Id.* at 90 (quoting Layne v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981)).
79. *Id.* at 90.
80. *Id.* at 90 n.12.
81. *Id.*
82. *See* Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019).
83. *Id.* at 215-16.
84. *Id.* at 215.

Association for Transgender Health (WPATH) Standards of Care, the Fifth Circuit relied on the First Circuit's conclusion in *Kosilek*, which said that " "there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender euphoria."[85] Therefore, as stated above[86], where there is "a robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment."[87] Contrast this to the Seventh Circuit's decision in *Fields v. Smith*[88]

The Ninth Circuit Court of Appeals is the most recent Circuit Court to address this issue.[89] *Edmo v. Corizon, Inc.* represents a major shift from prior cases such as *Kosilek* and *Gibson*.[90] In *Edmo*, the Ninth Circuit Court of Appeals held that when prison officials refused to provide gender-affirming surgery to a transgender inmate, the prison officials were deliberately indifferent to that transgender inmate's needs in violation of the Eighth Amendment.[91] Adree Edmo, a transgender inmate, suffered from gender dysphoria both before and during her time in prison.[92] Although Edmo received hormone therapy while incarcerated, she continued to experience significant distress caused by her male genitalia.[93] Edmo attempted self-castration "because of the severity of her distress."[94] As evidenced by her self-castration attempt," a prison doctor noted "that Edmo's gender dysphoria 'had risen to another level.'"[95] However, that prison doctor still denied Edmo gender-affirming surgery.[96]

The Department of Corrections did not dispute that Edmo's gender dysphoria was a sufficiently serious medical need under the first prong of the deliberate indifference standard.[97] Rather, the issue is whether the prison officials "provided adequate and medically acceptable care to

85. *Id.* at 21.
86. *See supra* notes 55-56 and accompanying text.
87. 920 F.3d 212 at 220.
88. *See* Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).
89. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019).
90. Compare 935 F.3d 757, 767 with Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014), and Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019).
91. 935 F.3d 757 at 767.
92. *Id.* at 771-72.
93. *Id.* at 772.
94. *Id.* at 773.
95. *Id.* at 773.
96. *Id.* at 773.
97. *Id.* at 785.

Edmo."[98] Basing its analysis in the WPATH standards,[99] the court held that the "'course of treatment' chosen to alleviate [Edmo's] gender dysphoria was 'medically unacceptable under the circumstances.'"[100] Furthermore, the court held that the prison officials "acted with deliberate indifference to Edmo's serious medical needs" when the prison doctor continued with "Edmo's ineffective treatment plan" despite the fact that the doctor knew of Edmo's castration attempt, knew of Edmo's diagnosis of gender dysphoria, and knew that Edmo "experienced 'clinically significant' distress that impaired her ability to function."[101]

In its opinion, the Ninth Circuit recognized the tension with the Fifth Circuit's holding in *Gibson*.[102] The Ninth Circuit disagreed with the categorical nature of the Fifth Circuit's holding because the Fifth Circuit "relie[d] on incorrect or . . . outdated premise" of gender dysphoria.[103] The Ninth Circuit criticized the *Gibson* court for its categorical ban on gender-affirming surgery as paradigmatic of deliberate indifference[104] and for failing to recognize a clear "medical consensus [on the medical necessity of gender-affirming surgery] in appropriate circumstances."[105]

III. APPLYING THE EVOLVING STANDARDS OF DECENCY TO TRANSGENDER PRISONER'S MEDICAL CLAIMS UNDER THE EIGHTH AMENDMENT

As the landscape of health and medicine undergoes changes, so does the level of medical care deemed appropriate for inmates.[106] The comprehension of healthcare needs specific to transgender prisoners has advanced in tandem with evolving standards of decency, influenced by progressing medical insights, legal considerations, and societal attitudes toward transgender individuals and their rights. Adherence to these evolving standards of decency demonstrates a prisoner's eligibility for

98. *Id.* at 786.

99. *Id.* at 787.

100. *Id.* at 786 (quoting Hamby v. Hammond, 821 F.3d 1085, 1092 (9th Cir. 2019)).

101. *Id.* at 793.

102. *Id.* at 794.

103. *Id.* at 795 ("Most fundamentally, *Gibson* relies on an incorrect, or at best outdated, premise: that '[t]here is no medical consensus that [gender-affirming surgery] is a necessary or even effective treatment for gender dysphoria.'" (citing Gibson v. Collier, 920 F.3d 212, 223 (5th Cir. 2019))).

104. *Id.* at 796 ("*Gibson* eschews Eighth Amendment precedent requiring a case-by-case determination of the medical necessity of a particular treatment.").

105. *Id.* at 795.

106. *See* Helling v. McKinney, 509 U.S. 25, 35 (1993).

legal recourse under the Eighth Amendment.[107] As described below, the understanding of gender dysphoria, from the viewpoint of both society and the medical field, has progressed enough to meet the evolving standards of decency.[108] Therefore, the Supreme Court should adopt the Ninth Circuit's medical necessity analysis from *Edmo*.[109]

This Comment argues that courts are prepared to acknowledge the denial of gender-affirming surgery as actionable within the framework of the evolving standards of decency.[110] This section examines how the evolving standards of decency principles are applicable to gender-affirming surgery.[111]

A. Transgender Healthcare Legislative Enactments

When evaluating the evolving standards of decency, courts may refer to statutes and regulations as indicators of societal value shifts.[112] As discussed below, states are split on whether to protect transgender healthcare,[113] but the federal government is more consistent with holding that transgender individuals should be protected.[114] Nevertheless, the "number of recent legislative enactments [especially at the federal level] reflects the prevailing social attitude" that transgender healthcare should be protected; therefore, this factor most likely weighs in favor of a cognizable claim.[115]

1. State Legislative Action

At the state level, currently, transgender exclusions in health insurance service coverage is prohibited in twenty-four states and the District of Columbia, with California being the first in 2005.[116] Furthermore, fourteen states, the District of Columbia, and Puerto Rico

107. 509 U.S. 25 at 36.

108. *See* discussion *infra* Sections III.A-D.

109. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019).

110. *See* discussion *infra* Part III.

111. *See supra* notes 38-47 and accompanying text.

112. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (finding that "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"); Coker v. Georgia, 433 U.S. 584, 594 (1977) (stating that legislative response is "most marked indication" of society's attitude).

113. *See* discussion *infra* Section III.A.1.

114. *See* discussion *infra* Section III.A.2.

115. *See* Lisa Gizzi, *Helling v. McKinney and Smoking in the Cell Block: Cruel and Unusual Punishment?*, 43 AM. U. L. REV 1091, 1113 (1994).

116. *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Apr. 1, 2024).

have laws that prohibit health insurance discrimination based on sexual orientation and gender identity.[117] Furthermore, at the state and local level, protections for incarcerated transgender individuals have been established.[118]

With regards to gender-affirming care specifically, currently twenty-three states have laws that, partially or totally, ban gender-affirming care for minors; however, some of these laws are not currently in effect while facing legal challenges.[119] Missouri is currently the only state that bans gender-affirming care for both minors and adults.[120] Sixteen states and the District of Columbia currently have no restrictions on gender-affirming care.[121] Ten states plus Kansas City, Missouri protect access to gender-affirming care.[122]

2. Federal Legislative Action

Issues regarding access to transgender healthcare are also addressed at the federal level.[123] Sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and transgender status.[124] Courts have also interpreted the Americans with Disabilities Act to include transgender individuals in protections from discrimination based on sex.[125]

Furthermore, the Affordable Care Act (Section 1557) includes broad civil rights protections in health care, prohibiting discrimination based on race, color, national origin, sex, age, or disability in all health care programs or activities that receive federal funding.[126] Under the Obama administration, sex discrimination was interpreted to include discrimination based on gender identity; Trump's administration reversed

117. *Id.*

118. *See* Adam Beam, *California Will House Transgender Inmates by Gender Identity*, CNN (Sept. 26, 2020), https://apnews.com/article/us-news-laws-gavin-newsom-ca-state-wire-lifestyle-14cd954b06360d21349b77233318369e (stating that California and Connecticut require prisons to house transgender inmates by their gender identity rather than biological sex and that Rhode Island, New York City and Massachusetts also house inmates based on their gender identity.).

119. Vaishali Guar, *State Laws on Gender-Affirming Care*, FINDLAW (June 14, 2023), https://www.findlaw.com/lgbtq-law/state-laws-on-gender-affirming-care.html.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See* Stacy Barrett, *Legal Guide to Gender-Affirming Care*, NOLO (Jan. 8, 2024), https://www.nolo.com/legal-encyclopedia/legal-guide-to-gender-affirming-care.html.

124. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1743 (2020).

125. *See, e.g.*, Williams v. Kincaid, 45 F.4th 759, 773 (4th Cir. 2022).

126. 42 U.S.C.S. § 18116 (2022).

those protections, but the Biden administration restored them in 2021.[127] Section 1557 protects transgender individuals from discrimination in certain healthcare settings by

> prevent[ing] health professionals and insurers from denying overall health care and coverage based on sex and gender identity, prohibit[ing] insurers from denying a person sex-specific care because that person identifies as another gender, outlaw[ing] blanket bans on both gender-affirming care itself and on specific gender-affirming procedures, and prevent[ing] insurance companies from placing discriminatory limits on coverage for gender-affirming care.[128]

B. Judicial Precedent

When evaluating the evolving standards of decency, courts may also refer to history and precedent as indicators of societal value shifts.[129] Judicial precedent indicates a trend toward acknowledging claims related to gender-affirming surgery.[130] Transgender inmates' Eighth Amendment claims were first considered by the Supreme Court in 1994.[131] However, in *Farmer v. Brennan*, the inmate's claims were related to the prison's failure to protect the transgender inmate from assault, and not to the denial of gender affirming care.[132] Following *Farmer*, many lower courts have found denial of hormone therapy to be a viable claim, affirming that gender dysphoria is a serious medical issue.[133] However, the Supreme Court has not yet considered gender-affirming surgery claims under the Eighth Amendment.[134]

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127. *See* Barrett, *supra* note 123.

128. *Id.*

129. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 176-78 (1976) (discussing influence of history and precedent on determination of whether death penalty violates contemporary values).

130. *See* discussion *supra* Section II.B.

131. Farmer v. Brennan, 511 U.S. 825, 851 (1994) (holding that a prisoner must satisfy the subjective aspect of the deliberate indifference standard).

132. *Id.*

133. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019); Rosati v. Igbinoso, 791 F.3d 1037, 1039-40 (9th Cir. 2015); Kosilek v. Spencer, 774 F.3d 63, 86 (1st Cir. 2014); De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013); Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011); Allard v. Gomez, 9 F. App'x 793, 794 (9th Cir. 2001); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1187 (N.D. Cal. 2015); Konitzer v. Frank, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010).

134. The Supreme Court denied the Idaho Department of Correction's writ of certiorari. *See Edmo v. Corizon, Inc*., 935 F.3d 757 (9th Cir. 2019), *cert. denied*, Idaho Dep't of Corrections v. Edmo, 141 S. Ct. 610 (2020).

As heavily discussed above in Part II, the lower courts are divided on whether prison officials' refusal to provide gender-affirming care to transgender inmates constitutes an Eighth Amendment violation.[135] As mentioned above in Part II, *Edmo* signifies a significant shift from previous cases such as *Kosilek* and *Gibson*.[136] Five years after *Kosilek*, the Ninth Circuit determined that prison authorities exhibited deliberate indifference to the plaintiff's medical needs, contravening the Eighth Amendment, by denying gender-affirming surgery.[137] Acknowledging the established medical consensus regarding the necessity of gender-affirming surgery for gender dysphoria, the court's decision diverges significantly from the precedent set by *Gibson*, as it is firmly grounded in crucial Eighth Amendment considerations, signifying a pivotal shift in legal interpretation.[138]

The Ninth Circuit's ruling in *Edmo* represents the appropriate approach.[139] According to *Edmo* and *Kosilek*, blanket bans are incompatible with the Eighth Amendment because they ignore individual medical needs.[140] Because *Estelle* implies the necessity of an individual analysis of medical needs,[141] the central question is whether GCS is medically appropriate for addressing an individual's gender dysphoria, as specified in the authoritative standards of care: the WPATH's Standard of Care.[142] The Ninth Circuit Court of Appeals properly focused its

135. *See* discussion *supra* Section II.B.

136. Compare Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) with Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014), *and* Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019).

137. 935 F.3d 757 at 767.

138. *Id.* at 785, 787, 794-95.

139. *See* John Ferraro, *The Eighth for Edmo: Access to Gender-Affirming Care in Prisons*, 62 B.C. L. REV. 344 (2021).

140. 935 F.3d 757 at 796 (reviewing the plaintiff's specific medical circumstances under the Eighth Amendment); Kosilek v. Spencer, 774 F.3d 63, 90-91 (1st Cir. 2014); *see* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (setting forth the deliberate indifference test with regard to an individual's serious medical needs).

141. *See* 429 U.S. 97 at 106 (holding that valid Eighth Amendment claims regarding inadequate medical care need to allege acts amounting to deliberate indifference to a serious medical need).

142. *See* 935 F.3d 757 at 794 (assessing the plaintiff's individual circumstances against the WPATH's standard of care); *see also* 774 F.3d 63 at 90 (considering the plaintiff's individual circumstances against the WPATH's standard of care recommendations); THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (2011) (providing clinical treatment recommendations for gender dysphoria).

> The World Professional Association for Transgender Health (WPATH) is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for

analysis in this manner when it reviewed only the WPATH's standard of care and Edmo's individual medical circumstances when it reached its decision.[143] The *Edmo* approach correctly prioritizes the judgment of the medical community at large, including the medical professionals who understand an individual's specific medical needs and circumstances.[144]

While judicial precedent regarding access to hormone therapy is unequivocal, the stance on gender-affirming surgery remains less defined.[145] Despite disparities between the *Edmo* and *Gibson* rulings indicating a lack of uniformity among Circuit Courts regarding gender-affirming care in correctional settings, it remains uncertain whether other Circuits will align with the Fifth or Ninth Circuit's perspective.[146] This factor is not as strong for favoring recognizing claims for gender-affirming surgery, unlike the legislative landscape discussed previously.[147] Nonetheless, the precedent concerning access to hormone therapy and the Ninth Circuit's decision suggest that this aspect will likely become more favorable as more courts grapple with this issue.[148]

C. Public Attitudes

When evaluating the evolving standards of decency, courts may also refer to public attitudes.[149] Public opinion presents a more complex aspect compared to legislation and judicial precedent, potentially remaining neutral or even hindering the application of standards.[150] Based on multiple lines of argument to consider (public opinion toward prisoners receiving medical care, public opinion toward transgender individuals, and public opinion toward transgender individuals' healthcare access),

> transgender health . . . and the main function[] of WPATH is to promote the highest standards of health care for individuals.

Id.

143. *See* 935 F.3d 757 at 794.

144. *See* 429 U.S. 97 at 106 (providing a framework for assessing whether medical care in prisons falls below the constitutional minimum); 935 F.3d 757 at 794 (emphasizing the importance of medical evidence in determining the constitutionally adequate standards of care).

145. *See supra* note 136 and accompanying text; compare Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) with Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014), and Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019).

146. *See* 935 F.3d 757 at 795; *see also* 920 F.3d 212 at 223.

147. *See supra* Section III.A.

148. *See* 935 F.3d 757 at 795.

149. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (looking to "objective indicia that reflect the public attitude toward a given sanction").

150. *See* Thompson v. Oklahoma, 487 U.S. 815, 865-69 (1987) (Scalia, J., dissenting).

this factor appears to ultimately lean toward neutrality or slight positivity.[151]

1. Public Opinion Toward Inmates Receiving Healthcare

The public generally lacks prioritization for ensuring adequate healthcare for incarcerated individuals, and it's unlikely this sentiment will change,[152] as constitutional guarantees cannot be disregarded simply because a marginalized group asserts their rights.[153] One obstacle for any healthcare claim made by prisoners is the belief held by some Americans that inmates should not receive the same level of healthcare as those who are not incarcerated.[154] Much of the discussion centers around the cost of healthcare in prisons, which is funded by taxpayers.[155] Some perceive providing proper healthcare to inmates as unfair, particularly when compared to the quality of medical treatment or lack thereof received by non-incarcerated individuals.[156] It's improbable that gender-affirming surgeries would significantly increase spending on prison healthcare, as the cost of such surgeries is comparable to or even less than that of other medical care and surgeries routinely provided to prisoners.[157] For instance, the expenses incurred in litigating *Edmo* demonstrate the lack of persuasiveness in cost arguments.[158] It is ironic that litigation cost the Illinois Department of Corrections $2,631,593 to litigate Edmo's claim of

151. *See* discussion *infra* Section III.C.

152. *See* Steve Coll, *The Jail Healthcare Crisis*, NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis (noting that historically, significant advancements in civil rights have typically followed a moral awakening within at least a vocal minority of the public, yet the advocacy for an improved ethic of prison medicine remains largely confined to a limited body of specialized literature).

153. *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002).

154. *See* Norval Morris, *Minimum Standards for Medical Services in Prisons and Jails in* MEDICAL CARE OF PRISONERS AND DETAINEES 37, 37 (Associated Scientific Publishers, 1973).

155. *See* Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care,* 63 VA. L. REV. 921, 963 (1977); Office of Development, Testing, and Dissemination, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, and United States Department of Justice, *Health Care in Correctional Institutions—MANUAL 4* (1979) [hereinafter Manual 4].

156. *See*, Manual 4, *supra* note 155.

157. *See* Fields v. Smith, 653 F.3d 550, 555-56 (7th Cir. 2011) (emphasizing that while gender-affirming surgery is expensive, other surgeries such as a $37,000 coronary bypass surgery and a $32,000 kidney transplant, both paid for by the DOC, are even more expensive, and refusing to provide gender-affirming care may ultimately lead to additional costly treatments for prisoners with gender dysphoria).

158. Edmo v. Idaho Dep't of Corr., No. 1:17-cv-00151-BLW, 2022 U.S. Dist. LEXIS 207537, at *39 (D. Idaho Sep. 30, 2022).

cruel and unusual punishment, especially considering that Edmo's surgery was estimated to cost between $20,000 and $30,000.[159]

2. Public Opinion Toward Transgender Individuals

Although societal views on transgender rights are diverse, those rights have evolved over the past decade, resulting in increased visibility and acceptance.[160] However, transgender individuals still confront discrimination and mistreatment, as their legal rights remain heavily politicized in American society and media.[161] Yet, despite this polarization, across various policy areas, Americans show support for transgender rights, with a majority expressing positive attitudes and beliefs toward transgender individuals, as well as perceiving an overall increase in societal acceptance of transgender people, which is seen as a positive trend.[162] For example, a majority of American adults "favor laws that would protect transgender individuals from discrimination in jobs, housing and public spaces such as restaurants and stores."[163]

Although a majority of Americans show support for transgender rights, there is "an unprecedented surge in attacks against trans people,"[164]

159. *See* Amanda Peacher & James Dawson, *Court Says Idaho Must Provide Gender Confirmation Surgery To Transgender Inmate*, NPR (Aug. 23, 2019), https://www.npr.org/2019/08/23/753788697/court-says-idaho-must-provide-gender-confirmation-surgery-to-transgender-inmate.

160. *See* Daniel Greenberg, Maxine Najle, Natalie Jackson, Oyindamola Bola, & Robert P. Jones, *America's Growing Support for Transgender Rights*, PRRI (June 10, 2019), https://www.prri.org/research/americas-growing-support-for-transgender-rights/ (noting that sixty-two percent of Americans say they have become more supportive of transgender rights in the past five years).

161. *See 2019 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU INVESTIGATION (2019), https://ucr.fbi.gov/hate-crime/2019/topic-pages/tables/table-1.xls (last visited Apr. 1, 2024). (Noting 198 instances of bias motivated violence against transgender individuals in 2019); Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing In States Across the Country*, Human Rights Campaign (May 23, 2023), https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country (discussing the various bills that have been introduced in state legislatures across the country).

162. Winston Luhur, Taylor Brown, & Andrew Flores, *Public Opinion of Transgender Rights in the United States*, WILLIAMS INSTITUTE 1, 10 (Aug. 2019), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-US-Aug-2019.pdf.

163. *See* Kim Parker, Juliana Menasce Horowitz, & Anna Brown *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RESCH. CTR. (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/.

164. Kendall Ciesemier & Chase Strangio, *Why and How Trans Hate is Spreading*, AM. C. L. UNION (Apr. 27, 2023), https://www.aclu.org/podcast/why-and-how-trans-hate-is-spreading.

which is fueled by "misconceptions and lies."[165] The use of misinformation and disinformation, which are forms of propaganda, is "central to processes of contemporary political communications"[166] by helping to maintain "existing power structures,"[167] such as white supremacy, heteronormativity, or patriarchy.[168] "When transgender health misinformation is mobilized for political ends, it motivates anti-transgender policy and influences individual-level attitudes, opinions, and behaviors."[169] For example, Arkansas's Save Adolescents from Experimentation (SAFE) Act, which bans transition-related care for trans people under eighteen, was fueled by a disinformation campaign that used several types of disinformation,

> including claims that the care provided to trans youth constitutes unethical experimentation on children's developing bodies, that trans youth are likely to desist in adulthood and so providing them irreversible care as youth is unethical, and that the costs of providing transition-related care is a burden on insurers and the state.[170]

Beyond getting the bill passed, the disinformation campaign "made it impossible to receive the care necessary to receive legal name and gender-marker changes, . . . increased the risk of exposure to discrimination in housing, employment, education, and public accommodations, and it laid the groundwork for further legislation targeting trans people both within Arkansas and in other states."[171]

The types of disinformation used in the SAFE Act campaign has been invalidated by actual facts.[172] The claim that "the care provided to trans youth constitutes unethical experimentation on children's developing bodies"[173] is refuted by the fact that hormone replacement

165. *See Myths and Facts: Battling Disinformation About Transgender Rights*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/myths-and-facts-battling-disinformation-about-transgender-rights.

166. Thomas J. Billard, *The Politics of Transgender Health Misinformation*, 41 POL. COMMC'N 344, 348 (2024).

167. Madhavi Reddi, Rachel Kuo, & Daniel Kreiss, *Identity Propaganda: Racial Narratives and Disinformation*, 25 NEW MEDIA & SOC'Y 2201, 2202 (2021).

168. *Id.* at 2205.

169. *See* Billard, *supra* note 166, at 348.

170. *Id.*; Ark. Code Ann. §§ 20-9-1501 to 20-9-1504.

171. *See* Billard, *supra* note 166, at 348.

172. *Id.* at 346-48. The common types of misinformation include "definitional information, which is misinformation about what transition-related health care actually is and what it does," misinformation about the accessibility of trans care, misinformation about the safety of trans care, misinformation about the cost of trans care, misinformation about the frequency with which people detransition, and misinformation about the cause of trans identity. *Id.*

173. *Id.* at 348.

therapy, "among other kinds of transition-related care, is medically safe and consists of treatments routinely provided to cisgender (i.e., non-transgender) patients."[174] The claim that "trans youth are likely to desist in adulthood"[175] is debunked by the fact that "as few as 2.5% of youth who identify as transgender in childhood (including those who never receive transition-related care) go on to later identify as cisgender."[176] The claim that "the costs of providing transition-related care is a burden on insurers and the state"[177] is rebutted by the fact that "the cost to provide all members transition-related care equates to $0.22 per month per member (PMPM) for military-provided insurance and between $0.016 and $0.06 PMPM for private insurance."[178]

Even though there is seemingly a prevalence of opposition to transgender rights in the media, it is powered by disinformation and because the misinformation used is false, it cannot be trusted; therefore, the argument that there is a prevalence of opposition to transgenders in the media is not convincing.

3. Public Opinion Toward Transgender Individuals' Access to Gender-Affirming Care

The majority of Americans support adults accessing "any kind of care designed to support and affirm their gender identity, including therapy, consultations with doctors, hormones or other medication, and surgery."[179] However, only thirty-nine percent of Americans support minors having the same access.[180] However, the topic for this Comment does not focus on minors, so this Comment does not delve into public opinion towards gender-affirming care for minors.

D. Scientific and Statistical Data

Since the factors lean toward the fact that denial of gender-affirming care violates the contemporary standards of decency, scientific and statistical data about the seriousness of the potential harm and the likelihood that the alleged harm will injure the prisoner's health must be

174. *Id.* at 346.
175. *Id.* at 348.
176. *Id.* at 347.
177. *Id.* at 348.
178. *Id.* at 346.
179. Orion Rummler, *How Personal Relationships Influence Views on Gender-Affirming Care*, THE 19TH (Sept. 18, 2023), https://19thnews.org/2023/09/poll-gender-affirming-care-transgender-personal-relationships/.
180. *Id.*

provided.[181] This data weighs heavily in favor of recognizing gender-affirming surgery claims.[182] Medical care, continually evolving and improving with the availability of information, has seen significant progress and reached a consensus within the past decade regarding gender identity and transgender healthcare.[183]

Once perceived as cosmetic, and thus unnecessary, gender-affirming care is now recognized as medically necessary according to medical consensus.[184] Numerous insurers now provide coverage for transgender-related healthcare.[185] Additionally, the WPATH Standards of Care, the globally acknowledged guidelines for transgender healthcare, assert that gender-affirming surgery is medically essential for alleviating symptoms in transgender individuals with gender dysphoria.[186]

The cases in Section II.B highlight the severe consequences of inadequate healthcare or an omission of mental healthcare.[187] In cases like *Edmo*, *Gibson*, and *Kosilek*, plaintiffs resorted to self-castration and multiple suicide attempts due to their inadequately treated gender dysphoria, underscoring the severity of their symptoms and the growing awareness surrounding this condition.[188] This underscores the gravity of

181. *See Helling v. McKinney*, 509 U.S. 25, 36 (1993).

182. *See* discussion *infra* Section III.D.

183. Sophia Shapiro & Tia Powell, *Medical Intervention and LGBT People: A Brief History in* TRAUMA, RESILIENCE, AND HEALTH PROMOTION IN LGBT PATIENTS, 15, 16 (Kristen L. Eckstrand & Jennifer Potter eds., 2017); *see Edmo v. Corizon, Inc*., 935 F.3d 757, 769 (9th Cir. 2019) ("[T]he medical consensus is that GCS is effective and medically necessary in appropriate circumstances. The WPATH Standards of Care which are endorsed by the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America recognize this fact.").

184. See Mallory Bersi, *Transgender Healthcare "Is Not Cosmetic or Elective. It is Essential,"* BOSTON U. SCH. PUB. HEALTH (Oct. 7, 2021), https:// www.bu.edu/sph/news/articles/2021/transgender-healthcare-is-not-cosmetic-or-elective-it-is-essential/.

185. *See* McCauley & Brinkley-Rubinstein, *supra* note 4, at 159.

186. *See* 935 F.3d 757 at 770 (discussing the WPATH Standards of Care indicate that while some individuals may express their gender identity without surgery, for others, surgery is crucial to alleviate gender dysphoria).

187. See discussion *supra* Section II.B.

188. *See* 935 F.3d 757 at 793 (explaining that during Edmo's evaluation for gender-affirming surgery, her doctor was aware that she had made several attempts to castrate herself and had tried to commit suicide); *see also* Gibson v. Collier*,* 920 F.3d 212, 217 (5th Cir. 2019) (explaining that while undergoing hormone therapy treatment, Gibson had made attempts at both suicide and self-castration); Kosilek v. Spencer, 889 F. Supp. 2d 190, 197 (D. Mass. 2012)

potential harm to transgender inmates, aligning it with other serious health concerns.[189] As affirmed in *Edmo*, there exists a clear medical consensus supporting the recognition of claims for gender-affirming surgery.[190]

E. Adopting the Edmo *Holding*

The potential for courts to rule favorably on claims regarding gender dysphoria among transgender prisoners, in accordance with evolving standards of decency, hinges on both the judicial stance and societal perspectives in the United States.[191] Numerous courts have already recognized treatment for gender dysphoria as constituting a serious medical necessity under the Eighth Amendment.[192] Moreover, there has been a significant increase in state and local statutes aimed at safeguarding transgender rights over the past two decades.[193] However, public opinion remains divided on this issue, rendering it largely neutral in the context of legal standards.[194] Additionally, advancements in medical understanding have led to the recognition of gender dysphoria as a distinct and severe

(explaining that while incarcerated, Kosilek has made two attempts to castrate herself and has also attempted suicide).

189. Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated on other grounds by* Sandin v. Conner, 515 U.S. 472 (1995) (stating that a serious medical need can relate to "physical, dental and mental health").

190. *See* 935 F.3d 757 at 795 ("[T]he medical consensus is that GCS is effective and medically necessary in appropriate circumstances. The WPATH Standards of Care which are endorsed by the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America recognize this fact.").

191. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

192. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019); Rosati v. Igbinoso, 791 F.3d 1037, 1039-40 (9th Cir. 2015); Kosilek v. Spencer, 774 F.3d 63, 86 (1st Cir. 2014); De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013); Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011); Allard v. Gomez, 9 F. App'x 793, 794 (9th Cir. 2001); White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1187 (N.D. Cal. 2015); Konitzer v. Frank, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010).

193. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Apr. 1, 2024).

194. Daniel Greenberg, Maxine Najle, Natalie Jackson, Oyindamola Bola, & Robert P. Jones, *America's Growing Support for Transgender Rights*, PRRI (June 10, 2019), https://www.prri.org/research/americas-growing-support-for-transgender-rights/ (noting that sixty-two percent of Americans say they have become more supportive of transgender rights in the past five years).

condition necessitating adequate treatment.[195] Taken together, these factors should compel courts to rule in favor of transgender inmates' claims for gender-affirming surgery and come to the same conclusion as the Ninth Circuit did in *Edmo*.[196]

IV. CONCLUSION

Although significant changes have occurred in the recognition of legal rights within the LGBTQ+ community in recent years, discrimination still remains prevalent in various aspects of the lives of LGBTQ+ individuals, with transgender people particularly affected.[197] In prison, transgender individuals face issues such as inadequate housing, rampant sexual assault, and inadequate healthcare, and transgender inmates suffer when these issues are not addressed.[198] To protect the health and bodily autonomy of transgender prisoners, the courts must allow gender-affirming surgery claims under the cruel and unusual punishment clause of the Eighth Amendment.[199]

The rigorous deliberate indifference standard set forth by the Eighth Amendment's Cruel and Unusual Punishment Clause already imposes a significant hurdle for incarcerated individuals in their pursuit of adequate healthcare within prisons.[200] Nevertheless, given the dynamic nature of the Eighth Amendment, courts retain the capacity to reassess their perspectives on prison conditions in light of evolving standards of decency.[201] Presently, special consideration is warranted for Eighth Amendment claims made by transgender prisoners.[202] With notable advancements in both societal attitudes and medical understanding, courts

195. *See* Shapiro & Powell, *supra* note 183, at 19 (noting that the LGBT and medical communities are in an evolving relationship).

196. *See* Helling v. McKinney, 509 U.S. 25, 36 (1993); *see also* Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (holding that prison officials were deliberately indifferent to a transgender inmate's needs in violation of the Eighth Amendment when they refused to provide gender-affirming surgery to that transgender inmate).

197. *See* Alessi & Martin, *supra* note 3, at 3.

198. *See* McCauley & Brinkley-Rubinstein, *supra* note 4, at 155-160.

199. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (stating that modern standards of decency have codified the view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.") (citing Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

200. *See* discussion *supra* Section II.A.

201. *See supra* notes 37-43 and accompanying text.

202. *See* discussion *supra* Part III.

are increasingly poised to render favorable judgments regarding the medical claims of transgender prisoners under the Eighth Amendment.[203]

203. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").