

Evolving Standards of Decency

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INTRODUCTION

Netflix released on June 17, 2016 an episode of the hit show *Orange Is the New Black* reflecting an all-too-familiar scenario for transgender inmates.[1] Sophia, a transgender woman who has been attacked, confronts her prison warden about her mistreatment. Her prison warden tosses her in solitary confinement. For her "own protection", the warden cuts off Sophia's hormone treatments and blocks Sophia's family from contacting her. Desperate and alone, Sophia sets her mattress on fire, a dire attempt to force the warden to release her and resume Sophia's hormone therapy treatments.

Since *Orange is the New Black* premiered, transgender rights have been part of the public discourse. Transgender inmates face significant hurdles in the nation's prison systems. Some transgender inmates face extreme forms of gender dysphoria, leading to severe depression and anxiety. Federal appellate courts are

just beginning to grapple with the constitutional implications of prison officials refusing to provide transgender inmates with gender reassignment surgery. The Constitution protects inmates from "cruel and unusual punishment." [2] The problem, however, is that the courts do not agree on whether "cruel and unusual" means the State must provide gender confirmation surgery for transgender inmates.

Part I of this Note explores the background of the Eighth Amendment and transgender rights to healthcare in the modern era. Part II of this Note describes the current disagreement between the First and Fifth Circuits and the Ninth Circuit. I consider the logical and procedural inconsistencies with the Fifth Circuit's opinion and its implications, as well as the inherent pragmatism in the Ninth Circuit approach. I conclude that the Ninth Circuit's approach makes far more sense, as some transgender prisoners genuinely require gender

reassignment surgery even after hormone therapy. Part III examines the practical and moral arguments for providing gender reassignment surgery to transgender prisoners. I argue it would be more affordable and more humane to provide proper healthcare to those most vulnerable in prison environments rather than allowing mentally ill transgender inmates to suffer without medical care.

PART I: BACKGROUND

The Eighth Amendment of the Constitution protects citizens from "cruel and unusual punishment". [3] This Constitutional Amendment was a response to English interrogation techniques.[4] English law enforcement officers were notorious for inflicting torture on both accused and convicted criminals alike.[5] The English Bill of Rights of 1689 prohibited cruel and unusual punishment; the addition of "unusual" may have been inadvertent.[6] Nevertheless, the original drafters of the Constitution included this provision in the Bill of Rights.[7]

The Supreme Court did not interpret the Eighth Amendment clause against cruel and unusual punishment until 1879 in *Wilkerson v. Utah*. [8] The Court upheld a decision sentencing a defendant to public execution by shooting, but held the Eighth Amendment precluded torture.[9] Unnecessary cruelty was therefore also barred by the Eighth Amendment.[10] A little over a decade later, in *In re Kemmler*[11], the Supreme Court held that the Eighth Amendment did not apply to the states, and that electrocution was a permissible form of punishment.[12] *Kemmler* proposed that punishment was not unconstitutional just because it was cruel, if legislators had a legitimately humane purpose for enacting it.[13]

The "cruel and unusual" standard under the Constitution evolved with time and changing perceptions of decency.[14] The Supreme Court consistently upheld painful punishments which may seem shocking today. For example, the Court

declined to overturn a punishment of fifty years of hard labor for illegally selling liquor.[15]

The Court began to broaden the scope of the Eighth Amendment to fit with society's changing morals.[16] A hard-line rule emerged from Supreme Court precedent establishing the meaning of "cruel and unusual" punishment. First, a punishment may not involve unnecessary and wanton infliction of pain.[17] Second, the punishment must not be grossly out of proportion to the severity of the crime.[18]

Supreme Court Justice Potter Stewart wrote the Eighth Amendment should be interpreted in a "flexible and dynamic manner", Supreme Court Justice Potter Stewart maintained, that may evolve as "public opinion becomes enlightened by a humane justice." [19] Thus, the Supreme Court ruled that the government has a constitutional obligation to provide medical care for those it has incarcerated.[20] The State inflicts unnecessary and wanton infliction of pain in violation of the Eighth Amendment by showing deliberate indifference to serious medical needs of prisoners.[21] The Court cautioned when prison officials make a mistake, although it may "produce anguish", their actions do not qualify as a wanton infliction of unnecessary pain.[22]

The Court in the past three decades has expanded government liability under the Eighth Amendment.[23] However, the Court took care to limit application of the Eighth Amendment to government officials, usually in prisons.[24] An Eighth Amendment violation requires a showing of two prongs: "(1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need." [25]

As a practical matter, transgender inmates currently have no right to transgender-specific healthcare.[26] The Office of Civil Rights in the federal Department of Health and Human Services confirmed in 2012 that the Affordable Care Act prohibited sex discrimination, and, therefore, discrimination based on gender identity.[27] However, the Department of Health and Human Services is less likely to prioritize discrimination based on gender identity and sexual orientation under the current administration; in fact, the HHS has actively signaled intent to eliminate protections for LGBTQ Americans.[28]

A lack of federal protections compounds already-overwhelming barriers to transgender care, even to those outside the prison system. Transgender healthcare is the subject of a hotly-contested and rigorous debate in the medical community; medical providers often protest the effectiveness and morality of gender-transition surgeries.[29] Transgender people often avoid doctors for fear of discrimination.[30] This fear is well founded.[31] Organizations sensitive to transgender issues which offer hormone therapy, such as Planned Parenthood, are also locked in a constant struggle to obtain funding and keep their doors open.[32]

Adequate care can be prohibitively expensive, particularly among a population with a high unemployment rate, such as transgender people.[33] Hormone therapy can cost around thirty dollars a month.[34] Undergoing surgery can cost anywhere from \$5,000 to \$30,000 out of pocket.[35] Many transgender individuals have no access to healthcare.[36] Whether transgender people can obtain gender-based healthcare can depend largely on where they live.[37] As a result, many turn to unsafe methods to complete gender transition on their own.[38] If transgender patients try to transition without proper medical supervision, they face serious risks such as HIV transmission and hypercoagulability, or dangerously increased blood-clotting.[39] Transgender inmates have difficulty obtaining hormonal therapy through prison doctors.[40] Transgender inmates may make drastic and desperate choices to change their biological hormones when gender-identity dysphoria goes untreated.[41]

Transgender inmates are also more likely to suffer mental health issues than their cisgender, or those whose gender identity matches their sex at birth, counterparts.[42] Many transgender inmates, as previously mentioned, go untreated and undiagnosed, which contributes to depression and anxiety.[43] Further, transgender inmates are more likely to

experience abuse and harassment in correctional facilities from staff and fellow prisoners alike.[44] As a result, transgender inmates are often separated and isolated from the general prison population, purportedly for their own safety.[45] The practice of isolating transgender inmates has serious repercussions on their mental health.[46]

Courts have only just begun to address the inherent inequalities transgender inmates face in correctional facilities. One of the first steps to addressing these inequalities was acknowledging gender dysphoria exists; the Second Circuit only identified "transsexualism" as a serious medical condition in 2000.[47] The Fourth Circuit followed in 2003, finding that prison officials were deliberately indifferent to a transgender inmate's serious medical needs by denying her necessary hormone therapy after she compulsively self-mutilated.[48] The Seventh Circuit in 2011 held that a statute that barred prison officials from providing hormone therapy or sex reassignment surgery violated the Eighth Amendment.[49]

Some jurisdictions deny even the most basic requests to transgender inmates. For example, in January of 2020, the Fifth Circuit denied a transgender inmate's request to change her legal name and pronouns to reflect her gender identity.[50]

Federal legislatures have addressed gender issues with an eye towards transgender citizens without specifically regulating the prison environment. For example, the Violence Against Women Act bars discrimination against gender identity for any funding recipient.[51] The federal Hate Crimes Act punishes those who cause injury based on an individual's gender identity.[52] Federal law allows any state to request the Attorney General's assistance in prosecuting a

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crime based on an individual's gender identity.[53] It also requires institutions receiving federal funding to keep track of hate crimes committed on campus which are based in prejudice against gender identity.[54]

California in October of 2015 became the first state in the United States to implement a policy to allow transgender prisoners to petition for sex reassignment surgery.[55] Progressive California appellate courts have even ruled that Medi-Cal, a government healthcare program, must cover gender confirmation surgeries.[56] Transgender people have mostly made legislative progress in non-criminal forums.[57] But gains have been slow for transgender inmates alleging Eighth Amendment violations as they are routinely denied healthcare.[58] They are not guaranteed full medical treatment for gender dysphoria and rarely, if ever, receive it.[59]

PART II: THE CURRENT SPLIT OF OPINION BETWEEN THE FIRST AND FIFTH CIRCUITS AND NINTH CIRCUIT

The Supreme Court has not yet addressed the issue of whether the Eighth Amendment requires the government to provide sex confirmation surgery to transgender inmates. A split among the circuits emerged last year when the Ninth Circuit ruled prison officials violated the Eighth Amendment by refusing to provide sex reassignment surgery to a transgender inmate diagnosed with gender dysphoria.[60] The Fifth and First Circuits previously held government officials were *not* required to provide sex reassignment surgery under the Eighth Amendment.[61] The Supreme Court should adopt the Ninth Circuit point of view rather than the approach adopted by the First and Fifth Circuits. Further, the Supreme Court should create a clearly delineated test to determine whether gender confirmation surgery is medically necessary under the Eighth Amendment.

A. The First and Fifth Circuit Approach in Gibson v. Collier and Kosilek v. Spencer

Kosilek v. Spencer

The subject of *Kosilek v. Spencer* was Michelle Lynn Kosilek, an inmate living at the Massachusetts



Correctional Institution at Norfolk.[62] At the age of five, her mother left her, and she began dressing in girl's clothing and playing with other girls at her orphanage.[63] The nuns running the orphanage punished Ms. Kosilek for this behavior as so did Ms. Kosilek's stepfather.[64] Ms. Kosilek eventually ran away from home and first began taking hormones at the age of eighteen.[65] She was sentenced to life in prison for the murder of her spouse and began dressing as a woman while incarcerated.[66] Prison officials eventually stopped her from dressing as a woman, and barred her from wearing makeup.[67] She said, "My life is hell," when asked about her life behind bars because she was not allowed to live as a woman.[68] She admitted she'd attempted suicide twice and mutilation once due to her gender dysphoria.[69]

Ms. Kosilek filed for injunctive relief under the Eighth Amendment after she requested sex reassignment surgery to relieve her gender identity dysphoria.[70] The district court found for Kosilek, holding that Kosilek had a serious medical need, sex reassignment surgery was the only adequate treatment, and that the Department of Corrections' security concerns regarding hormone therapy and sex reassignment surgery were merely pretextual.[71] The First Circuit affirmed, but granted a rehearing *en banc* less than one month after the decision.[72]

The court agreed Ms. Kosilek had a serious medical need because she was diagnosed with gender identity disorder, noting that the Department of

Corrections had provided care for gender identity disorder since 2003.[73] During the course of the trial, the Department of Corrections hired multiple doctors who agreed sex reassignment surgery was medically necessary for Kosilek.[74] In determining whether Kosilek had a serious medical need, the court asked whether the Department of Corrections' actions were medically "imprudent", concluding that they were not.[75] The Court of Appeals overturned the district court's dismissal of Dr. Schmidt, one of the medical professionals who examined Kosilek and concluded sexual reassignment surgery was not necessary, because Dr. Schmidt did not follow the Harry Benjamin Standards of Care.[76] The majority insisted Dr. Schmidt's opinion showed greater nuance, seemingly disagreeing with the district judge's findings of fact. [77]

The court further concluded that because prison officials provided the transgender plaintiff with hormone therapy, mental health resources, facial hair removal, and feminine clothing and accessories, the Department of Corrections had provided a reasonable and acceptable alternative to sex reassignment surgery.[78] The court opined that it is not the court system's place to require that departments of correction adopt the "more compassionate of two adequate options." [79] It wrote that although Kosilek presented future risk of self-harm and suicide, the Department of Corrections was adequately equipped to respond to Kosilek's

suicidal ideation through its standard operating procedures.[80]

The court then evaluated the subjective prong, questioning whether prison officials showed deliberate indifference to Kosilek's serious medical needs.[81] The Department of Corrections argued sexual reassignment surgery carried inherent security risks, which was why it was reasonable to refuse to offer it to Kosilek.[81] The defendant insisted Kosilek would be victimized after receiving sexual reassignment surgery, and that other prisoners would threaten to harm themselves to force prison officials to accede to prisoner demands.[83] The district court had dismissed these security risks, but appellate court deferred to prison officials' judgment, holding the district judge had no right to ignore their expertise.[84] Finally, the court concluded that because different medical professionals have different opinions about the efficacy of sexual reassignment surgery, the Department of Corrections cannot violate the Eighth Amendment by choosing one opinion over the other.[85] Therefore, the First Circuit found that the Department of Corrections had not violated Kosilek's Eighth Amendment right to be free from cruel and unusual punishment.[86]

The First Circuit reviewed the district court's findings based on a *de novo* approach with deference to the judge's findings of fact, but Judge Thompson's dissent suggests this approach was not properly followed.[87] Judge Thompson pointed out that the majority reviewed the district judge's finding of deliberate indifference *de novo* rather than with deference to the judge's findings of fact.[88] He asserted, the majority simply disregarded the district court's determinations of credibility and motivation and instead made its own assumptions.[89] He further disagreed with the majority's opinion that the district judge substituted a medical professional's judgment with his own.[90] As to the objective prong of the Eighth Amendment violation, Judge Thompson pointed out the majority's assumption that the Department of Corrections may choose any treatment plan so long as medical opinions differ is flawed.[91]

Gibson v. Collier

The Fifth Circuit encountered an identical question to *Kosilek* in 2019.[92] Vanessa Lynn Gibson alleged that the defendant Texas Department of Criminal Justice's actions were unconstitutional under the Eighth Amendment.[93] When the plaintiff appealed her case to the Fifth Circuit, the defendant did not contest that Ms. Gibson suffered a serious medical need.[94] The defendant instead complained Ms. Gibson failed to show the defendant was deliberately indifferent to her medical needs.[95]

Other courts relied on the World Professional Association for Transgender Health (WPATH) standards of care when making rulings about serious medical needs.[96] The Fifth Circuit however, declared the WPATH standards were "merely one side in a sharply contested medical debate over sex reassignment surgery." [97] The court relied heavily on the First Circuit *Kosilek* opinion, careful to point out that three doctors who testified before the *Kosilek* district judge expressed concerns about the WPATH standards of care.[98] Therefore, the majority concluded, no medical consensus exists as to the WPATH standards of care or to the efficacy of sex reassignment surgery.[99] Thus, the plaintiff failed to prove the deliberate indifference prong, or the subjective prong, of an Eighth Amendment violation.

The appellate court nevertheless ruled against Gibson despite admitting that it was provided with a sparse record,[100] concluding that refusing to provide sex reassignment surgery cannot be "unusual" punishment under the Eighth Amendment when only one state has ever provided sex reassignment surgery to a transgender inmate.[101] Gibson, arguing *pro se* in her appellate arguments,[102] conceded the WPATH standards of care may be hotly contested.[103] However, she insisted the *Kosilek* opinion opened the door for an "individualized assessment of the inmate's particular medical needs." [104] Therefore, she contended, a categorical prison policy disallowing sex reassignment surgery is unconstitutional under the Eighth Amendment.[105] The court flatly dismissed this argument.[106] The Fifth Circuit relied on the *Kosilek* dissent, rather than on the *Kosilek* majority's own words suggesting the *Kosilek* majority really meant to impose a *de facto* ban on sex reassignment surgeries.[107] It is unclear why the *Gibson* court ignored the majority opinion, which made clear that transgender inmates could still receive sex reassignment surgery even under current constitutional limitations. Perhaps the *Gibson* court meant to impose a stricter, hard-line rule, permanently disposing of any future Eighth Amendment claims regarding denial of sex reassignment surgeries.

The court acknowledged Gibson, the transgender inmate at the center of the controversy, had been formally diagnosed with Gender Identity Disorder. The court further recognized Gibson had lived as a woman since she was fifteen, and had adopted a female name.[108] Yet the court insisted on referring to Gibson using male pronouns throughout its forty-page opinion, primarily citing cases from the 1970's to justify doing so.[109] The First Circuit carefully perused the record in a fact-based inquiry to determine whether sex reassignment surgery was medically necessary for Kosilek, whereas, the Fifth Circuit decided Gibson's claims on the merits despite an insufficient factual record.[110]

Defendant moved for summary judgment against Gibson under a qualified immunity theory.[111] The Fifth Circuit affirmed, granting summary judgment in favor of the defendant rather than acknowledging the district court's procedural error.[112] It ruled on the merits of Gibson's Eighth Amendment claim even though Gibson never so much as received an evaluation from a psychiatrist for sex reassignment surgery.[113] The court insisted this error was insufficient to merit reversal anyway.[114]

B. The Ninth Circuit Approach in Edmo v. Corizon

Andree Edmo was a transgender woman at the Idaho State Correctional Institution.[115] Edmo saw herself as a female since the age of five or six, but only presented herself as a woman since she was twenty or twenty-one.[116] A prison psychiatrist and psychologist diagnosed her with gender dysphoria.[117] Edmo changed her legal name to "Adree" and her legal sex to "female" while she was in prison.[118] She presented as a woman while she lived in prison, wearing feminine hairstyles and makeup, even when doing so resulted in disciplinary violations.[119] Edmo's gender dysphoria caused her to feel "depressed," "disgusting," "tormented," and "hopeless." [120]

Prison officials provided hormone therapy to treat Edmo's gender dysphoria after she was diagnosed in 2012.[121] The hormone therapy helped her "clear her mind", and helped her



appear more feminine.[122] Still, she hated her body because she retained her male genitalia, testifying she felt “depressed, embarrassed, [and] disgusted” by it every day.[123]

The Ninth Circuit concluded gender confirmation surgery can be medically necessary for transgender inmates after conducting an expansive review of available literature regarding gender dysphoria.[124] The court recognized gender dysphoria is a serious medical condition that can cause “clinically significant distress” in transgender individuals and therefore can implicate the Eighth Amendment.[125] Whether a particular inmate has gender dysphoria serious enough to trigger the government’s duty to provide treatment depends largely on the individual facts of the case.[126] Relevant considerations in considering whether a prisoner requires gender reassignment surgery may include “the judgments of prison medical officials” and “the views of prudent professionals in the field”.[127] Ninth Circuit precedence, unlike Fifth and First Circuit precedence, indicated that the reviewing court need not defer to the judgment of prison doctors or administrators.[128]

The Ninth Circuit first had to determine whether gender reassignment surgery could ever be medically necessary under the circumstances. In doing so, the court expressly disagreed with the Fifth Circuit’s *Gibson* decision.[129] The Ninth Circuit called “outdated” and “incorrect” the Fifth Circuit conclusion that there is no medical consensus that sex reassignment surgery is medically necessary or effective.[130] Most medical professionals support the WPATH standards of care, which are endorsed by almost every respected medical association.[131] The Ninth Circuit further held the Fifth Circuit was an outlier in rejecting the WPATH standards of care.[132]

The First Circuit contended reasonable doctors could disagree as to whether transgender women could properly experience life as their preferred gender in a prison environment; however, the Ninth Circuit highlighted a passage in the WPATH standards of care that expressly contradicted this contention.[133] The court identified how *deficient* other treatments had been for Edmo.[134] Edmo still attempted to self-castrate even though the state had provided her with hormone and therapy treatment; physicians pointed out self-castration is typically not associated with depression and anxiety.[135] The First and Fifth Circuits had ignored the possibility that alternative treatment could be defective, instead broadly suggesting hormone and psychiatric therapy

would be enough to treat gender dysphoria.[136]

The Ninth Circuit concluded Edmo had not met her burden on the subjective prong, whether the state showed deliberate indifference to Edmo’s serious medical needs.[137] Even though the state had administered some medical care, the state could still show deliberate indifference—the “alternative treatment” of hormone and psychiatric therapy was not sufficient considering Edmo was still at risk of suicide and self-castration.[138] Where the Fifth and First Circuits had alleged hormone therapy was at least adequate and enough to ward off an Eighth Amendment claim, the Ninth Circuit rejected this contention, holding it was adequate in some cases.[139] Therefore, the Court held withholding access to gender reassignment surgery for gender-dysphoric prisoners can constitute deliberate indifference to a prisoner’s needs.[140]

PART III: THE POLICY ARGUMENT FOR ADOPTING THE NINTH CIRCUIT APPROACH

The Ninth Circuit approach is simply the most logical approach, and is the most grounded in medical reality. The Ninth Circuit approach endorses the WPATH standards of care, which helped shape the *Edmo* opinion and have been adopted by the American Medical Association, the American Psychiatric Association, the American Medical Student Association, and American Psychological Association.[141] The American Psychological Association has produced literature explaining the WPATH standards of care and why they provide individualized treatment planning to support the needs of those suffering from gender dysphoria.[142] There are no other “competing evidence-based standards” that are nationally or internationally recognized by medical professional groups.[143]

Medical treatment options for gender dysphoria include hormone therapy and surgery under the WPATH standards of care.[144] The WPATH standards of care make clear these treatment options are effective in alleviating gender dysphoria and are medically necessary for many people.[145] Many transgender people find comfort without the need for sex reassignment surgery within these standards.[146] Others cannot find relief from gender dysphoria without surgical change to their secondary and/or primary sex characteristics.[147] Transgender individuals who undergo sex reassignment surgery generally benefit from an

improvement in “subjective wellbeing, cosmesis, and sexual function.”[148] Surgical intervention is not the *only* option under the WPATH standards of care, simply an option—the WPATH standards of care endorse a range of options to those suffering from gender dysphoria, including psychotherapy.[149]

Some cases posit the WPATH standards of care are controversial and political.[150] However, the WPATH’s aim is to provide and promote evidence-based care, education, research, advocacy, public policy, and respect in transsexual and transgender health.[151] The WPATH asserts that its standards of care are based on “the best available science and expert professional consensus.” Therefore, the WPATH standards of care are simply meant to reflect medical consensus, not to force any political agenda on medical professionals.[152] These standards are also very useful for medical professionals trying to help their gender-dysphoric patients. They are flexible guidelines meant to meet the individual needs of any and all patients.[153] They explain the difference between gender nonconformity, meaning “the extent to which a person’s gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex”, and gender dysphoria, the “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.”[154] It also recommends the minimum credentials for those dealing with adolescents who present with symptoms of gender dysphoria.[155] The WPATH standards of care create guidelines for assessing those with gender dysphoria, which would create a clear, consistent path to treating transgender inmates in our nation’s prisons.[156] This is crucial for future success in helping transgender inmates who suffer from psychological problems.[157]

Offering transgender inmates the right to gender-affirming surgery is also the most ethical policy. The data is limited on the number of transgender people living in the United States today. Some literature estimates the number is somewhere around 1 million people.[158] However, an estimated one in six people among the transgender community will go to prison once in their lives, compared to one in a hundred people among the general population.[159] Transgender inmates are “13 times more likely than their non-transgender counterparts to be sexually assaulted in prison.”[160] There are many, many transgender inmates struggling under the current weight of the prison system, and need better healthcare to survive in the face of such abuse.

Gender dysphoria can create “severe and persistent discomfort” with one’s biological sex.[161] Gender dysphoria often leads to depression and anxiety.[162] Serious medical issues can result, such as self-castration and suicide.[163] This problem was obvious to the Ninth Circuit, which observed petitioner Edmo suffered from severe depression and twice attempted castration.[164] Gender-affirming surgery and hormone therapy are accepted practices of treatment for

gender dysphoria.[165] Offering gender-affirming surgery could go a long way to helping solve mental health crises among the transgender population in prisons.

Many issues among transgender inmates are closely inter-related. Many of them end up in prison after suffering from poverty and mental health issues.[166] They often suffer rape and harassment, compounding these mental health issues once imprisoned.[167] These inmates tend to commit crimes due to poverty and mental health issues.[168] The cycle can continue for years. Offering adequate healthcare to transgender inmates would allow treatment of such severe mental health issues early, which may ease the cycle of recidivism.

A law student articulated his bases for the theory that transgender inmates may be less likely to commit future crimes upon release from prison. Alexander Kirkpatrick said the process of rehabilitation and reconciliation is essential to approval for parole, Mr. Kirkpatrick explained, which is also an essential part of therapy and transgender-specific healthcare.[169] He explained:

Our society has matured enough to recognize that some transgender inmates do need drastic measures to treat severe mental distress which cannot be helped by traditional measures.

The commitment offenses of many transgender life inmates were directly or indirectly caused by their gender identity struggles or factors related to their gender dysphoria. For [transgender] parolees, articulating insight, demonstrating rehabilitation, and reconciliation involves directly confronting how their gender identity struggles—their inability to be themselves—may have influenced their offenses. Since their gender identity was a causative factor in their crime, demonstrating rehabilitation may involve

showing the [parole] board that they are no longer influenced by the mental health effects of gender dysphoria or the psychological triggers of social stigmatization that caused their commitment offenses in the first place. [...] If the struggles of gender identity are described by transgender individuals as a process of becoming themselves, and the severe effects of gender dysphoria are resolved through proper medical and mental health treatment, then... by facilitating sex-reassignment surgery for transgender life inmates who require the procedure to have a coherent self-identity, we are also enabling these life inmates the opportunity for the rehabilitation and reconciliation that is expected to be found suitable for release.[170]

This argument goes to the heart of the issue: solving astronomical rates of incarceration among gender dysphoric inmates. If United States departments of corrections adopt a widespread policy authorizing sex reassignment surgery for those who need it, transgender inmates may begin the process of rehabilitating themselves and, hopefully, moving beyond a lifetime of crime.

CONCLUSION

The Ninth Circuit approach is simply more logical and far more ethical than the First and Fifth Circuit approach. Their logic is flawed even putting aside any procedural errors the Fifth Circuit may have failed to address.[171] The First Circuit, though it took care to specify its holding was fact-specific and did not extend to every transgender inmate,

failed to explicitly acknowledge some transgender inmates may need sex reassignment surgery. Some transgender people, such as Adree Edmo, still try to self-harm even when provided with hormones and talk therapy. To deny those inmates sex reassignment surgery even as a last resort flies in the face of the spirit of the Eighth Amendment. As Supreme Court Justice Thurgood Marshall stated in his *Furman* concurrence, the fluid meaning of the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”.[172] Our society has matured enough to recognize that some transgender inmates *do* need drastic measures to treat severe mental distress which cannot be helped by traditional measures. It is time to extend Eighth Amendment protections to help those most in need. In doing so, the United States will join the ranks of many health organizations who have endorsed the WPATH standards of care. The country will help ease the cycle of recidivism and give transgender inmates a fighting chance to change. The courts will follow the logical conclusion that the Eighth Amendment demands, reflecting the principles of mercy and humility our legal system has tried to uphold since the Founding Fathers inked the Bill of Rights.



[1] See Sophie Gilbert, Orange Is the New Black: ‘Doctor Psycho’, *The Atlantic* (June 18, 2016). (<https://www.theatlantic.com/entertainment/archive/2016/06/orange-is-the-new-black-doctor-psycho/487430/>).

[2] U.S. Const. amend. VIII.

[3] *Id.*

[4] *Furman v. Georgia*, 408 U.S. 238, 316-317 (1972).

[5] *Id.* “Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses. Death, of course, was the usual result.” *Id.* at 317.

[6] *Id.* at 318.

[7] *Id.* at 317.

[8] *Wilkerson v. Utah*, 99 U.S. 130 (1878)

[9] “Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.” *Id.* at 135-136.

[10] *Id.*

[11] 136 U.S. 436 (1890).

[12] The Court reaffirmed that the Eighth Amendment does not apply to the states in *O’Neil v. Vermont*, 144 U.S. 323 (1892). The O’Neil dissent would influence the Court in later holdings, where three justices wrote: “That designation (cruel and unusual), it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering. . . .

The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive.” *Furman*, 408 U.S. at 323-324 (quoting *In re Kemmler*, 136 U.S. 339-340).

[13] *Furman*, 408 U.S. at 323.

[14] *Id.* at 242 (Douglas, J., concurring) “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

[15] *O’Neil v. Vermont*, 144 U.S. 323 (1892) (holding that the Eighth Amendment did not apply to the States when a man convicted of 307 counts of illegally selling liquor was fined \$6,140 and 54 years of hard labor if the fine was not timely paid).

[16] *Weems v. United States*, 217 U.S. 349 (1910) (finding that 15 years of hard labor, a lifetime of constant surveillance, and a loss of civil rights as punishment for falsifying an official document was cruel and unusual punishment for the purposes of the Eighth Amendment); See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (“The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain.”); *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that the loss of natural citizenship as applied to a wartime deserter was cruel and unusual punishment).

[17] *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

[18] *Id.*

[19] *Gregg*, 428 U.S. at 171 (quoting *Furman v. Georgia*, 408 U.S. 238, 392-393 (1972) (Burger, C. J., dissenting)).

[19] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

[20] *Id.* at 104 (citing *Gregg*, 428 U.S. at 173) Justice Marshall offered examples of deliberate indifference to serious medical needs: “this is true 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 or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under [42 U.S.C. section] 1983.” *Id.* at 104-105.

[21] *Weems v. United States*, 217 U.S. 349, 405 (1910).

[22] See *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (finding that an inmate stated a claim for an Eighth Amendment violation after the government terminated a prisoner’s treatment for Hepatitis C because state officials believed the prisoner was using drugs); *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (holding that the use of excessive physical force against a prisoner may violate the Eighth Amendment where a prison guard beat an inmate); *Helling v. McKinney*, 509 U.S. 25, 34-35 (1993) (finding that prisoner stated a claim for violation of Eighth Amendment rights after the prisoner was involuntarily exposed to secondhand tobacco smoke); *Wilson v. Seiter*, 501 U.S. 294, 303-304 (1991) (finding that confinement conditions including overcrowding, excessive noise, and inadequate heating and cooling may alone or in combination amount to Eighth Amendment violation if prison officials show deliberate indifference). But see *Whitley v. Albers*, 475 U.S. 312, 320-321, 326 (1986), abrogated on

other grounds by *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (finding that the shooting of prisoner during a prison riot without prior verbal warning did not violate prisoner's right to be free from cruel and unusual punishment); *Rhodes v. Chapman*, 452 U.S. 337, 341, 352 (1981) (finding that the government did not violate the Eighth Amendment by housing two inmates in one sixty-three square foot prison cell).

[24] See *Ingraham v. Wright*, 430 U.S. 651, 671 (finding that there was inadequate basis for uprooting the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in public schools).

[25] *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (en banc) (citing *Sires v. Berman*, 834 F.2d 9, 12 (1st Cir.1987)).

[26] The first transgender woman housed at a prison ever to be approved for sex reassignment surgery was Shiloh Quine in 2015, following a lengthy court battle at the state level. Kristine Phillips, *A Convicted Killer Became the First U.S. Inmate to get State-Funded Gender-Reassignment Surgery*, The Washington Post (Jan. 10, 2017, 6:10 A.M.). The spokeswoman for the California Department of Corrections and Rehabilitation said that the state is constitutionally required to provide medically necessary treatment for gender dysphoria; however, eighty percent of inmate requests for sex reassignment surgery were denied. *Id.* It was only after Quine's 2015 lawsuit that the California Department of Corrections and rehabilitation agreed to cover Quine's sex reassignment surgery and to allow transgender inmates to wear clothes and buy items from commissary consistent with their gender identity. *Id.*

[27] FAQ: Equal Access to Health Care, Lambda Legal, <https://www.lambdalegal.org/know-your-rights/article/trans-related-care-faq> ("When the Affordable Care Act was enacted, the law's antidiscrimination provisions created an important new tool to combat anti-LGBT and especially anti-transgender discrimination in health care. In a letter dated July 12, 2012, the Office of Civil Rights (OCR) in the federal Department of Health and Human Services (HHS) responded to a letter signed by Lambda Legal and the New Beginning Initiative confirming that the HHS prohibition against sex discrimination 'extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity...[and] also prohibits sexual harassment and discrimination regardless of actual or perceived sexual orientation or gender identity of the individuals involved.'")

[28] Dan Diamond, *HHS Nearing Plan to Roll Back Transgender Protections*, Politico (Apr. 24, 2019, 6:07 P.M.), <https://www.politico.com/story/2019/04/24/hhs-transgender-1379336> ("The Trump administration is preparing to roll back protections for transgender patients while empowering health care workers to refuse care based on religious objections, according to three officials with knowledge of the pending regulations.... One rule would replace an Obama administration policy extending nondiscrimination protections to transgender patients, which have been blocked in court. A second rule would finalize broad protections for health workers who cite religious or moral objections to providing services such as abortion or contraception, a priority for Christian conservative groups allied with the administration.") See also Ariana Eunjung Cha, *Proposed HHS Rule Would Strip Obama-Era Protections for LGBTQ Individuals*,

The Washington Post (Nov. 1, 2019, 3:16 P.M.), <https://www.washingtonpost.com/health/2019/11/01/new-hhs-rule-would-strip-obama-era-protections-lgbtq-individuals/> (reporting that the HHS under the Trump administration proposed a new rule which would allow organizations and individuals receiving HHS grant money to discriminate against LGBTQ individuals.) The HHS maintained that Obama-era protections forced religious groups to "compromise their beliefs." *Id.* Further, the HHS drafted a broad "conscience" rule allowing healthcare providers to refuse to provide services if it violates the providers' religious beliefs. *Id.*

[29] Emma Green, *Health and Human Services and the Religious-Liberty War*, The Atlantic (May 7, 2019), <https://www.theatlantic.com/politics/archive/2019/05/hhs-trump-religious-freedom/588697/> (Farr Curlin, professor of bioethics at Duke University, stated that "there have long been, and remain, principled objections" to gender-transition surgeries, "based on the conclusion that these services are not consistent with the physician's commitment to the patient's health.")

[30] Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR: All Things Considered (November 21, 2017, 4:29 PM ET), <https://www.npr.org/series/559149737/you-me-and-them-experiencing-discrimination-in-america>.

[31] *Id.* ("Right now, it's very hard for a lot of [transgender] people to even find a primary care provider who's willing to work with them", said Kellan Baker, a doctoral candidate at Johns Hopkins University who studies how health policies affect gay, lesbian, queer and transgender Americans.")

[32] *Id.* ("Planned Parenthood trains its staff to be sensitive to transgender people. Many of its health centers offer trans people a wide array of services, including primary care, annual exams and STD screenings. Currently, Planned Parenthood offers hormone replacement therapy at health centers in 17 states, and its national headquarters reports an 80 percent increase in centers offering hormones to transgender patients from 2013 to 2015."); Jamie Ducharme, *Planned Parenthood Faces an Uncertain Road Without Title X Funding—and Patients May Struggle to Get Care*, Time Magazine (Aug. 19, 2019), <https://time.com/5655500/planned-parenthood-title-x-funding/> (reporting that Planned Parenthood declined to accept Title X funding rather than operate under a new regulation which prevents Title X providers from offering abortion referrals). The President of Planned Parenthood suggested that operating without Title X funding would be like "holding an umbrella during a tsunami"; Planned Parenthood is Title X's biggest beneficiary. Ducharme, *supra*.

[33] See Ulaby, *supra* note 30.

[34] Blake Ellis, *Transgender and Struggling to Pay Medical Costs*, CNN (Aug. 22, 2014, 5:40 P.M.), <https://money.cnn.com/2013/08/22/pf/transgender-medical-costs/index.html>.

[35] *Id.* Indeed, the total cost of gender transition can greatly exceed \$30,000, particularly when complications arise after surgery. Tim Chevalier, a transgender man from California, incurred \$50,000 in medical bills after an emergency forced him back to the hospital after a procedure.

[36] Neda Ulaby, *Health Care System Fails Many*

Transgender Americans, NPR (November 1, 2017, 4:29 P.M.), <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans>. According to an NPR poll, 31% of transgender Americans lack regular access to medical care. *Id.* This can often be attributed to a lack of employment opportunity among the transgender community; a significant plurality of Americans accesses healthcare insurance through their jobs. *Id.*; Joseph Zellabos-Roig, *A Majority of Americans with Employer-Based Health Insurance Don't Mind if it Changes to Medicare for All — As Long As They Can Keep Their Current Coverage*, Business Insider (Aug. 8, 2019, 12:35 P.M.), <https://www.businessinsider.com/most-americans-employer-based-plans-healthcare-medicare-for-all-2019-8> (a 2019 survey found that 44% of respondents were on an employer-based health insurance plan). Tellingly, the unemployment rate among the transgender community in 2015 was 15%, three times the national average. Ulaby, *supra*.

[37] Tim Mullaney, *Employee Health Insurance, Obamacare Make Sex Change a New Reality for 1.4 Million Americans*, CNBC (Mar. 27, 2018, 9:58 A.M.), <https://www.cnbc.com/2018/03/27/work-health-insurance-obamacare-coverage-spur-sex-change-surgery-boom.html> (“[I]n Texas, for example, Medicaid and insurance provided to state employees doesn’t cover gender-affirmation surgery. But in places like New York and California it’s routine. A total of 17 states plus Washington, D.C., have issued guidelines for Medicaid coverage of gender surgery, according to the Center for Transgender Equality.”)

[38] Nelson Sanchez, John Sanchez, and Ann Danoff, *Health Care Utilization, Barriers to Care, and Hormone Usage Among Male-to-Female Transgender Persons in New York City*, 99 Am. J. of Pub. Health 713, 713 (2009) (“[T]he prevalence of unsupervised hormone use reportedly ranges from 29% to 63% within urban groups of male-to-female transgender persons, posing significant health risks to transgender clients.”)

[39] *Id.* (“One serious potential risk is that of HIV seroconversion from needle sharing or parenteral administration of hormones. Although no data exist on the incidence of HIV infection secondary to needle sharing, a review of US-based HIV prevention literature found an average HIV prevalence of 27.7% (range=16%–68%) among male-to-female trans persons. Hormone therapy regimens pose additional health risks to transgender clients, the most serious of which is hypercoagulability associated with estrogen administration. [...] [M]any clients use high-dose hormone regimens and utilize multiple hormones concurrently without medical supervision in the belief that this will achieve faster results.”)

[40] George R. Brown, *Qualitative Analysis of Transgender Inmates’ Correspondence: Implications for Departments of Correction*, 20 J. of Correctional Health Care 334–335, 337 (2014). Transgender inmates across multiple states reported difficulty obtaining evaluations for gender identity disturbances. *Id.*

[41] *Id.* at 339–340 (“Autocastration in prison settings is most often associated with a primary diagnosis of GID that is untreated or undertreated, with numerous examples of such behaviors occurring in corrections facilities in multiple countries. Five percent (n=6) of the inmates writings reviewed in this survey reported attempted or completed autocastration while incarcerated.”); Jillian Keenan, *Getting*

Hormones and Surgery for Transgender Prisoners, The Atlantic (August 23, 2013).

[42] Brown, *supra* note 35 at 335 (“Transgender inmates suffer inordinately from mental health problems, such as depression and suicidality.”)

[43] *Id.*

[44] *Id.* at 336. A shocking 42% of transgender inmates in the study self-reported abuse; 23% reported physical abuse and harassment and 19% reported sexual mistreatment, either by guards or other inmates. *Id.*

[45] Keenan, *supra* note 36 (“Transgender prisoners, and especially transgender women, are also at a much higher risk of violence and sexual assault. Historically, transgender prisoners have been placed in “non-punitive administrative segregation”—a euphemism for solitary confinement—for their own protection.”)

[46] *Id.*

[47] *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2nd Cir. 2000) (“Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a ‘serious medical need’.... There is no reason to treat transsexualism differently than any other psychiatric disorder. Thus ... plaintiff’s complaint does state a ‘serious medical need’”) (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir.1987)).

[48] *De’Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (“De’lonta’s need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent. [...] And, nothing in the record refutes the allegation that Appellees know that De’lonta’s compulsive self-mutilation began after the discontinuation of her hormone therapy. Nor does the limited record before us demonstrate any justification (although there may be one not yet disclosed) for either the policy requiring termination of De’lonta’s hormone treatment or the alleged denial of any other treatment to prevent her continuing self-inflicted injuries.”)

[49] *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011). The Seventh Circuit, in doing so, acknowledged that it in previous decisions ruled transgender inmates had no right to estrogen or hormone therapy. *Id.* (citing *Meriwether*, 821 F.2d at 413 and *Maggert*, 131 F. 3d at 671). The court also acknowledged that, although gender identity dysphoria treatment is expensive, so are many other common treatments provided to inmates, such as coronary bypass and kidney transplant surgery. *Id.*

[50] *United States v. Varner*, 948 F.3d 250, 252 (5th Cir. 2020). The Fifth Circuit declined to grant the transgender plaintiff’s request to change the name on her judgment of conviction for child pornography on procedural grounds, particularly lack of jurisdiction. *Id.* at 252, 253. The court then declined to grant Varner’s request to change her pronouns because there is “no authority” dictating courts must refer to transgender litigants by their preferred pronouns. *Id.* at 254–255. The court went even so far as to suggest using litigants’ preferred pronouns was “purely... courtesy.” *Id.* at 255.

[51] 34 U.S.C. 12291(b)(13)(A) (Current through P.L. 116–108 2019). However, the Violence Against Women Act expired in February of 2019 after Congress failed to reauthorize the legislation. Kate Thayer, *The Violence Against*

Women Act Has Expired. Advocates Say That Sends a Dangerous Message and are Pushing for Permanent Protections, Chicago Tribune (Feb. 21, 2019, 11:05 A.M.), <https://www.chicagotribune.com/lifestyles/ct-life-violence-against-women-act-expired-20190220-story.html>.

[52] 18 U.S.C. § 249(a)(2)(A) (Current through P.L. 116-108).

[53] 34 U.S.C. § 30503(a)(1)(C) (Current through P.L. 116-108).

[54] 20 U.S.C. § 1092 (f)(1)(F)(ii) (Current through P.L. 116-108).

[55] Alexander Kirkpatrick, *The Caged Bird Sings of Freedom: Why Allowing Sex-Reassignment Surgery for Transgender Life Prisoners Facilitates Rehabilitation and Reconciliation*, 26 S. Cal. Rev. L. & Soc. Just. 37, 39 (2016-2017).

[56] See *G.B. v. Lackner*, 80 Cal. App. 3d 64, 70-71 (1978).

[57] See *Lackner*, 80 Cal. App. 3d at 70-71; *O'Donnabhain v. C.I.R.*, 134 T.C. 34, 76-77 (holding that a transgender woman could deduct sex confirmation surgery and hormone therapy costs from her income as a necessary medical expense).

[58] See *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015) (holding that transgender inmate had no right to hormone therapy after inmate attempted self-castration and was put on suicide watch); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (noting the government's contention was that "the State has a legitimate interest in not having a male with female breasts in a male prison and in not placing persons with functional male genitals in a female prison"); *Supre v. Ricketts*, 792 F.2d 958, 962-963 (10th Cir. 1986) (holding that federal law does not require prison officials to administer estrogen therapy to a "transsexual inmate" because estrogen therapy is "controversial").

[59] See *Maggert v. Hanks*, 131 F.3d 670, 671-672 (7th Cir. 1997) (finding that transgender inmate was not entitled to sex hormone therapy as treatment for gender dysphoria under the Eighth Amendment). See also Brooke Acevedo, *The Constitutionality and Future of Sex Reassignment Surgery in United States Prisons*, 28 Hastings Women's L.J. 81, 86 (2017).

[60] *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797 (9th Cir. 2019).

[61] *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019); *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (en banc).

[62] Report of Dr. David Seil, M.D., February 23, 2003, in the case of *Michelle Lynn Kosilek v. Howard Clarke et. al.*, 2003 WL 25910594 (D. Mass. 2003).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Kosilek*, 774 F.3d at 63.

[71] *Id.* *Kosilek* had, once before, filed for injunctive relief

under the Eighth Amendment, a case which the First Circuit labels as "*Kosilek I*". *Id.* At the time, Ms. Kosilek was receiving only "supportive therapy" for her dysphoria. *Id.* The district court found for the defendant, the Department of Corrections, because it believed the Department of Corrections refused to provide Kosilek any further treatment due to security concerns. *Id.* However, the district court warned the department of corrections that supportive therapy was not sufficient, especially in light of Kosilek's suicide attempts. *Id.* Later, in "*Kosilek II*", or Ms. Kosilek's second trial for injunctive relief under the Eighth Amendment, the district court dismissed the Department of Corrections' primary security concerns as "pretextual" and "greatly exaggerated". *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 241 (D. Mass. 2012). The Department of Corrections had alleged it was concerned that allowing Ms. Kosilek to receive sex reassignment surgery would encourage other inmates to manipulate prison officials to receive the same treatment and also that transporting Ms. Kosilek for sex reassignment surgery would allow her the opportunity to escape. *Id.* The court reasoned that the Department of Corrections was actually primarily concerned with the *political* and *social* ramifications of allowing Ms. Kosilek sex change surgery, which is not a permissible reason to deny an inmate medical care. *Id.* at 240.

[72] *Kosilek*, 774 F.3d at 63.

[73] *Id.* at 86.

[74] *Id.* ("Kosilek emphasizes that doctors at both UMass and Fenway Clinic—doctors hired by the DOC—confirmed at trial that SRS was "medically necessary." The failure to provide treatment, these doctors testified, would almost certainly lead to a deterioration in Kosilek's mental state and a high likelihood of self-harming behaviors. In light of this risk, and given that they believed Kosilek had successfully met all eligibility criteria for SRS, these doctors believed that any course of treatment excluding SRS is insufficient to treat Kosilek's GID.")

[75] *Id.* at 88-89. The court disagreed with the district judge, appearing to agree that a reasonable doctor could find an inmate could not truly live as a woman in a prison environment. *Id.* at 88. The court pointed out three doctors opined that an inmate could not complete a "real life experience" as a woman in a prison, absent a "variety of societal, familial, and vocational pressures" that exist in the real world. *Id.* It should be noted that Kosilek was sentenced to life in prison without the possibility of parole and would likely never see the world outside prison bars again. *Id.* at 68-69.

[76] *Id.* at 86-89.

[77] *Id.*

[78] *Id.* at 89-90 ("Beginning in 2003, [the Department of Corrections] has provided hormones, electrolysis, feminine clothing and accessories, and mental health services aimed at alleviating her distress. The parties agree that this care has led to a real and marked improvement in Kosilek's mental state. [...] The question 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. It is not.")

[79] *Id.* at 90.

[80] *Id.*

[81] *Id.* at 91.

[82] *Id.* at 92.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 91–92.

[86] *Id.* at 96.

[87] *Id.* at 96 (“The majority turns a blind eye to binding precedent, opting instead to cobble together law from other circuits and non-Eighth Amendment jurisprudence to formulate a standard of review that, though articulated as one of variable exactitude, amounts to sweeping *de novo* review. Armed with the ability to take a fresh look at findings that clearly warranted deference, the majority easily steps into the trial judge’s shoes—the inarguable superiority of the judge’s ability to marshal facts, assess motive, and gauge credibility all but forgotten.”)

[88] *Id.*

[89] *Id.* at 98–99.

[90] *Id.* at 102–104. As mentioned previously, the court points out Dr. Schmidt departed from the Harry Benjamin Standards of Care. *Id.* The court appears to be referring to the Harry Benjamin International Gender Dysphoria Association Standards of Care. See *World Prof’l Ass’n for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 1, n. 1 (7th ed. 2011) (https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf). The Harry Benjamin International Gender Dysphoria Association changed its name to the World Professional Association for Transgender Health (WPATH) and changed the name of its Standards of Care accordingly. See *Id.* In turn, the Ninth Circuit relied upon the WPATH Standards of Care in *Edmo v. Corizon*. *Edmo*, 935 F.3d at 769. Many other courts had relied upon the Harry Benjamin or the WPATH Standards of Care before *Kosilek*, which Judge Thompson identifies as evidence that Dr. Schmidt was an outlier in disagreeing with them. See, e.g., *De’lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir.2013) (stating that the Harry Benjamin Standards of Care are “the generally accepted protocols for the treatment of GID”); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) (noting that the “course of treatment for Gender Identity Disorder generally followed in the community is governed by the ‘Standards of Care’ ”); *O’Donnabhain v. Comm’r of Internal Revenue*, 134 T.C. 34, 65 (U.S. Tax Ct. 2010) (indicating that the Standards are “widely accepted in the psychiatric profession, as evidenced by the recognition of the standards’ triadic therapy sequence as the appropriate treatment for GID and transsexualism in numerous psychiatric and medical reference texts”).

[91] *Id.* at 108 (“The majority’s presumption that the existence of varying medical opinions should insulate the DOC is not only an unpreserved, unsupported argument but it has very troubling implications. It gives correctional departments serious leeway with the Eighth Amendment. If they do not want to provide a prisoner with care recommended by one or more than one medical provider,

they need only find a doctor with a differing mind set (typically not a difficult task). It is no stretch to think that might be what happened here.”)

[92] *Gibson*, 920 F.3d at 212.

[93] *Id.* at 216–218. It should be noted that the court here referred to the plaintiff using male pronouns. *Id.* (“Scott Lynn Gibson is a transgender Texas prison inmate in the custody of the Texas Department of Criminal Justice (TDCJ) in Gatesville. [...] Gibson was born male. But as his brief explains, he has been diagnosed as having a medical condition known today as “gender dysphoria” or “Gender Identity Disorder” (GID). He has lived as a female since the age of 15 and calls himself Vanessa Lynn Gibson.”) The case name itself also reflects the court’s attitude towards Gibson’s gender preferences: “Scott Lynn Gibson, also known as Vanessa Lynn, Plaintiff-Appellant.” *Id.* at 212. This case name stands in contrast to the First Circuit Court’s decision, where the plaintiff was identified as “Michelle Kosilek”. *Kosilek*, 774 F.3d at 63. I instead refer to the plaintiff using female pronouns according to common courtesy.

[94] *Id.* at 219.

[95] *Id.*

[96] *De’lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir.2013); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012); *O’Donnabhain v. Comm’r of Internal Revenue*, 134 T.C. 34, 65 (U.S. Tax Ct. 2010); *supra*, note 89.

[97] *Gibson*, 920 F.3d at 221.

[98] *Id.* at 221–222 (“Dr. Schmidt expressed hesitation to refer to the [WPATH] Standards of Care, or the recommendation for [sex reassignment surgery], as medically necessary. [...] Cynthia Osborne... a gender specialist... did not view [sex reassignment surgery] as medically necessary in light of ‘the whole continuum from noninvasive to invasive’ treatment options available to individuals with [gender dysphoria]. Dr. Levine expressed concerns that later versions of WPATH were driven by political considerations rather than medical judgment.”)

[99] *Id.* at 223.

[100] *Id.* at 221.

[101] *Id.* at 227–228.

[102] *Id.* at 218.

[103] *Id.* at 223.

[104] *Id.* at 224.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 225 (referring to the *Kosilek* dissenting opinion, “To quote the dissent: ‘[T]he majority in essence creates a *de facto* ban on sex reassignment surgery for inmates in this circuit.... [T]he precedent set by this court today will preclude inmates from ever being able to mount a successful Eighth Amendment claim for sex reassignment surgery in the courts.”). However, a closer look at the *Kosilek* majority opinion shows the *en banc* court expressly denounced this viewpoint. After the plaintiff suggested the *Kosilek* opinion would create a *de facto* ban on sex reassignment surgery, the First Circuit wrote, “We do not agree. ... [A]ny such policy

[creates a blanket policy regarding sex reassignment surgery] would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs." *Kosilek*, 774 F.3d at 90–91. See also *Roe v. Elyea*, 631 F.3d 843, 862–63 (holding that a department of corrections' failure to consider the prisoner's individual needs may constitute a violation of the Eighth Amendment).

[108] *Gibson*, 920 F.3d at 217.

[109] *Id.* at 242 n.2.

[110] *Kosilek*, 774 F.3d at 90; *Gibson*, 920 F.3d at 216.

[111] *Gibson*, 920 F.3d at 231 (Barksdale, R., dissenting).

[112] *Id.* at 226–227. Summary judgment may be entered against a party which fails to show it will be able to prove an essential element of its case “after adequate time for discovery”. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). But the district judge *sua sponte* granted summary judgment in favor of the defendant on the merits of Gibson's Eighth Amendment claims without notice and without giving Gibson leave to respond, before discovery had commenced. *Gibson*, 920 F.3d at 228, 230 (Barksdale, R., dissenting). Both the district judge and the Fifth Circuit put the burden on Gibson to prove there was a medical consensus as to the efficacy of sex reassignment surgery; however, since Gibson was not the moving party, the defendant actually had the burden of proving that there was no medical consensus. *Gibson*, 920 F.3d at 232 (Barksdale, R., dissenting). Therefore, the Fifth Circuit appears to ignore procedural error in its ruling.

[113] *Gibson*, 920 F.3d. at 227, 231.

[114] *Id.*

[115] *Edmo*, 935 F.3d at 771–72.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 772.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Edmo*, 935 F.3d at 768–771, 785.

[125] *Id.*

[126] *Id.* at 786.

[127] *Id.*

[128] *Id.* (quoting *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989)); see also *Gibson*, *supra*, note 61 at 235.

[129] *Edmo*, 935 F.3d at 794–95.

[130] *Id.* at 795.

[131] *Id.*

[132] *Id.*

[133] *Kosilek*, *supra*, note 61 at 77–79; *Edmo*, 935 F.3d at 789. The court pointed out the idea that transgender prisoners

could never qualify for sex reassignment surgery is something like a Catch-22. *Id.* at n. 17 (“In concluding that Edmo does not meet the sixth WPATH criterion, Dr. Garvey expressed concern that there is a lack of evidence regarding GCS in prison settings. That rationale acts as self-fulfilling prophecy. If prisons and prison officials deny GCS to prisoners because of a lack of data, the data will never be generated, and the cycle will continue.”)

[134] *Edmo*, 935 F.3d at 790.

[135] *Id.*

[136] *Kosilek*, 774 F.3d at 91–92; *Gibson*, 920 F.3d at 222. Unlike Edmo, Kosilek improved after receiving hormone and psychiatric therapy. *Kosilek*, 774 F.3d at 90. There was a “significant passage of time” after she received treatment where she stopped exhibiting symptoms of suicidal ideation or attempted to self-castrate. *Id.* It is less clear whether Gibson suffered just as strongly after receiving hormone therapy than he had before receiving hormone therapy. *Gibson*, 920 F.3d at 217. Gibson averred that she was depressed, had attempted to castrate herself, and had attempted to commit suicide three times, although her suicide attempts were sometimes unrelated to her gender dysphoria. *Id.*

[137] *Edmo*, 935 F.3d at 793–94.

[138] *Id.* The court quoted a helpful analogy: “imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.” *Id.* at 793–94 (quoting *De'lonta*, 708 F.3d at 526).

[139] *Kosilek*, 774 F.3d at 89–90; *Gibson*, 920 F.3d at 225; *Edmo*, 935 F.3d at 793.

[140] *Edmo*, 935 F.3d at 793.

[141] *Id.* at 769.

[142] Sarah Miller, *Transgender Inmates: A Systems-Based Model for Assessment and Treatment Planning*, Psychological Services 1, 2 (2018).

[143] *Edmo*, 935 F.3d at 769 (citing *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018)). See also Emanuella Grinberg, *What is medically necessary treatment for gender-affirming health care?*, CNN (June 20, 2019), <https://www.cnn.com/2018/05/31/health/transgender-medically-necessary-procedures/index.html> (calling the WPATH standards of care a “set of flexible clinical guidelines that the world's leading medical associations and courts of law follow”).

[144] World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 5 (7th ed. 2011) (https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf).

[145] *Id.*

[146] *Id.* at 54.

[147] *Id.* at 55. See also *Edmo*, 935 F.3d at 770 (citing Jae

Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 Int'l J. Prisoner Health 32, 36 (2017) (“Negative outcomes such as genital self-harm, including autocastration and/or autopenectomy, can arise when gender-affirming surgeries are delayed or denied.”).

[148] Coleman Et al., *supra* note 144, at 107.

[149] *Id.* at 2.

[150] *Reid*, 808 F.3d at 1193; *Farrier*, 131 F.3d at 327; *Supra*, 792 F.2d at 962–63.

[151] Coleman Et al., *supra* note 144 at 1.

[152] *Id.*

[153] *Id.* at 2.

[154] *Id.* at 5.

[155] *Id.* at 13.

[156] *Id.* at 23–24. The WPATH standards of care ask psychiatric professionals to evaluate clients based on the context of the client’s psychological adjustment. *Id.* “Th[is] evaluation includes, at a minimum, assessment of gender identity and gender dysphoria, history and development of gender dysphoric feelings, the impact of stigma attached to gender nonconformity on mental health, and the availability of support from family, friends, and peers (for example, in-person or online contact with other transsexual, transgender, or gender-nonconforming individuals or groups).” *Id.*

[157] Miller, *supra* note 144 at 1. Because the prison environment is strict and inmates are not allowed certain property (for example, undergarments or makeup), transgender inmates may suffer from dysphoria if they are not properly diagnosed. *Id.*

[158] Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 Am. J. Pub. Health (March 2014), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>.

[159] *Id.*; *United States Profile*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/US.html> (last visited March 30, 2020).

[160] Stroumsa, *supra* note 158.

[161] Jae Sevelius and Valerie Jenness, *Challenges and opportunities for gender-affirming healthcare for transgender women in prison*, 13 Int'l J. Prisoner Health 32, 35 (2017).

[162] *Id.*

[163] *Id.* See also *Edmo*, 935 F.3d at 757.

[164] *Edmo*, 935 F.3d at 757.

[165] Jae Sevelius and Valerie Jenness, *Challenges and opportunities for gender-affirming healthcare for transgender women in prison*, 13 Int'l J. Prisoner Health 32, 35 (2017). These behaviors also appear in transgender children raised in homes hostile to their gender identity; these children experience “depression, anxiety, fear, anger, self-mutilation, low self-esteem, and suicidal ideation”. Gerald Mallon and Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Practice Perspective*, 85 Child Welfare 215, 217 (2006). These hostile homes could be comparable environments, albeit often

less dangerous, to the prison environment, where inmates suffer discrimination and sexual assault due to their gender identity.

[166] Gerald Mallon and Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Practice Perspective*, 85 Child Welfare 215, 224 (2006) (“[Transgender youth] may run away from home and live on the streets, or they may seek to escape the pain of their lives using substances. ... [T]rans youth also are at significantly higher risk for suicide. Because of severe employment discrimination, transgender youth who are homeless, runaways, or throwaways may need to find work in the sex industry to survive and pay for their hormones, electrolysis, cosmetic surgery, and genital reassignment surgery.”)

[167] Alexander Kirkpatrick, *The Caged Bird Sings of Freedom: Why Allowing Sex-Reassignment Surgery for Transgender Life Prisoners Facilitates Rehabilitation and Reconciliation*, 26 S. Cal. Rev. L. & Soc. Just. 37, 53 (2016–2017).

[168] *Id.* at 62–65.

[169] *Id.*

[170] *Id.* at 64.

[171] See *supra*, note 112.

[172] 408 U.S. at 327 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).