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Freeze-Frames and Blanket Bans: The Unconstitutionality of Prisons' Denial of Gender Confirmation Surgery to Transgender Inmates

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Comments

Freeze-Frames and Blanket Bans: The Unconstitutionality of Prisons' Denial of Gender Confirmation Surgery to Transgender Inmates

Aranda Stathers*

Abstract

It is long established that the Eighth Amendment's prohibition against imposing cruel and unusual punishments requires prisons to adequately address their inmates' medical needs. Inmates identifying with the LGBTQ+ community are not exempt from this constitutional mandate. Trans inmates with gender dysphoria require specific treatment, including, but not limited to, gender confirmation surgery. While courts acknowledge that prisons owe a duty to provide some transition-related care, the extent of that duty remains contested. With no guidance from Congress or the Supreme Court, the constitutionality of prisons' denial of gender confirmation surgery is in the hands of the circuit courts, which have come to differing conclusions.

This Comment examines the current legal landscape for inmates seeking to obtain gender confirming surgery under the Eighth Amendment. This Comment addresses not only the medi-

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cal necessity of gender confirmation surgery but also whether the current guidelines outlining transition-related care are actually helping trans inmates obtain medically necessary gender confirmation surgery. Lastly, this Comment discusses the progress and trajectory of LGBTQ+ rights and the implications that it may have on trans inmates' ability to obtain access to gender confirmation surgery through the Eighth Amendment in the future.

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INTRODUCTION

Today, approximately 1.4 million adults in the United States identify as transgender ("trans").[1] Nearly 1 in 6 trans people (16 percent) have been incarcerated at some point in their life—far

1. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. 3 (2016), https://bit.ly/3CJF9bv [https://perma.cc/VB8V-8AN4]; *see* Am. Psych. Ass'n., *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (3rd ed. 2014), https://

more than the general U.S. population.[2] This rate is further increased in minority communities within the trans community. Among Black trans people, 47 percent have been incarcerated at some point in their lives.[3] Studies attribute these rates to the disproportionately high rate of poverty, which in turn feeds into other disparities.[4] Trans people experience homelessness and discrimination at rates higher than the rest of the U.S. population.[5] Shelters

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bit.ly/34fgCyV [https://perma.cc/3N7U-2ELG]. The American Psychological Association defines the term transgender as follows:

> *Transgender* is an umbrella term for persons whose gender identity, *gender expression,* or behavior does not conform to that typically associated with the sex to which they were assigned at birth. *Gender identity* refers to a person's internal sense of being male, female or something else; *gender expression* refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics.

Id. at 1 (emphasis in original).

2. Nat'l Ctr. for Transgender Equal., *A Blueprint For Equality: Prison and Detention Reform* 1 (2012), https://bit.ly/3q8CHaW [https://perma.cc/B9PH-WRVG]; *see* Thomas P. Ehrlich, *How Many Americans Have Been Incarcerated?*, EHRLICH L. OFFS., https://bit.ly/3AlKGF1 [https://perma.cc/6Z53-S2CW] (last visited Sept. 22, 2022) ("In the United States, 743 of every 100,000 people is incarcerated . . . [and] 3% of the population has been to jail or prison at one time."). The current U.S. population is estimated to be 333,022,958. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU (Aug. 25, 2022), https://bit.ly/3AKLncA [https://perma.cc/A26A-39Z4].

3. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), https://bit.ly/2Yf89Zz [https://perma.cc/U3TP-NXH4].

4. *See* SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 140 (2016), https://bit.ly/3xOBgjT [https://perma.cc/3C3T-NTWL] [hereinafter JAMES]. Out of nearly 28,000 trans respondents, 29 percent reported living in poverty compared to 12 percent of the general, cis-gendered U.S. population. *Id.* at 12. A major contributor to this is likely that 15 percent of trans people are unemployed, compared to 5 percent of the U.S. population. *Id.* Respondents with disabilities also faced higher rates of economic instability with 24 percent unemployed. *Id.* at 6. Among trans people of color, Latinx (43 percent), American Indian (41 percent), multiracial (40 percent), and Black (38 percent) respondents were most likely to live in poverty. *Id*.

5. *See id.* at 79. Thirty percent of respondents experienced homelessness at some point in their lifetime. *Id.* at 178. Twenty-three percent experienced some form of housing discrimination in the past year, such as being evicted from their home or denied a home or apartment because of being trans. *Id.* at 176. The homelessness rate was substantially higher among respondents whose immediate family kicked them out of the house, with nearly three-quarters (74 percent) experiencing homelessness. *Id.* at 178. The homelessness rate was also nearly twice as high among respondents who have done sex work (59 percent) and those living with HIV (59 percent), as well as respondents who have lost their job because of their gender identity or expression (55 percent). *Id.* Trans women of color, including American Indian (59 percent), Black (51 percent), multiracial (51 percent), and Middle Eastern (49 percent) women also experienced disproportionately high rates of homelessness. *Id.*

designed for the homeless often are not safe places for trans people.[6] Due to their increased risk of homelessness and housing insecurity, trans people are more to likely have negative interactions with police.[7] Although every case is unique, studies show trans people share common experiences that put them at a higher risk for violence, discrimination, and incarceration.[8]

Within the U.S. prison system, trans inmates face serious barriers to transition-related medical care while incarcerated.[9] Serving as the gatekeeper of their medical care, trans inmates often turn to

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6. *See id.* at 13. "[Twenty-six percent] of those who experienced homelessness in the past year avoided staying in a shelter because they feared being mistreated as a transgender person." *Id.* "Those who did stay in a shelter reported high levels of mistreatment [with 70 percent of] respondents who stayed in a shelter [ ] report[ing] some form of mistreatment, including being harassed, sexually or physically assaulted, or kicked out because of being transgender." *Id.*

7. *Id.* at 184–89. Fifty-eight percent experienced some form of mistreatment by police including being verbally harassed, purposefully misgendered, physically assaulted, or sexually assaulted. *Id.* at 14. Fifteen percent of Black respondents reported that they were physically assaulted by police, while seven percent reported that they were sexually assaulted by police. *Id.* at 187; *see also* Amanda Arnold, *A Guide to the 'Walking While Trans' Ban*, THE CUT (July 22, 2020), https://bit.ly/31tnTtv [https://perma.cc/UJ27-DQZV]. New York's "Walking While Trans Ban" was a colloquial name for the "Loitering for the Purpose of Prostitution" law enacted in 1976. *Id.* Until its repeal in 2021, advocates argued that the Ban disproportionately targeted and detained trans women of color. *Id.* Ostensibly, the law was meant to target sex workers; however, "it allow[ed police] to arbitrarily arrest and detain New Yorkers for simply walking around or standing on the street." *Id.* The Legal Aid Society, in a 2016 class-action lawsuit challenging the constitutionality of the law listed examples of women who have been targeted, such as "women assumed to be loitering for prostitution because they were wearing a 'short dress,' 'a skirt and high heels,' 'tight black pants,' or 'a black dress.'" *Id.*

8. *See Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN (Apr. 8, 2021), https://bit.ly/3plNHzT [https://perma.cc/SFC2-SQ85]. In 2021, at least 57 trans or gender non-conforming people were fatally shot or killed by other violent means. *Id.* Often, these abhorrent acts of violence go unreported or misreported. *Id.* Trans people of color and trans women are disproportionately affected, with nearly three out of four of all lethal anti-LGBT hate crimes committed against trans women and girls. Transgender Educ. Servs. of Utah, *Anti Violence*, https://bit.ly/3v8vGZi [https://perma.cc/KP4F-6UWM] (last visited July 22, 2022).

9. *See* D. MORGAN BASSICHIS, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 27 (Dean Spade ed., 2007), https://bit.ly/34iLAq2 [https://perma.cc/6ASM-7JXZ] (finding that compared to other incarcerated populations, trans and gender non-conforming communities have been disproportionately subject to residing in ill-equipped correctional facilities and are thus in disproportionate need of medical services in prison); *see also* Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 JAMA SURGERY 611, 613 (2021). While often referred to in its singular form, gender confirmation surgery (also referred to as *gender affirmation surgery*) can include several types of surgeries designed to support and affirm an individ-

their respective prisons for hormone therapy, psychiatric treatment, and other transition-related care, including gender confirmation surgery, to alleviate their gender dysphoria, the medical diagnosis necessary to be eligible for gender confirming surgery.[10] However, prison physicians and officials commonly block inmates' access to such treatments through restrictive policies such as "freeze-frames" and "blanket bans" on transition-related care.[11] Without treatment, gender dysphoria can lead to debilitating distress, depression, impairment of function, substance use, self-mutilation to alter one's genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.[12] To overcome these restrictive policies, trans in-

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ual's gender identity when it conflicts with the gender they were assigned at birth. *Id.* at 612.

10. *See id.* at 28; *see also* Dallas Ducar, *Giving gender-affirming care: 'gender dysphoria' diagnosis should not be required,* STAT (Mar. 11, 2022), https://bit.ly/3KnzpZx [https://perma.cc/4Z33-249P]. In the United States, "gender dysphoria" is the medical diagnosis required to receive medically necessary gender confirmation surgery and other transition-related medical care. *Id.* However, the diagnosis does not apply to all trans people, as not all seek surgical or medical intervention. *Id.*; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (5th ed. 2013). [hereinafter DSM-5] The DSM-5 defines gender identity and dysphoria as follows:

> *Gender identity* refers to an individual's self-perception as male or female. The term *gender dysphoria* denotes strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex. The terms gender identity and gender dysphoria should be distinguished from the term sexual orientation.

Id. (emphasis in original).

11. *See* Morgan S. Mason, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 VAND. L. REV. EN BANC 157, 172 (2018). The Federal Bureau of Prisons made progress in 2011, with its repudiation of "freeze-frame" policies that halted treatment for the inmate at the level of treatment they received prior to incarceration. *Id.*; *but see* Laura R. Givens, Note, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 584 (2013). "Florida's policy [ ] states that transgender inmates do not 'present [any] medical necessity for treatment.'" Laura R. Givens, Note, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 584 (2013). The policy calls for a blanket ban on transition-related care by ordering the discontinuation of any transition-related treatment that trans inmates received prior to incarceration, such as hormone therapy." *Id.*; *see* ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, & GENDER NONCONFORMING PEOPLE 68 (7th ed. 2012), https://bit.ly/2Y4UCDL [https://perma.cc/9K93-XHVU] [hereinafter WPATH STANDARDS] (finding that the "consequences of abrupt withdrawal of hormones or lack of initiation of hormone therapy when medically necessary include a high likelihood of negative outcomes such as surgical self-treatment by autocastration, depressed mood, dysphoria, and/or suicidality").

12. *See* discussion *infra* Section II.A.3.

mates have sought recourse through the Eighth Amendment of the U.S. Constitution, asserting that the prison's failure to provide transition-related medical care violates their Eighth Amendment right to be free from cruel and unusual punishment.[13]

The Eighth Amendment limits the government's ability to impose disproportionately harsh punishments on persons accused or

13. *See* U.S. CONST. amend. VIII. Imprisoned persons seeking to challenge prison officials' decisions implicating their constitutional rights may bring either a § 1983 or a *Bivens* action. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971) (recognizing a similar cause of action to § 1983 and allowing claims against federal actors). The Eighth Amendment is not the only path to a remedy. The state-created-danger doctrine is a type of claim through which a plaintiff may allege a constitutional violation by the state under the Due Process Clause of the Fourteenth Amendment. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) (holding that while the government has no affirmative duty to protect people from privately inflicted harms, it does have a duty to protect a person if they are physically in government custody or if the government is responsible for creating the danger). The culpability standard for a violation of the Due Process Clause of the Fourteenth Amendment is that the behavior "shocks the conscience" of the court. *See* Rochin v. California, 342 U.S. 165, 172 (1952). To prevail on an Eighth Amendment claim of inadequate medical care, inmates must show that officials treated them with "deliberate indifference to serious medical needs." *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976). This Comment reasons that a plaintiff has a greater likelihood of success with an Eighth Amendment claim due to the fact that the Fourteenth Amendment's "shocks the conscience" threshold is greater than the Eighth Amendment's "deliberate indifference" threshold and is wholly subjective in nature. *See* United Artists Theatre Cir. v. Township of Warrington, 316 F.3d 392, 399 (3d Cir. 2003) (quoting Sacramento v. Lewis, 523 U.S. 833, 850 (1998)) (stating that whether conduct "shocks the conscience" is a highly individualized inquiry because "[what] shocks in one environment may not be so patently egregious in another"); Foster v. California, 394 U.S. 440, 450 (1969) (Black, J., dissenting) (arguing that the "shocks the conscience" test invites the Court to make its own rules based on personal opinions of individual Justices). Additionally, the Supreme Court's recent string of cases portends that, moving forward, such claims will likely be unsuccessful due to their inability to be rooted in 18th-century common law and history. *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2235 (2022) (holding that the Due Process Clause of the Fourteenth Amendment guarantees some substantive rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in the Nation's history and tradition," and be "implicit in the concept of ordered liberty"); *Dobbs*, 142 S.Ct. at 2301 (THOMAS, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents . . . [b]ecause any substantive due process decision is 'demonstrably erroneous.'"); *see also* Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022) (rejecting the *Lemon* test, which called for an examination of a law's purposes, effects, and potential for entanglement with religion, and instead holding that the Establishment Clause must be interpreted by "reference to historical practices and understandings" that reflect the understanding of the Founding Fathers); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111, 2127 (2022) (holding that means-end scrutiny does not apply in the Second Amendment context, rather the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms).

convicted of a crime.[14] In *Trop v. Dulles*,[15] the Supreme Court held that the Eighth Amendment is not static, rather courts "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16] In *Estelle v. Gamble*,[17] the Court held that a healthcare provider's mere negligence in the treatment of incarcerated persons does not violate the Eighth Amendment.[18] To give further clarity to the lower courts, the Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment," and effectively established the deliberate indifference standard used today to evaluate Eighth Amendment claims.[19]

The test the Court established in *Estelle* is a two-prong test consisting of both an objective and subjective prong.[20] Under the objective prong, the inmate must be incarcerated under conditions posing a substantial risk of serious harm.[21] Under the subjective prong, the inmate must show that the prison official acted with "deliberate indifference" to the inmate's health or safety.[22] Failure to satisfy either prong of the *Estelle* test makes a plaintiff unable to proceed with an Eighth Amendment claim.

In *Farmer v. Brennan*,[23] the Court clarified the subjective prong of the *Estelle* test by articulating what type of conduct rises to the level of "deliberate indifference."[24] The Court held that a prison official only acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or

14. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

15. 356 U.S. 86 (1958).

16. *Id.* at 101.

17. 429 U.S. 97 (1976).

18. *Id.* at 107–08.

19. *Id.* at 104. Some factors that courts have considered in determining whether a "serious medical need" is at issue are: "(1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' (2) whether the medical condition significantly affects daily activities, and (3) 'the existence of chronic and substantial pain.'" Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003).

20. *See id.*

21. *See id.* at 106.

22. *See id.* A prison official demonstrates "deliberate indifference" if they recklessly disregard a substantial risk of harm to the prisoner. Farmer v. Brennan, 511 U.S. 825, 836 (1994). This is a higher standard than negligence and requires the official to know of and disregard an excessive risk of harm to the prisoner. *See id.* at 837.

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

24. *Id.* at 837.

safety."[25] The official must both be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [also] draw the inference."[26] Additionally, the course of treatment, or lack thereof, must have been criminally reckless or worse.[27] The Court held that anything less, such as an official's negligent failure to alleviate a significant risk that he should have perceived but did not, fails to rise to the level of deliberate indifference.[28] With the Court's clarification of *Farmer*, the subjective prong of the *Estelle* test creates a steep climb for potential claimants because it requires a plaintiff to demonstrate knowledge of a prison official's mindset and internal motivations.[29]

While courts acknowledge prisons owe a duty to provide some transition-related care, the extent of that duty remains contested, specifically the duty to provide gender confirmation surgery.[30] With no guidance from the U.S. Congress or the Supreme Court, the constitutionality of prisons' denial of gender confirmation surgery is in the hands of the lower courts, which have come to differing conclusions.[31] This Comment examines the current legal landscape for inmates seeking to obtain gender confirmation surgery under the Eighth Amendment and addresses the medical necessity of gender confirmation surgery. It looks at whether the current guidelines outlining transition-related care are helping trans inmates obtain medically necessary gender confirmation surgery or if they are a well-intentioned barrier. Lastly, this Comment addresses the progress and trajectory of the LGBTQ+ rights movement and the implications that it may have on trans inmates' constitutional right to gender confirmation surgery in the future.

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25. *Id.*
26. *Id.*
27. *See id.* at 839–40.
28. *Id.* at 838.
29. Sarah Ortlip-Sommers, *Living Freely Behind Bars: Reframing the Due Process Rights of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 369 (2021).
30. *See* discussion *infra* Section II.B.
31. Press Release, Nat'l Ctr. for Lesbian Rts., U.S. Supreme Court Declines to Review Federal Court Ruling Ordering Medically Necessary Care for Transgender Prisoner in Idaho (Oct. 13, 2020), https://bit.ly/3pGESRX [https://perma.cc/KN7R-4E9A].

I. BACKGROUND

A. Gender Dysphoria

1. The Diagnostic and Statistical Manual of Mental Disorders

The first step for trans inmates to receive transition-related medical care from their prison facilities is to be formally diagnosed with gender dysphoria. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5) is the handbook widely used by the medical community in the United States to diagnose psychiatric illnesses.[32] According to the DSM-5, to be diagnosed with gender dysphoria, the feeling of incongruence between one's experienced and expressed gender and their gender assigned at birth must last at least six months.[33] Additionally, the feeling of incongruence must manifest in at least two of the following ways:

> (1) A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics);
> (2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics);
> (3) A strong desire for the primary and/or secondary sex characteristics of the other gender;
> (4) A strong desire to be of the other gender (or some alternative gender different from one's assigned gender);
> (5) A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender); or
> (6) A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).[34]

Treatment for gender dysphoria depends upon its severity.[35] For some individuals with severe gender dysphoria, hormone therapy is insufficient, and surgery is medically necessary as it is the

32. *See* State v. Shannon, 20 N.E.2d 510, 512 (N.Y. 2012) (verbing the DSM as "an authoritative text widely used in the mental health profession").

33. *See* DSM-5 *supra* note 10, at 452.

34. *Id.*

35. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 4 (2016), https://bit.ly/3Mt5kZi [https://perma.cc/YQ36-BZ8F] ("Transitioning is the time period during which a person begins to live according to their gender identity . . . . [S]ome people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body better reflect the gender they know themselves to be.").

only effective treatment to alleviate the dysphoria.[36] The World Professional Association for Transgender Health (WPATH) has provided treatment guidelines for incarcerated individuals to medical practitioners since 1998.[37]

2. WPATH Standards of Care

WPATH claims "to promote the highest standards of health care for transgender individuals" through the promulgation of Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("The Standards").[38] Founded in 1979, WPATH is an organization designed to offer a unified voice to health care providers who oversee the care of trans patients.[39] The Standards are based on "the best available science and expert professional consensus," and are routinely updated. WPATH acknowledges that most of the research and experience in this field comes from a Western Hemisphere perspective and may require adaptation for other regions of the world.[40] Many of the major medical and mental health groups in the United States recognize the Standards as representative of the consensus of the medical and mental health communities regarding the appropriate treatment for trans and gender-diverse individuals.[41]

The Standards indicate that options for psychological and medical treatment of gender dysphoria include: (1) "changes in gender expression and role," (2) "hormone therapy to feminize or masculinize the body," (3) "surgical changes of primary or secondary sex characteristics", and (4) "psychiatric treatment."[42] It is important to note that the trans experience is not uniform and not all trans people surgically transition.[43] The criteria put forth in the Standards for

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36. *See* WPATH STANDARDS, *supra* note 11, at 54.

37. *See* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018).

38. *See* WPATH STANDARDS, *supra* note 11, at 1.

39. *Id.*

40. *See id.* at 3.

41. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019) (including the American Medical Association; American Medical Student Association; American Psychiatric Association; American Psychological Association; American Family Practice Association; Endocrine Society; National Association of Social Workers; American Academy of Plastic Surgeons; American College of Surgeons; Health Professionals Advancing LGBTQ Equality; HIV Medicine Association; Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus; and Mental Health America).

42. *See* WPATH STANDARDS, *supra* note 11, at 9–10.

43. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* text accompanying note 35; *see also* Grant, *supra* note 3, at 26 ("[A]ppropriate medical treatment is highly dependent on an individual's ability to pay for it. The *desire* to medically

hormone therapy and surgical treatments for gender dysphoria are meant to serve as *guidelines* for clinicians.[44] The Standards "are intended to be flexible to meet the diverse health care needs of [trans] and gender-nonconforming people" and are intended to apply equally to incarcerated persons.[45] Individual health professionals and programs may, and are encouraged by the Standards to, modify the standards where appropriate and necessary.[46] WPATH acknowledges that clinical departures from the Standards may arise.[47] To account for these departures, the Standards state that these modifications "should be recognized as such, explained to the patient, and documented through informed consent for quality patient care and legal protection."[48] The purpose of this protocol is to "accumulate new data, which can be retrospectively examined to allow for the health care system and the [Standards] to evolve" as science and society evolve.[49] While WPATH emphasize the Standards' flexibility, the Standards firmly state that genital surgery should not be carried out until (1) patients reach the legal age of

transition and the *ability to afford* to do so are entirely different and should not be conflated or confused."); Jonathan Keith, *I'm a Surgeon Who Helps Transgender People Live the Way They Feel Inside*, USA TODAY (July 6, 2018, 6:00 A.M.), https://bit.ly/37ahWo5 [https://perma.cc/CYT4-34SJ]. In 2014, the Obama administration allowed "Medicare to cover gender confirming surgeries, reversing a ban that had been in place since 1981." *Id.* "The 2010 Affordable Care Act mandated equal treatment of the sexes, which translated into more private and Medicaid coverage for gender confirmation surgery as well." *Id.* "A Johns Hopkins Medicine study found that these surgeries increased four-fold between 2000 and 2014 as coverage increased." *Id.*

44. *See* WPATH STANDARDS, *supra* note 11, at 104.

45. *See id.* at 2, 67–68. The WPATH Standards apply equally to incarcerated persons and expressly state:

> Health care for transsexual, transgender, and gender-nonconforming people living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community. . . . All elements of assessment and treatment as described in the [Standards] can be provided to people living in institutions. Access to these medically necessary treatments should not be denied on the basis of institutionalization or housing arrangements. If the in-house expertise of health professionals in the direct or indirect employ of the institution does not exist to assess and/or treat people with gender dysphoria, it is appropriate to obtain outside consultation from professionals who are knowledgeable about this specialized area of health care.

Id.

46. *See id.* at 2.

47. *See id.* at 2 (identifying factors that may warrant a deviation from the Standards include a patient's unique anatomic, social, or psychological situation and health professionals' evolving method of handling a common situation, a research protocol, lack of resources, or the need for specific harm-reduction strategies).

48. *See id.*

49. *See id.* at 104.

majority to give consent for medical procedures in a given country and (2) patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity.[50]

For patients seeking transmasculine or transfeminine top surgery, the Standards recommends the following prerequisites to surgery:

(1) Persistent, well documented gender dysphoria;
(2) Capacity to make a fully informed decision and to give consent for treatment;
(3) Age of majority in a given country;
(4) If significant medical or mental health concerns are present, they must be well controlled; and
(5) Twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual).[51]

In addition to the above prerequisites, for patients seeking transmasculine or transfeminine bottom surgery, the Standards recommend that the individual live 12 continuous months in a gender role that is congruent with their gender identity.[52] While transitioning looks different for each person, for those suffering from severe gender dysphoria, gender confirmation surgery can be a lifesaving procedure.[53]

3. Impact of Gender Confirmation Surgery

Medical studies have increasingly documented that trans individuals experience higher levels of self-harm, anxiety, depression, suicidal ideations, and other mental health concerns compared to the general population.[54] The 2015 U.S. Transgender Survey found that "40 [percent] of respondents have attempted suicide in their lifetime . . . nearly 9 times the attempted suicide rate in the U.S. population [(4.6 percent)]."[55] A recent study analyzing the data

50. *See id.* at 21.
51. *See id.* at 59–60.
52. *See id.* at 60.
53. *See* discussion *infra* Section II.B.3.
54. *See* Tracy A. Becerra-Culqui et al., *Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers,* PEDIATRICS, May 2018, at 1, 7–9, https://bit.ly/3S7QEB6 [https://perma.cc/7DR6-2RGZ] (finding that trans and gender-nonconforming youth have a higher prevalence of anxiety, attention disorders, mental health diagnoses, suicidal ideation, and self-inflicted injuries compared to their cisgender counterparts); *see also Cisgender*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014) (defining cisgender as "a person whose gender identity corresponds with the sex the person had or was identified as having at birth").
55. *See* JAMES, *supra* note 4, at 5.

from the 2015 survey found that gender-confirming surgeries are associated with numerous positive health benefits.[56] The study compared the psychological distress, substance use, and suicide risk of trans people who underwent gender confirmation surgery with those of trans people who desired, but did not undergo gender confirmation surgery.[57] The study found that respondents who received one or more gender-confirming surgeries had a 42-percent reduction in the odds of experiencing psychological distress, a 35-percent reduction in the odds of tobacco smoking, and a 44-percent reduction in the odds of suicidal ideation.[58] The study also found that those who received all of the gender-confirming surgeries they needed had significant reductions in the odds of every adverse mental health outcome examined, including suicide attempts and substance abuse.[59]

Appropriate treatment for gender dysphoria, including gender confirmation surgery, can save lives.[60] While courts acknowledge prisons have a duty to provide some transition-related care, the extent of that duty remains contested.[61] Recently, the Ninth Circuit created a circuit split over whether denying a trans inmate gender confirmation surgery constitutes a violation of their Eighth Amendment right to be free from cruel and unusual punishment.[62]

B. Overview of Circuit Decisions

Until 2019, courts held that the denial of gender confirmation surgery to a trans inmate did not constitute an Eighth Amendment violation.[63] This section reviews the various circuit decisions regarding the medical necessity of gender confirmation surgery and the constitutionality of surgery denial.

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56. Almazan & Keuroghlian, *supra* note 9, at 612. The 2015 U.S. Transgender Survey is the largest dataset containing comprehensive information on the surgical and mental health experiences of trans and gender-diverse people. *Id.*

57. *Id.* at 613.

58. *Id.* at 615.

59. *Id.* at 615.

60. *See* discussion *supra* Section II.A.3.

61. *See* discussion *infra* Section II.B.

62. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 785–86 (9th Cir. 2019).

63. *See* Gibson v. Collier, 920 F.3d 212, 226 (5th Cir. 2019); Campbell v. Kallas, No. 16-CV-261, 2020 WL 7230235, at *9 (W.D. Wis. Dec. 8, 2020); Lamb v. Norwood, 899 F.3d 1159, 1164 (10th Cir. 2018); Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014).

1. First Circuit (2014)

The circuit courts first addressed the constitutionality of denying gender confirmation surgery in *Kosilek v. Spencer*.[64] In 2014, Michelle Kosilek, a trans woman, brought action against the Massachusetts Department of Corrections (DOC), alleging that the prison officials' refusal to provide her gender confirmation surgery to treat her gender dysphoria constituted inadequate medical care and deliberate indifference to her serious medical needs in violation of the Eighth Amendment.[65]

The First Circuit held that the DOC's refusal to provide gender confirmation surgery to treat Kosilek's gender dysphoria failed to satisfy the objective prong of the *Estelle* test and found that the denial was not sufficiently harmful to Kosilek.[66] As a result, the court found that the DOC was not deliberately indifferent in refusing to provide gender confirmation surgery.[67] The First Circuit recognized the WPATH Standards as reliable guidelines for trans-related care and emphasized its flexible nature to justify the denial of the surgery.[68]

In finding that the current treatment for Kosilek was sufficient, the court found that the doctor's decision to not provide gender confirmation surgery was not deliberately indifferent to her gender dysphoria.[69] Kosilek reported that her adjusted treatment alleviated her gender dysphoria and a significant amount of time passed since

64. Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014).

65. Kosilek v. Spencer, 774 F.3d 63, 63 (1st Cir. 2014). This was not the first time Kosilek brought action against the DOC in regard to her medical treatment as a trans woman. *See* Kosilek v. Maloney, 221 F.2d 156, 185 (D. Mass. 2002) (recognizing that Kosilek's gender dysphoria constituted a serious medical need and finding that while the DOC did not offer adequate care for her serious medical needs, Kosilek failed to show that the DOC was deliberately indifferent to her serious medical needs).

66. *Kosilek*, 774 F.3d at 89; *but see* Kosilek v. Spencer, 889 F. Supp. 2d 190, 197 (D. Mass. 2012) (noting that Kosilek's gender dysphoria led her to attempt self-castration and to twice attempt suicide while incarcerated); *but see Kosilek*, 774 F.3d at 71 (noting that a DOC-retained physician stated that "it is quite likely Michelle will attempt suicide again if she is not able to change her anatomy" and that doctors believed gender confirmation surgery "would most likely 'allow [her] to have full relief from the symptoms of gender dysphoria'").

67. *Kosilek*, 774 F.3d at 96.

68. *See id.* at 87 ("[T]he Standards . . . themselves admit of significant flexibility in their interpretation and application. They state . . . that [they] and are 'intended to provide flexible directions' to medical professionals in crafting treatment plans.").

69. *See id.* at 89 (acknowledging that antidepressants and psychotherapy alone are not sufficient to treat gender dysphoria; however, the later provision of hormone therapy, electrolysis, feminine clothing and accessories, and mental health services aimed at alleviating her distress were sufficient treatment).

she last exhibited symptoms of suicidal ideation or attempted to self-castrate.[70] As a result, the court found compelling evidence that Kosilek's current treatment plan made her gender dysphoria no longer life-threatening, and therefore her current treatment was neither deliberately indifferent to her now less-serious medical needs, nor did it pose a substantial risk of harm.[71] The reasoning of the First Circuit became the basis for the Fifth and Ninth Circuits in their later rulings when approached with similar disputes.[72]

2. Tenth Circuit (2018)

In *Lamb v. Norwood*,[73] the Tenth Circuit held that a state does not inflict cruel and unusual punishment by declining to provide gender confirmation surgery to a trans inmate when the inmate's dysphoria is being treated by other means.[74] In 2018, Michelle Renee Lamb, a trans woman, brought suit against the Kansas DOC, alleging that prison officials violated her Eighth Amendment rights by failing to effectively treat her gender dysphoria per the WPATH Standards.[75] Prior to her suit, Lamb received hormone treatment, testosterone-blocking medication, and weekly counseling sessions to treat her gender dysphoria.[76] Lamb sought an injunction directing the DOC to treat her gender dysphoria through higher doses of hormone therapy, gender confirmation surgery, and a transfer to a female-only facility.[77]

Lamb alleged that prison officials were deliberately indifferent to her gender dysphoria, but the district court granted summary judgment to the DOC.[78] The district court looked to other circuits' reliance on the flexible nature of the WPATH Standards to justify

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70. *See* Kosilek v. Spencer, 774 F.3d 63, 90 (1st Cir. 2014).

71. *See id.* In *Kosilek*, the Tenth Circuit held:

> The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments' or to require the DOC adopt the more compassionate of two adequate options.

Id.

72. *See* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019); *see also* Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019).

73. 899 F.3d 1159 (10th Cir. 2018).

74. *See* Lamb v. Norwood, 899 F.3d 1159, 1161 (10th Cir. 2018).

75. *See id.* at 1163; *see also* Lamb v. Norwood, 262 F. Supp. 3d 1151, 1154–55 (D. Kan. 2017).

76. *See Lamb*, 899 F.3d at 1161.

77. *Lamb*, 262 F. Supp. 3d at 1156.

78. *See id.* at 1161.

the denial of Lamb's surgery.[79] The Tenth Circuit affirmed, holding that a reasonable factfinder could not infer deliberate indifference given the existing treatment.[80] The court reiterated that "prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants."[81]

3. Fifth Circuit (2019)

Within the first sentence of its majority opinion, the Fifth Circuit in *Gibson v. Collier*,[82] dashed the hopes of all trans inmates within its jurisdiction when it unequivocally held that "a state does not inflict cruel and unusual punishment by declining to provide [gender confirmation surgery] to a [trans] inmate," legitimizing prisons' ability to issue blanket bans on the treatment without any type of individual inquiry.[83] In 2019, Vanessa Lynn Gibson, a trans woman, brought suit against the Director of Texas Department of Criminal Justice (TDCJ), alleging that TDCJ's policy, which did not authorize gender confirmation surgery or an individualized assessment to determine whether such surgery was medically necessary for any particular inmate, constituted deliberate indifference to her serious medical needs in violation of the Eighth Amendment both facially and as applied.[84]

The Fifth Circuit reasoned that the Eighth Amendment does not require prisons to provide "whatever care an inmate wants," rather it "proscribes only medical care so unconscionable as to fall below society's minimum standards of decency."[85] Accordingly, "mere disagreement with one's medical treatment is insufficient" to trigger Eighth Amendment protections.[86] The Court further held

79. *See id.* at 1158 (citing Druley v. Patton, 601 Fed. Appx. 632, 635 (10th Cir. 2015)) (viewing the Standards as "flexible directions for the treatment" of gender dysphoria).

80. *See id.* at 1162.

81. *Id.*

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

83. *See id.* at 215.

84. *See id.* at 217–18. The court noted:

> [The] TDCJ [p]olicy . . . provides that [trans] inmates must be 'evaluated by appropriate medical and mental health professionals and [have their] treatment determined on a case by case basis,' reflecting the 'current, accepted standards of care . . . . [D]octors denied Gibson's requests because the policy does not 'designate [gender confirmation surgery] as part of the treatment for [gender dysphoria].'

Id.

85. *See id.* at 216 (citing Kosilek v. Spencer, 774 F.3d 63, 76–78 (1st Cir. 2014)).

86. *See id.* (citing Delaughter v. Woodall, 909 F.3d 130, 136 (5th Cir. 2018)).

that because of medical disagreement over the necessity of gender confirmation surgery, including disputes in the medical community over the Standards, the surgery could not be definitively considered a necessity.[87] The court found that the Standards, which state that gender confirmation surgery is medically necessary and is an effective method of treating gender dysphoria, do not reflect a consensus within the medical community.[88] Rather, it reflects "merely one side in a sharply contested medical debate."[89] The Fifth Circuit's reasoning enabled prisons to institute blanket bans on gender confirmation surgery without considering an incarcerated individual's factual circumstances and the evolution of medical and societal knowledge on gender dysphoria and the trans community.[90]

4. Seventh Circuit (2019)

In 2018, Nicole Rose Campbell, a trans woman, brought suit against the Wisconsin Department of Corrections, alleging that prison officials acted with deliberate indifference to her serious medical needs when they declined to provide her with gender confirmation surgery.[91] The DOC officials filed a motion for summary judgment on qualified immunity grounds.[92] The district denied the DOC officials' motion, and the officials filed an interlocutory appeal.[93] In 2019, the Seventh Circuit reversed, holding that the DOC officials were entitled to qualified immunity, and remanded the case for further proceedings.[94]

Prior to her suit, the DOC provided Campbell hormone therapy to treat her gender dysphoria.[95] Campbell also requested access

87. *See id.* at 221.

88. *See id.* (stating that the ongoing medical debate about the efficacy of gender confirmation surgery as a treatment for gender dysphoria "dooms Gibson's claim"); *see also id.* at 228 ("It cannot be deliberately indifferent to deny in Texas what is controversial in every other state.").

89. *Id.* at 220.

90. *See id.* at 216 ("The dissent suggests that a blanket ban is unconstitutional—and that an individualized assessment is required. But that defies common sense. To use an analogy: If the FDA prohibits a particular drug, surely the Eighth Amendment does not require an individualized assessment for any inmate who requests that drug.").

91. *See* Campbell v. Kallas, 16-CV-261, 2018 WL 2089351, at *1 (W.D. Wis. May 4, 2018).

92. *See id.* at *8; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (holding that government officials performing discretionary functions are immune from civil suit if their conduct does not violate clearly established constitutional rights of which a reasonable official would know).

93. *See* Campbell v. Kallas, 936 F.3d 536, 543 (7th Cir. 2019).

94. *See id.* at 549.

95. *See id.* at 537–38.

to light makeup, electrolysis, and most important to her, gender confirmation surgery.[96] DOC officials denied each request, explaining that electrolysis and makeup are not permitted within the male institutions where Campbell was housed.[97] DOC officials stated that Campbell could not obtain gender confirmation surgery until she experienced 12 continuous months of "living as a woman," as required by the WPATH Standards, which she could not do as long as she was incarcerated.[98] The district court did not find that the DOC's policy requiring an inmate to satisfy the 12-month prerequisite before being considered for gender confirmation surgery constituted a blanket ban, and was thereby unconstitutional, even though the DOC stated it was impossible for anyone incarcerated to satisfy the prerequisite.[99] The court rationalized this by finding that because an inmate who completed their "real-life" experience before incarceration might be eligible to receive the surgery, the policy, by its terms, is not a blanket ban on gender confirmation surgery.[100]

The Seventh Circuit held that the district court erred in denying the officials' motion for summary judgment holding instead that they were entitled to qualified immunity.[101] The DOC officials contended that qualified immunity shielded them from liability for monetary damages because their actions did not violate "clearly established" constitutional or statutory rights.[102] The court reasoned that any right that Campbell had to gender affirmation surgery was not clearly established because, at the time the officials denied the surgery, no prison in the U.S. had ever provided gender confirma-

96. *See id.* at 542.

97. *See id.*

98. *See* Campbell v. Kallas, 16-CV-261, 2018 WL 2089351, at *45 (W.D. Wis. May 4, 2018) (responding to Campbell's inquiry as to whether the prison provides gender confirmation surgery, the deputy warden said, "No . . . [p]er [Division of Adult Institutions] policy, this surgery is not going to be approved statewide due to the inability of inmates to live a 'real-life' experience.").

99. *See id.* at *5.

100. *See id.*

101. *See* Campbell v. Kallas, 936 F.3d 536, 549 (7th Cir. 2019); *see also* Pearson v. Callahan, 555 U.S. 223, 227 (2009). There is a two-step inquiry for resolving government officials' qualified immunity claims. *Id.* at 227. A court must decide, in no particular order, (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) whether the right was "clearly established" at the time of the defendant's alleged misconduct. *Id.* Qualified immunity applies unless the official's conduct violated a clearly established right. *Id.*

102. *See* Reichle v. Howards, 566 U.S. 658, 664 (2012) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) ("To be clearly established, a right must be sufficiently clear 'that every reasonable official would have understood that what he is doing violates that right.'").

tion surgery to an inmate.[103] The court then thrusted the responsibility onto Campbell, citing that her failure to provide any case law that warned defendants that treating inmates' gender dysphoria with hormone therapy and deferring consideration of whether gender confirmation surgery may constitute an Eighth Amendment violation further freed officials from liability now and in the future.[104] As such, defendants were immune from liability for monetary damages and Campbell's only available remedy was injunctive relief.[105] The court reversed the district court's decision regarding qualified immunity and remanded the case so the medical necessity of gender confirmation surgery could be determined.[106]

On remand in 2020, the district court found that Campbell's gender dysphoria constituted a serious medical need for which gender confirmation surgery "was the only effective treatment."[107] In the DOC's denial of the surgery, the district court found that DOC officials showed deliberate indifference to Campbell's need for treatment for her severe gender dysphoria by failing to conduct an individualized assessment to determine her eligibility for the surgery.[108] As such, the court ordered an injunction requiring the DOC to promptly arrange for Campbell to be assessed by a qualified surgeon and to provide that surgery if the surgeon deems her to be a suitable candidate.[109]

5. Ninth Circuit (2019)

In 2019, Adree Edmo became the second inmate in the country to receive gender confirmation surgery.[110] In *Edmo v. Corizon*,[111] the Ninth Circuit addressed whether gender confirmation surgery was medically necessary for Edmo.[112] Edmo brought action against

103. *See Campbell*, 936 F.3d at 549 ("[W]hen the defendants denied Campbell's request for [gender confirmation surgery], no case clearly established a right to gender-dysphoria treatment beyond hormone therapy.").

104. *See id.*

105. *See id.* at 538, 544.

106. *See id.* at 548.

107. *See* Campbell v. Kallas, No. 16-CV-261, 2020 WL 7230235, at *6 (W.D. Wis. Dec. 8, 2020).

108. *See id.* at *8.

109. *See id.* at *9.

110. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019); *see also* Aviva Stahl, *Transgender Prisoners: What an Inmate's Surgery Means for Trans Rights*, ROLLING STONE (Nov. 9, 2017), https://bit.ly/3R6L9Sf [https://perma.cc/M7WD-QUZR] (stating that Plaintiff Shiloh Heavenly Quine came to a settlement agreement with the California DOC in 2015 that resulted in her becoming the first inmate to receive gender confirmation surgery).

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

112. *See id.* at 787.

the Idaho Department of Corrections (IDOC), alleging that the failure to provide her with gender confirmation surgery violated her Eighth Amendment rights.[113] Edmo sought a preliminary injunction requiring IDOC to provide adequate medical care, including a referral to a qualified surgeon and access to gender affirmation surgery.[114] The district court ruled in favor of Edmo, ordering the DOC to provide her with adequate medical care, including gender confirmation surgery.[115] The DOC appealed.[116] Utilizing a case-by-case analysis, the Ninth Circuit affirmed the district court's finding that Edmo had established her Eighth Amendment rights were violated because gender confirmation surgery was medically necessary in her particular case.[117]

Prior to filing suit, the DOC provided Edmo with hormone therapy to treat her gender dysphoria.[118] After gaining the maximum physical changes associated with hormone treatment, she continued to experience enormous emotional and psychological suffering and repeatedly requested gender affirmation surgery from prison officials.[119] While receiving hormone therapy, Edmo twice attempted self-castration while in the DOC's custody.[120] Despite this, the DOC decided that Edmo did not qualify for gender confirmation surgery and did not provide her any new treatment to address her worsening gender dysphoria.[121]

On appeal, both Edmo's and the defendants' medical experts relied on the WPATH Standards to evaluate Edmo's medical need for gender confirmation surgery.[122] The key dispute between the parties was whether Edmo satisfied the WPATH criterion for surgery.[123] Dr. Scott Eliason, the Corizon psychiatrist that diagnosed

113. *See id.* at 767.

114. *See id.* at 775; *see also* Winter v. Nat. Ress. Def. Council, Inc., 555 U.S. 7, 22 (2008). A preliminary injunction is only awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Id.* To make this showing, plaintiff must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Id.*

115. *See* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1129 (D. Idaho 2018) (ordering a mandatory preliminary injunction be issued because both the facts and the law clearly favor Edmo and extreme or very serious damage will result if it is not issued).

116. *See Edmo*, 935 F.3d at 765.

117. *See id.* at 796–97.

118. *See id.* at 772.

119. *See id.*

120. *See id.* at 773.

121. *See id.*

122. *See id.* at 774.

123. *See id.*

Edmo with gender dysphoria, testified at an evidentiary hearing, citing the Standards, that he did not believe gender confirmation surgery was appropriate for two reasons: (1) "because [the] mental health issues distinct from Edmo's gender dysphoria were not 'fully in adequate control,' and (2) because Edmo had not lived in her identified gender role for 12 months outside of prison."[124] Dr. Eliason explained that Edmo needed to experience "living as a woman" around her "real social network" so that she could "determine whether or not [ ] that was her real identity."[125] Additionally, Dr. Eliason stated that while the medical necessity for gender confirmation surgery is "not very well defined and is constantly shifting," in his view, the surgery would be medically necessary in at least three situations: (1) "congenital malformations or ambiguous genitalia," (2) "severe and devastating dysphoria that is primarily due to genitals," or (3) "some type of medical problem in which endogenous sexual hormones were causing severe physiological damage."[126] Dr. Eliason concluded that because Edmo did not meet any of *his* criteria, gender confirmation surgery is not medically necessary for her.[127] The court held that Dr. Eliason's decision was based on inexplicable criteria that unreasonably deviated from the recognized WPATH Standards and ultimately found in favor of Edmo.[128]

The Ninth Circuit reaffirmed the district court's decision.[129] The court explicitly limited its holding, explaining that its decision was based upon, and limited to, "the unique facts and circumstances presented" by Edmo's case.[130] The district court emphasized that the decision was "not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender affirmation surgery."[131]

Similar to the Fifth Circuit, the Ninth Circuit relied on the First Circuit's reasoning in *Kosilek* in deciding the constitutionality of a blanket ban of gender confirmation surgery.[132] The court acknowl-

124. *Id.*
125. Edmo v. Corizon, Inc., 935 F.3d 757, 774 (9th Cir. 2019).
126. *Id.* at 773.
127. *See id.*
128. *See id.* at 792 (". . . Dr. Eliason conceded that self-castration could show gender dysphoria sufficiently severe to satisfy that criterion. And at the evidentiary hearing, he acknowledged that Edmo 'does primarily meet that criteri[on].' Thus, even under Dr. Eliason's own criteria, Edmo should have been provided [gender confirmation surgery].").
129. *See id.* at 803.
130. *Id.* at 783.
131. *Id.*
132. *See id.* at 794.

edged that its decision, though using the same reasoning, contradicted the Fifth Circuit's decision in *Gibson*.[133] The court observed that the reason for the different outcome was that *Gibson* relied on an incorrect premise that there is no medical consensus that gender confirmation surgery is a medically necessary or effective treatment for gender dysphoria.[134]

In coming to their decisions, the First and Ninth Circuits relied on a fact-specific approach to determine the plaintiff's medical need for gender confirmation surgery, in contrast to the Fifth Circuit's blanket ban on the surgery.[135] This circuit split creates two pivotal questions pertaining to trans inmates' access to gender confirmation surgery: (1) Whether gender confirmation surgery is a medical necessity, and if so, (2) when is does the denial of the surgery amount to deliberate indifference?

II. ANALYSIS

A. The Medical Necessity of Gender Confirmation Surgery

A prison that fails to provide medically necessary treatment to a person in its care "is incompatible with the concept of human dignity and has no place in a civilized society."[136] For trans inmates to have access to gender confirmation surgery under the Eighth Amendment, a court must find that (1) the surgery is medically necessary, (2) the inmate is incarcerated under conditions posing a substantial risk of serious harm, and (3) the prison officials knowingly acted with deliberate indifference in denying the surgery.[137] However, the courts have not established a reusable standard that determines when a medical treatment meets this threshold.[138]

An inmate seeking to prove a violation of their Eighth Amendment protections must meet the objective and subjective prongs of

133. *See id.*

134. Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019).

135. *Id.* at 796.

136. Brown v. Plata, 563 U.S. 493, 510–11 (2011).

137. *See* Kosilek v. Spencer, 774 F.3d 63, 86 (1st Cir. 2014) ("That GID is a serious medical need, and one which mandates treatment, is not in dispute in this case. . . . Rather, the parties disagree over whether SRS is a medically necessary component of Kosilek's care, such that any course of treatment not including surgery is constitutionally inadequate."); *see also* Estelle v. Gamble, 429 U.S. 97, 108 (1976).

138. *Compare Edmo*, 935 F.3d at 786 (relying on expert testimony to convey the necessity of gender confirmation surgery and apply the WPATH standards, and granting discretion to the more credible expert), *with* Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019) (holding that gender confirmation surgery is never a medical necessity, allowing the issuance of a blanket ban on the surgery).

the *Estelle* test.[139] Through the objective prong, it must be shown that the person's current condition poses a substantial risk of serious harm.[140] A common thread among the circuit decisions is that each plaintiff's gender dysphoria was so severe that they felt self-mutilation and/or suicide was their only way to alleviate the mental and physical anguish they were going through.[141] However, only one person was successful in petitioning the court for access to gender confirmation surgery.[142]

This Comment recommends that courts use the standard established by the objective prong of the *Estelle* test to determine the medical necessity of treatment. In doing so, similar to the Ninth Circuit, courts would conduct a case-by-case inquiry into whether withholding the treatment poses a substantial risk of serious harm. As a result, when an inmate's gender dysphoria rises to a level where their symptoms include suicidal ideations, suicide attempts, or self-mutilation, it becomes virtually incontestable that the risk of serious harm rises to a level where it becomes medically necessary for prison officials to provide the inmate with increased care beyond the inmate's current treatment plan.[143] However, it is also this Comment's position that an individual's suicidality should not be the bar by which courts determine that a gender confirming surgery is a medical necessity. Surgical intervention can be and, in regular

139. *See supra* notes 20–22 and accompanying text.

140. *See supra* note 19.

141. *See* Kosilek v. Spencer, 889 F. Supp. 2d 190, 197 (D. Mass. 2012) ("This anguish has caused Kosilek to attempt to castrate [herself] and to attempt twice to kill [herself] while incarcerated . . . "); Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) ("[Edmo] has twice attempted self-castration to remove her male genitalia, which cause her profound anguish."); Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) ("[Gibson] attempted to castrate or otherwise harm [herself] and has attempted suicide three times . . ."); Campbell v. Kallas, No. 16-CV-261, 2018 WL 2089351, at *6 (W.D. Wis. May 4, 2018) ("On several occasions, [Campbell] has said that she 'will consider self-castration and commit suicide if unable to have' [gender confirmation] surgery.").

142. *See Edmo*, 935 F.3d at 803.

143. *See* De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) (providing "some treatment" does not necessarily mean providing "constitutionally adequate treatment"); Jones v. Muskegon Cnty., 625 F.3d 935, 944 (6th Cir. 2010) ("[P]rison officials may not entirely insulate themselves from liability under § 1983 simply by providing some measure of treatment."); Gonzalez v. Feinerman, 663 F.3d 311, 314 (7th Cir. 2011) (holding that even though the initial course of treatment for a hernia was constitutionally adequate for the first five years, prison doctors acted with deliberate indifference when they "never altered their response to his hernia as the condition and associated pain worsened over time"); Langford v. Norris, 614 F.3d 445, 460 (8th Cir. 2010) (explaining that "a total deprivation of care is not a necessary condition for finding a constitutional violation" and that "a doctor's decision to take an easier and less efficacious course of treatment" constitutes deliberate indifference).

practice, often is determined before an individual's symptoms rise to life-threatening levels. With the aid of medical expert testimony and supplemental briefs, courts are more than capable to determine whether an individual has exhausted all other treatment methods and is in medical need of gender confirmation surgery.

To those that may feel the provision of the surgery is an unnecessary expense to shackle to prisons, when left inadequately treated or untreated, the above issues can lead to significant costs for prisons.[144] Costs to DOCs include medical costs related to emergency or surgical care and legal costs stemming from Section 1983 challenges and state tort lawsuits brought as a result of prisoner injury or death.[145] WPATH states that the medical procedures attendant to gender confirming surgeries are not "cosmetic" or "elective" or "for the mere convenience of the patient."[146] These transition-related procedures are not optional in any meaningful sense, rather they are understood to be medically necessary for the treatment of gender dysphoria and allow individuals to live a life where their physical appearance mirrors their lived experience.[147] For many in the trans community, individuals are comfortable living with their gender identity, role, and expression without surgery.[148] For others, gender confirmation surgery is the only effective treatment for gender dysphoria and is medically necessary, and the cost of not acquiring the surgery is a price many are not willing to live with.[149]

144. *See* George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORR. HEALTH CARE 280, 287–88 (2009) (noting that, by contrast, cases of self-castration appear to be rare in both the general community at large and among prisoners in states whose corrections policies allow for appropriate treatment of gender dysphoria).

145. *See* Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014); Edmo v. Corizon, Inc., 935 F.3d 757, 766 (9th Cir. 2019); Gibson v. Collier, 920 F.3d 212, 216 (5th Cir. 2019); Campbell v. Kallas, 936 F.3d 536, 537 (7th Cir. 2019).

146. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, POSITION STATEMENT ON MEDICAL NECESSITY OF TREATMENT, SEX REASSIGNMENT, AND INSURANCE COVERAGE IN THE U.S.A. 3 (2016), https://bit.ly/3KkPf66 [https://perma.cc/D9YM-A4F3].

147. *See id.*

148. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 5 (2016), https://bit.ly/3Mt5kZi [https://perma.cc/LHS2-H2AU].

149. *See id.*

B. The Denial of Medically Necessary Treatment to Trans Inmates is a Deviation from Ordinary Correctional Norms

Inmates have no choice but to rely on prison authorities to treat their medical needs.[150] As such, corrections officials have a constitutional obligation under the Eighth Amendment "to provide medical care for those whom [they are] punishing by incarceration."[151] Pursuant to this constitutional mandate, corrections officials have long understood that they are required to attend to the "serious medical needs" of all prisoners in their custody.[152] This extends to transition-related care.

Eighth Amendment jurisprudence has established that the alleged deprivation of rights must objectively be "sufficiently serious."[153] Courts have recognized that gender dysphoria presents a serious medical need.[154] The role of corrections officials is to facilitate the provision of medical treatment deemed necessary by qualified medical authorities.[155] As such, the denial of medically necessary treatment, including gender confirmation surgery, to trans inmates is a deviation from ordinary correctional norms as they pertain to the medical treatment of inmates.[156] The ordinary prison medical protocol requires corrections officials to facilitate the provision of any treatments prescribed as necessary by qualified medical authorities.[157] As such, courts should not deviate from this standard with respect to surgical treatments for gender dysphoria.

C. As-Is, the WPATH Standards are Incompatible with the Realities of Trans Inmates

The WPATH Standards are intended to be flexible to meet the diverse health care needs of trans and gender-nonconforming peo-

150. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

151. Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Estelle*, 429 U.S. at 103).

152. *See Estelle*, 429 U.S. at 104.

153. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (holding that the challenged action must result in the denial of "the minimal civilized measure of life's necessities"); *see also* Hudson v. McMillian, 503 U.S. 1, 5 (1992).

154. *See* Hicklin v. Precynthe, No. 16-CV-01357, 2018 WL 806764, at *10 (E.D. Mo. Feb. 9, 2018) ("A diagnosis of gender dysphoria disorder alone may constitute a serious medical need.").

155. *See Estelle*, 429 U.S. at 103.

156. *See id.*

157. *See* WPATH STANDARDS, *supra* note 11, at 67.

ple, not to serve as a barrier to care.[158] Some courts and DOCs use the flexibility of the standards to justify denying gender confirmation surgery, while others adhere too strictly to the Standards.[159] This is contrary to the intent the authors had in making the Standards flexible, which is to further access to transition-related care.[160]

In *Campbell*, the DOC instituted a blanket ban on gender confirmation surgery unless the inmate lived 12 continuous months in the gender role congruent with their gender identity outside of the prison.[161] The DOC recognized that it was not possible for an inmate to satisfy this requirement while in prison.[162] While the Seventh Circuit did not rule on the constitutionality of denying Campbell gender confirmation surgery, on remand, the district court found that such a requirement constituted a blanket ban of the surgery and required that the DOC give Campbell an assessment to determine her eligibility for the surgery.[163] In *Edmo*, the DOC's physician also cited the 12-month requirement and the Standard's flexible nature as justification to deny her access to gender confirmation surgery.[164] The Ninth Circuit also did not agree with the DOC and ordered that Edmo receive the surgery.[165] Despite the recommendation being merely a recommendation that could be modified, corrections officials still utilize the inability to satisfy this element as a basis to deny inmates access to gender confirmation surgery.[166] This Comment recommends that WPATH either remove the requirement that a person must have lived 12 continuous months in the gender role congruent with their gender identity from the Standards or explicitly state that this requirement is not applicable to incarcerated persons.

158. *See id.* (stating that the Standards "are intended to be flexible to meet the diverse health care needs of [trans] and gender-nonconforming people" and are intended to apply equally to incarcerated persons).

159. *See* Kosilek v. Spencer, 774 F.3d 63, 87 (1st Cir. 2014) (relying on the flexibility of the Standards to justify the DOC's deviation and denial of the surgery).

160. *Mission and Vision*, WPATH, https://bit.ly/3wzY0of [https://perma.cc/NVA6-7FQ5] (last visited Aug. 1, 2022) ("We envision a world wherein people of all gender identities and gender expressions have access to evidence-based healthcare, social services, justice and equality.").

161. *See* Campbell v. Kallas, 16-CV-261, 2018 WL 2089351, at *1 (W.D. Wis. May 4, 2018).

162. *See id.*

163. *See* Campbell v. Kallas, 936 F.3d 536, 537 (7th Cir. 2019); *see also* Campbell v. Kallas, No. 16-CV-261, 2020 WL 7230235, at *9 (W.D. Wis. Dec. 8, 2020).

164. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 774 (9th Cir. 2019).

165. *See id.* at 803.

166. *See id.* at 775.

Trans prisoners are particularly vulnerable within the incarcerated community.[167] Because preoperative trans inmates are incarcerated based on their anatomy rather than their gender expression, the requirement that a person must have lived 12 continuous months in the gender role congruent with their gender identity is uniquely dangerous and impractical to impose on trans inmates.[168] While incarcerated, they face elevated risks of physical violence, sexual assault, and mental health problems.[169] Respondents to a 2015 survey of trans inmates reported that sexual assault by facility staff persisted at rates five to six times higher than the general incarcerated population.[170] Trans inmates were also nine to ten times more likely to be sexually assaulted by another prisoner.[171] According to federal data, trans people are nearly 10 times more likely to be sexually assaulted than the rest of the general prison population, with approximately 40 percent of trans people in state and federal prisons reporting a sexual assault in the previous year.[172]

In addition to enduring higher rates of physical and sexual violence than their cisgender peers, trans inmates are often targeted for violence because of their vulnerability.[173] Trans women are at special risk for physical injury, rape, and even death, due to cultural norms within prisons that equate femininity with weakness.[174] Therefore it is imperative that the standards medical groups and practitioners promulgate and apply to trans inmates take into account their unique circumstances.

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167. *See e.g.*, Miranda Leitsinger, *Transgender Prisoners Say They 'Never Feel Safe.' Could a Proposed Law Help?*, KQED (Jan. 8, 2020), https://bit.ly/3wu881O [https://perma.cc/6Z5Y-EQCY] (detailing an instance where a male inmate murdered his cellmate, a trans woman, because of her trans identity and the disproportionate amount of violence against trans inmates); Statement from a Transgender Woman Prisoner in California, for inclusion in Conditions and Conduct in the Cal. Crim. Just. Sys.: A Rep. on U.S. Gov't Compliance with the U.N. Int'l Covenant on Civ. and Pol. Rts., (July 2006) https://bit.ly/3QRIqN5 [https://perma.cc/JB33-AJ63] (detailing the recurring physical and sexual abuse she is subjected to as a trans woman living in a male-only facility).

168. *See* Gary Cornelius, *Addressing Housing and Safety for Transgender Inmates*, LEXIPOL (May 8, 2020), https://bit.ly/3HotxwR [https://perma.cc/XTP4-BW5C].

169. *See* JAMES, *supra* note 4, at 191.

170. *See id.* at 192.

171. *See id.*

172. *See id.* at 190.

173. *See* Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1220, 1231 (2004).

174. *See id.* at 1220.

D. The Future of Trans Rights and the Ability for Inmates to Obtain Access to Gender Confirmation Surgery Through the Eighth Amendment

Like gender dysphoria, homosexuality was once a psychiatric diagnosis.[175] The societal normalization and progression of homosexuality in the DSM classifications of mental disorders demonstrates that concepts of mental disorders evolve and change as society progresses.[176] Forty years after the first diagnosis related to gender identity was formalized in the DSM, the acceptance and visibility of trans and gender-diverse people continues to grow within society.[177] Even the change from a diagnosis of "gender identity disorder" to one of "gender dysphoria" in DSM-5 signals psychiatry's increasingly affirming stance towards the normalization and depathologization of trans and gender-diverse populations.[178]

Like homosexuality, gender dysphoria is migrating towards mass-normalization.[179] If the trajectory of lesbian and gay rights is any indicator of trans rights, then gender dysphoria may eventually be completely depathologized and removed from the DSM. The uncoupling of gender dysphoria from a diagnostic classification would rightfully be considered a victory for the general LGBTQ+ community.[180] However, the complete depathologization of gender dysphoria and its removal from the DSM would put the ability for trans inmates to seek recourse through the Eighth Amendment in

175. *See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 571–72 (2015) (finding that "[a]s a consequence, debates about homosexuality gradually shifted away from medicine and psychiatry and into the moral and political realms as religious, governmental, military, media, and educational institutions were deprived of medical or scientific rationalization for discrimination").

176. Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCH. TODAY (Sept. 18, 2015), https://bit.ly/3KpPVHp [https://perma.cc/PT8B-4].

177. Jacob E. Perlson et al., *Envisioning a Future for Transgender and Gender-Diverse People Beyond the DSM*, 219 BRIT. J. OF PSYCH. 471, 471–72 (2021); *see generally* Brett Carpenter, *Fourth Circuit Holds Gender Receives ADA Protections*, POYNER SPRUILL (Aug. 23, 2022), https://bit.ly/3KpgL3l [https://perma.cc/TMV6-J9L3].

178. *Id.*

179. *See* Francine Russo, *Where Transgender Is No Longer a Diagnosis*, SCI. AM. (Jan. 6, 2017), https://bit.ly/3Cj8QR7 [https://perma.cc/K388-XSFD]. In 2017, Denmark became the first country to declassify it as a mental disorder to remove trans people from any association with words such as "problem," "disorder," or "dysphoria." *Id.*

180. *See generally* Roy Richard Grinker, *Being Trans Is Not a Mental Disorder*, N.Y. TIMES (Dec. 6, 2018), https://nyti.ms/3HOPDrA [https://perma.cc/Z3YL-VUT2].

danger.[181] As such, this Comment implores our state and federal lawmakers to read the tea leaves and consider establishing and codifying the protection of medically necessary gender confirmation surgery for trans inmates.

CONCLUSION

Trans inmates are among prisons' most vulnerable populations. There is no simple solution that will alleviate all of the struggles trans inmates face on a daily basis. However, courts across the nation have recognized that Eighth Amendment jurisprudence requires DOCs to address trans inmates' transition-related healthcare. This includes access to gender confirmation surgery. This Comment implores courts to determine the medical necessity of gender confirmation surgery for trans inmates through an objective a case-by-case analysis rather than issue decisions that permit blanket bans or freeze frames on the surgery without any kind of individual assessment or inquiry.

The purpose for medical intervention is to intervene before a particular issue threatens to take one's life. If the prison system and the medical community insist on medicalizing and pathologizing the trans experience, it must in turn treat it akin to other medical issues and provide individuals with the treatments necessary when the medical need develops. DOCs must not allow the physical and mental anguish of an individual to rise to a level where they feel suicide or self-mutilation is their only path forward. Instead, when a DOC finds that an individual's treatment method is no longer effective, they must chart a new course of treatment, even if that treatment is gender confirmation surgery. And if these DOCs fail their trans inmates, our justice system must be an avenue that allows trans inmates to seek recourse when they are denied medically necessary surgical interventions.

181. *See* Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 807 (2011) (observing that labeling gender dysphoria as a mental illness is "a double-edged sword" that is "at odds with the [trans] community's conceptualization of itself" because "while it allows access to hormone therapy, it does so by describing transgender individuals as somehow sick or infirm").

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