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## **I Am Woman, Hear Me Roar: Denial of Sexual Reassignment Surgery for Transgender Inmates and the Eighth Amendment's Ban on Cruel and Unusual Punishment**

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**I AM WOMAN, HEAR ME ROAR: DENIAL OF SEXUAL  
REASSIGNMENT SURGERY FOR TRANSGENDER INMATES AND  
THE EIGHTH AMENDMENT’S BAN ON CRUEL AND UNUSUAL  
PUNISHMENT**

*Chiara Haueter\**

**I. INTRODUCTION**

Adree Edmo. Vanessa Lynn Gibson. Michelle Kosilek. These are the names of three transgender women currently incarcerated within the United States prison system.<sup>1</sup> They have been fighting for their right to receive life changing gender confirmation surgery that will successfully alleviate the severe symptoms associated with their gender dysphoria diagnoses.<sup>2</sup> The United States prison system does not view gender confirmation surgery as medically necessary for transgender individuals with diagnoses of gender dysphoria, but the medical community largely disagrees.<sup>3</sup> The basis of these women’s

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<sup>1</sup> Edmo v. Corizon, 935 F.3d 757 (9th Cir. 2019); Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019); Kosilek v. Spencer 774 F.3d 63 (1st Cir. 2014).

<sup>2</sup> Although the courts use the term “sex reassignment surgery,” this Note will use the term “gender confirmation surgery” throughout its entirety as it is the preferred term given by the World Professional Association for Transgender Health Standards of Care and the transgender community.

<sup>3</sup> WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER

fight lies in the Eighth Amendment's ban on cruel and unusual punishment and their argument that denying them access to obtain gender confirmation surgery constitutes cruel and unusual punishment.<sup>4</sup>

Since its holding *Estelle v. Gamble*<sup>5</sup> the Supreme Court has long held that punishment is cruel and unusual when an inmate has a serious medical need and prison officials are deliberately indifferent to that medical need.<sup>6</sup> Gender confirmation surgery is a controversial subject within both the legal and medical communities as society has become increasingly more aware and accepting of transgender individuals and their needs.<sup>7</sup> In *Edmo v. Corizon*,<sup>8</sup> the Ninth Circuit Court of Appeals was the first court to hold that denial of gender confirmation surgery for a transgender inmate violates the Eighth Amendment's ban on cruel and unusual punishment.<sup>9</sup> In *Edmo*, the Ninth Circuit gave considerable deference to the medical community's acceptance of the World Professional Association for Transgender Health Standards of Care for transgender individuals in addition to the American Psychiatric Association's Diagnostic and Statistics Manual's definition of gender dysphoria.<sup>10</sup> The Ninth Circuit's holding created a split among the circuit courts that have decided the same issue.<sup>11</sup> The First and Fifth Circuits have both held that there is no Eighth Amendment violation when transgender inmates are denied sex reassignment surgery.<sup>12</sup> While both circuits recognized that gender

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NONCONFORMING PEOPLE 67 (7th ed. 2012) [hereinafter WPATH STANDARDS OF CARE].

<sup>4</sup> *Kosilek v. Spencer*, 774 F.3d 63, 69 (1st Cir. 2014), *cert denied*, 135 S. Ct. 2059 (2015); *Gibson v. Collier*, 920 F.3d 212, 218 (5th Cir. 2019), *cert denied*, 140 S. Ct. 653 (2019); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 775 (9th Cir. 2019), *cert denied*, 141 S. Ct. 610 (2020).

<sup>5</sup> 429 U.S. 97 (1976).

<sup>6</sup> *Id.* at 98.

<sup>7</sup> *Kosilek*, 774 F.3d at 78 (discussing medical expert's strong alternate views to sex reassignment surgery); *Gibson*, 920 F.3d at 216 (stating that medical professionals and the prison system disagree with sex reassignment surgery); *cf. Edmo*, 935 F.3d at 769-70 (stating that World Professional Association Standards of Care are the internationally recognized and accepted standards of care, and that the majority opinion of the medical community is that gender confirmation surgery is safe, effective, and medically necessary for some transgender individuals).

<sup>8</sup> *Edmo*, 935 F.3d 757.

<sup>9</sup> *Id.* at 767; U.S. CONST. amend. VIII.

<sup>10</sup> 935 F.3d at 769.

<sup>11</sup> *See Kosilek*, 774 F.3d at 96; *see also Gibson*, 920 F.3d at 228.

<sup>12</sup> *Kosilek*, 774 F.3d at 86; *Gibson*, 920 F.3d at 219.

dysphoria is a medical condition that creates a serious medical need, both also deemed gender confirmation surgery as not medically necessary due to the existence of less extreme remedies that they viewed as equally effective in relieving the severe symptoms associated with gender dysphoria.<sup>13</sup> Additionally, both circuits held that prison officials were not deliberately indifferent regarding the medical need for gender confirmation surgery for transgender inmates.<sup>14</sup>

This Note will focus on the rights of transgender inmates with severe gender dysphoria to receive gender confirmation surgery by examining the Eighth Amendment's ban on cruel and unusual punishment and the medical community's acceptance of the World Professional Association for Transgender Health Standards of Care ("WPATH Standards of Care"). It will address the severe symptoms that are common with diagnoses of gender dysphoria and how gender confirmation surgery can greatly alleviate those symptoms. This Note will argue that denial of gender confirmation surgery of transgender inmates with severe gender dysphoria is a violation of the Eighth Amendment's ban on cruel and unusual punishment. This Note will further argue that the Supreme Court should have granted certiorari in at least one of the three cases to decide the issue. This Note will also propose a rule that gender confirmation surgery should be provided to a transgender inmate when there is a diagnosis of gender dysphoria and the requirements under the WPATH Standards of Care for eligibility of gender confirmation surgery are met.

This Note will be divided into seven parts. Part II will provide the history and values of the Eighth Amendment. It will also examine the Supreme Court's holding in *Estelle v. Gamble* and its two-prong test for determining when a punishment is cruel and unusual. Part III will discuss how gender dysphoria is defined under the American Psychiatric Association's DSM-5. Part IV will discuss the WPATH Standards of Care and its increased acceptance within the medical community as the leading guidance for transgender health and well-being. Part V will discuss the Ninth Circuit's holding and opinion in *Edmo v. Corizon*. It will also discuss the creation of the circuit split

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<sup>13</sup> *Kosilek*, 774 F.3d at 89; *Gibson*, 920 F.3d at 221 (discussing the First Circuit's opinion in *Kosilek* that there are other less extreme measures available for Gibson that were provided to Kosilek, such as hormones, electrolysis, feminine clothing and accessories, and mental health services).

<sup>14</sup> *Kosilek*, 774 F.3d at 96; *Gibson*, 920 F.3d at 223.

and examine the First and Fifth Circuits holdings in *Kosilek v. Spencer*<sup>15</sup> and *Gibson v. Collier*,<sup>16</sup> respectively. Part VI will discuss why the Supreme Court should have granted certiorari to decide the issue and will propose a rule that gender confirmation surgery should be provided for transgender inmates with gender dysphoria diagnoses and who meet the requirements for gender confirmation surgery under the WPATH Standards of Care. Finally, Part VII will conclude the Note.

## II. THE EIGHTH AMENDMENT’S BAN ON CRUEL AND UNUSUAL PUNISHMENT

### A. Cruel and Unusual Punishment Defined

The Eighth Amendment states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>17</sup> The purpose of the Eighth Amendment is to protect people from both cruel and unusual punishments and treatments while incarcerated.<sup>18</sup> Although the Eighth Amendment originally protected from harsh punishments, it has been expanded to include treatment of inmates in prison.<sup>19</sup> The Supreme Court established a definition of cruel and unusual punishment in the 1976 case of *Estelle v. Gamble*.<sup>20</sup> In *Estelle*, the respondent Gamble claimed a violation of his Eighth Amendment rights when prison officials denied him treatment for injuries sustained while performing a prison work assignment.<sup>21</sup> 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.”<sup>22</sup> The Court stated that the legislative history and changing views of modern society shapes its interpretation of what constitutes cruel and unusual punishment.<sup>23</sup> The Eighth Amendment extends beyond physically cruel and unusual punishment, and “proscribes more than

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<sup>15</sup> 774 F.3d 63 (1st Cir. 2014).

<sup>16</sup> 920 F.3d 212 (5th Cir. 2019).

<sup>17</sup> U.S. CONST. amend. VIII.

<sup>18</sup> *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 98.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976)).

<sup>23</sup> *Id.*

physically barbarous punishments.”<sup>24</sup> The punishment should be proportionate to the sentence, as “[t]he Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,’ against which we must evaluate penal measures.”<sup>25</sup> Additionally, the Court noted that “[w]e have held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society, or which ‘involve the unnecessary and wanton infliction of pain.’”<sup>26</sup>

The Court in *Estelle* also unambiguously stated what would not constitute cruel and unusual punishment: medical malpractice or simple negligence on the part of a medical professional.<sup>27</sup> Likewise, an “unforeseeable accident” will not be sufficient to constitute a violation of the Eighth Amendment.<sup>28</sup> Although an accident may create additional suffering, that suffering alone does not characterize “wanton infliction of unnecessary pain.”<sup>29</sup> An unintentional failure to provide adequate medical care will similarly not be sufficient to constitute an Eighth Amendment violation.<sup>30</sup> Ultimately, to state a cognizable claim under the Eighth Amendment, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”<sup>31</sup>

## B. Deliberate Indifference and Medical Care of

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<sup>24</sup> *Id.* at 102.

<sup>25</sup> *Id.* (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>26</sup> *Id.* at 102-03 (first quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958); then quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

<sup>27</sup> *Id.* at 104.

<sup>28</sup> *Id.* at 105. The Court cited, *La. ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) as an example of an accident that does not constitute an Eighth Amendment violation. The Court concluded that there was no Eighth Amendment violation when a second electrocution attempt moved forward after a medical malfunction thwarted the first attempt. *Estelle*, 429 U.S. at 105.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 105-06.

<sup>31</sup> *Id.* at 106.

### Prisoners

*Estelle's* “deliberate indifference” test is used to decide whether an inmate had access to adequate medical care.<sup>32</sup> In order to prove an Eighth Amendment violation, an inmate must satisfy a two prong test: “(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.”<sup>33</sup> The inmate must show that the medical need is one that has been diagnosed by a medical doctor as needing treatment, or one that is so obvious that even a lay person would recognize the need for a medical professional’s attention.<sup>34</sup> The subjective prong can be shown by proving that there was a deliberate indifference through a “wanton disregard” to the inmate’s needs, although the disregard must be so substantial that it requires a conscious risk of easily preventable impending harm.<sup>35</sup> The inmate must prove deliberate indifference by showing an act or omission that fails to respond to an inmate’s medical need and that the harm suffered by the inmate was caused by that act or omission.<sup>36</sup>

General agreement and acceptance among the medical community for care and practice are “highly relevant in determining what care is medically acceptable and unacceptable.”<sup>37</sup> A difference of opinion between a physician and an inmate, or between physicians will not constitute what is medically acceptable and therefore will not be sufficient to prove deliberate indifference for an Eighth Amendment claim.<sup>38</sup> However, the insufficiency will only hold weight if the opinions of those physicians are *both* medically acceptable under the circumstances.<sup>39</sup>

Over the past two decades, the medical community relied largely on the WPATH Standards of Care regarding treatment for transgender individuals diagnosed with gender dysphoria,<sup>40</sup> including

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<sup>32</sup> *Id.* at 97.

<sup>33</sup> *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 83.

<sup>36</sup> *Norsworthy v. Beard*, 87 F. Supp.3d 1164, 1186 (N.D. Ca. 2015).

<sup>37</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> *Id.* at 769.

when gender confirmation surgery (“GCS”) is medically necessary.<sup>41</sup> While the medical community has increasingly relied on the WPATH Standards of Care, the judicial system has not been as quick to defer.<sup>42</sup> This means that, for transgender inmates, availability of GCS as medically necessary while incarcerated is a topic hotly debated and wildly controversial within the legal community.<sup>43</sup>

### III. GENDER DYSPHORIA DEFINED

Generally, whether a person is eligible for GCS is determined based on a diagnosis of gender dysphoria under the American Psychiatric Association’s Diagnostic and Statistics Manual (“DSM-5”).<sup>44</sup> For incarcerated transgender inmates, a diagnosis of gender dysphoria and the severity of that diagnosis without the possibility for GCS can mean living a life filled with constant mental and emotional anguish, self-hatred, and attempts at self-harm, including suicide and self-castration.<sup>45</sup>

Gender dysphoria is defined as a marked incongruence between one’s experienced or expressed gender and assigned gender at birth.<sup>46</sup> Diagnosis for gender dysphoria requires that this incongruence must have a duration of at least six months, and must be manifested by at least two of the marked criteria stated in the DSM-5.<sup>47</sup> Additionally, the incongruence must also be causing pain and

<sup>41</sup> WPATH STANDARDS OF CARE, *supra* note 3.

<sup>42</sup> *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014); *Gibson v. Collier* 920 F.3d 212 (5th Cir. 2019). *But see Edmo*, 935 F.3d 757.

<sup>43</sup> *Kosilek*, 774 F.3d at 70-74; *Gibson*, 920 F.3d at 216; *Edmo*, 936 F.3d at 769.

<sup>44</sup> AM. PSYCH. ASS’N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013).

<sup>45</sup> *Id.* at 455.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The criteria in the DSM-5 for gender dysphoria are:

- (1) a marked incongruence between one’s experienced/expressed gender, and primary and/or 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; (3) a strong desire for the primary and/or secondary sex characteristics of the other gender; (4) a strong desire to be of the other gender (or some alternative gender different from one’s assigned gender); (5) a strong desire to be treated as the other gender (or some alternative gender different from one’s assigned gender); (6) a strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).



suffering.<sup>48</sup> Gender dysphoria is generally associated with significant mental and emotional agony or impairment in social, occupational, or other important areas of functioning.<sup>49</sup> In adults, “this distress manifests because of the strong incongruence between the experienced gender and somatic sex.”<sup>50</sup> However, the physical and emotional torment based on the incongruence can be mitigated or alleviated by supportive environments and “*knowledge that biomedical treatments exists to reduce the incongruence.*”<sup>51</sup> The standards of care within the realm of transgender individuals has consistently been moving toward the standards of care suggested by the WPATH Standards of Care within the last two decades.<sup>52</sup>

#### IV. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH STANDARDS OF CARE

##### A. Purpose and Goal of the SOC

The World Professional Association for Transgender Health is a worldwide association whose purpose is to promote several different areas of transgender health.<sup>53</sup> The WPATH Standards of Care state that one of its main functions is “to promote the highest standards of health care for individuals through the articulation of WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People.”<sup>54</sup> The Standards of Care are based on “the best available science and expert professional consensus.”<sup>55</sup> The overall goal of the WPATH Standards of Care is to provide clinical guidance for medical professionals to assist transgender people with “safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”<sup>56</sup> Clinical

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*Id.*

<sup>48</sup> *Id.* at 453.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 455.

<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> WPATH STANDARDS OF CARE, *supra* note 3, at 1.

<sup>53</sup> *Id.* “[A]n international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect in transsexual and transgender health.” *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

guidance includes various types of care, including hormonal and surgical treatments.<sup>57</sup> Further, the WPATH Standards of Care state that while the standards are primarily for medical professionals, they can, *and should*, also be used by social institutions to better understand how to aid and promote the wellbeing of transgender individuals.<sup>58</sup>

The WPATH Standards of Care explain that while the standards are flexible, they offer “optimal health care and guiding treatment of people experiencing gender dysphoria.”<sup>59</sup> Treatment is individualized on the severity of the person’s diagnosis.<sup>60</sup> Hormone therapy or surgery can effectively alleviate an individual’s gender dysphoria and is medically necessary for many people because it significantly reduces comorbid conditions that are generally associated with gender dysphoria and allows individuals to live a life as their expressed gender.<sup>61</sup>

### **B. When is Gender Confirmation Surgery Medically Necessary**

Effective treatments for relieving symptoms of gender dysphoria range from regular psychotherapy to more permanent and extreme remedies such as hormone injections and gender confirmation surgery.<sup>62</sup> GCS brings physical changes to the body and an individual’s primary and secondary sex characteristics.<sup>63</sup> While many transgender individuals can find comfort with their gender identity and expression without surgery, for others surgery is essential and medically necessary in order to alleviate their gender dysphoria.<sup>64</sup> For those who cannot mitigate their gender dysphoria through psychotherapy alone, a change in primary or secondary sex characteristics is necessary to achieve greater congruence with their gender identity.<sup>65</sup> Several post-surgery follow-up studies have shown an “undeniable beneficial effect of

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.* at 2; *see supra* notes 44-51 and accompanying text for a definition of gender dysphoria.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 54.

<sup>65</sup> *Id.*

gender confirmation surgery on postoperative outcomes.”<sup>66</sup> The WPATH Standards of Care emphasize that GCS is not an elective surgery, and that an assessment of the individual by mental health professionals should determine whether GCS is medically necessary.<sup>67</sup> The WPATH Standards of Care set out specific guidelines to determine when GCS is medically necessary.

When transgender individuals express a desire for GCS, they must go through a series of mental and physical evaluations that will determine if reconstructive surgery is medically necessary.<sup>68</sup> While the standards for GCS recommendation are largely individualized, each potential candidate for surgery must have medical documentation of persistent gender dysphoria.<sup>69</sup> Persistent gender dysphoria means that a patient must exhibit significant distress because they are unable to live a complete life as their experienced or expressed gender.<sup>70</sup> The general threshold criteria for both male-to-female and female-to-male transitions are “(1) persistent, well-documented gender dysphoria; (2) capacity to make a fully informed decision and to consent for treatment; (3) age of majority; and (4) if significant medical or mental health concerns are present, they must be reasonably well controlled.”<sup>71</sup> A person requesting genital reconstructive surgery has additional criteria that are: “(1) twelve continuous months of hormone therapy as appropriate to the patient’s gender goals, and (2) twelve continuous months of living in a gender role that is congruent with their gender identity.”<sup>72</sup> The rationale for these last two criteria are

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<sup>66</sup> *Id.* at 55; see De Cuypere et al., *Sexual And Physical Health After Sex Reassignment Surgery*, ARCHIVES OF SEXUAL BEHAV., 34(6), 679-90 (2005); Gijs & Brewaeys, *Surgical Treatment Of Gender Dysphoria In Adults And Adolescents: Recent Developments, Effectiveness, And Challenges*, ANN. REV. OF SEX RSCH., 18, 178-224 (2007); Klein & Gorzalka, *Sexual Functioning In Transsexuals Following Hormone Therapy And Genital Surgery: A Review (CME)*, THE J. OF SEXUAL MED. 6(11) 2922-39, (2009); Pfafflin & Junge, *Thirty Years Of International Follow-Up Studies After Sex Reassignment Surgery: A Comprehensive Review, 1961-1991*, INT’L J. OF TRANSGENDERISM (1998) (discussing the beneficial outcomes of GCS, including subjective well-being, cosmesis and sexual function).

<sup>67</sup> WPATH STANDARDS OF CARE, *supra* note 3, at 33 (A qualified mental health professional is one that is comfortable and experienced working with transsexual, transgender, and gender non-conforming people.).

<sup>68</sup> *Id.* at 58.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 59.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 60.

that the experience of living for twelve months as their preferred gender identity “provides ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery.”<sup>73</sup> A change in gender role can bring significant personal and social consequences, so the decision to receive GCS should include “an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be, so that people can function successfully in their gender role.”<sup>74</sup> The criteria of living for twelve months as an individual’s congruent gender identity is the crux of why transgender individuals within the prison system consistently hit a wall when it comes to requesting GCS and its medical necessity.<sup>75</sup> Medical experts inside the prison system disagree on whether transgender individuals can actually experience living as their expressed gender roles for the required period, because within many prison systems in the United States, inmates are housed based on their genitalia.<sup>76</sup>

### C. WPATH Standards of Care Applicability to Transgender Individuals Within the Prison System

For many people diagnosed with gender dysphoria, the intensity of the associated distress meets the criteria for a formal diagnosis as a mental disorder.<sup>77</sup> The WPATH Standards of Care state that a diagnosis of gender dysphoria “is not a license for stigmatization or for the deprivation of civil and human rights.”<sup>78</sup> This means that a diagnosis of gender dysphoria should not go to the identity of the person but describe the person’s struggle within their diagnosis.<sup>79</sup>

For transgender individuals with diagnoses of gender dysphoria within the prison system, access to medical care, including

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 61.

<sup>75</sup> *Kosilek v. Spencer*, 774 F.3d 63, 88 (1st Cir. 2014) (discussing the district court’s disagreement with *Kosilek*’s medical expert that a real-life experience could not occur in prison); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 771 (9th Cir. 2019) (discussing that the WPATH Standards of Care explicitly state that for transgender individuals living in an institutional environment, the standards should “mirror that which would be available to them if they were living in a non-institutional setting within the same community.”).

<sup>76</sup> *See Edmo*, 935 F.3d at 769. *But see Kosilek*, 774 F.3d at 70-73.

<sup>77</sup> WPATH STANDARDS OF CARE, *supra* note 3, at 5.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

hormone therapy and GCS is largely based on policies within the various Departments of Corrections (“DOC”), as well as how inmates are housed.<sup>80</sup> However, the WPATH Standards of Care emphasize that any and all guidelines and treatment options put forth in its standards apply to people in institutional environments, *including prisons*.<sup>81</sup> The WPATH Standards of Care assert that “[p]eople should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons or long/intermediate health care facilities.”<sup>82</sup> Further, health care for transgender people living in an institutional environment should be the same that would be available to them if they were living in a non-institutional setting within the same community.<sup>83</sup> If there is not a medical or healthcare professional within the DOC that has significant experience in dealing with gender dysphoria or transgender individuals, the WPATH Standards of Care express that “it is appropriate to obtain outside consultation from the professionals who are knowledgeable about this specialized area of health care.”<sup>84</sup> The WPATH Standards of Care also aver that “reasonable accommodations in the institutional environment” can be made in the delivery of care for transgender individuals, and “denial of needed changes in gender role or access to treatments, *including GCS*, on the basis of residence in an institution are not reasonable accommodations under the WPATH Standards of Care.”<sup>85</sup>

Policies within the DOC system provide different reasons for the availability or unavailability of GCS to transgender inmates.<sup>86</sup> Some DOCs point to safety and security concerns regarding availability of GCS for transgender individuals, rather than relying on the standards of care relevant to the medical community in relation to transgender individuals.<sup>87</sup> In other instances, some judges have found that WPATH Standards of Care outweigh DOC safety and security

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<sup>80</sup> See *Edmo* 935 F.3d at 769; see also *Kosilek*, 774 F.3d at 70-73.

<sup>81</sup> WPATH STANDARDS OF CARE, *supra*, note 3, at 67 (emphasis added).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 68 (emphasis added).

<sup>86</sup> *Kosilek v. Spencer*, 774 F.3d 63, 92-94 (1st Cir. 2014) (discussing the Massachusetts DOC’s security concerns for postoperative male-to-female inmates being housed in an all-female prison population should be given great deference because of the DOC’s expertise in the area).

<sup>87</sup> *Id.* at 73-74.

concerns, or have found that the stated safety and security concerns lack merit.<sup>88</sup> These safety and security concerns play a significant part in resolving whether denying GCS to a transgender inmate is a violation of the Eighth Amendment.<sup>89</sup>

## V. EXAMINING CASES OF TRANSGENDER INMATES AND THE CIRCUIT SPLIT

### A. The Ninth Circuit and the Creation of the Circuit Split

The question of whether denial of GCS for a transgender inmate with a diagnosis of gender dysphoria constitutes a violation of the Eighth Amendment is a fairly current debate among the legal community. The Ninth Circuit's recent holding in *Edmo v. Corizon, Inc.*<sup>90</sup> has created a split among the few circuits who have answered the question.<sup>91</sup>

In *Edmo*, the petitioner, Adree Edmo ("Edmo"), identified and was living as a woman for several years.<sup>92</sup> Although Edmo had been prescribed hormone injections and regularly had access to and attended psychotherapy, she felt continued "distress and frustration" because she was still identified by her assigned sex at birth as well as "disgust" toward her male genitalia.<sup>93</sup> Additionally, Edmo attempted suicide and self-castration multiple times because of her inability to suppress her feelings stemming from her gender dysphoria through hormones and psychotherapy.<sup>94</sup> Edmo was eventually evaluated for GCS after her attempts at self-castration by the DOC's mental health professional.<sup>95</sup> She was ultimately denied GCS based on the medical provider's conclusion that she "did not meet the criteria" and therefore GCS "was not medically necessary."<sup>96</sup> Edmo sued the DOC alleging violation of

<sup>88</sup> *Id.* at 110-11 (Thompson, J., dissenting).

<sup>89</sup> *See* 774 F.3d at 70; Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019); *But see* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

<sup>90</sup> *Edmo*, 935 F.3d at 767.

<sup>91</sup> Kosilek v. Spencer, 774 F.3d 53, 92-94 (1st Cir. 2014); *see also* Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019); *Edmo*, 935 F.3d 757.

<sup>92</sup> 935 F.3d at 771-72.

<sup>93</sup> *Id.* at 772.

<sup>94</sup> *Id.* at 773.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

her Eighth Amendment rights against cruel and unusual punishment, as well as an injunction requiring the DOC to provide her with GCS.<sup>97</sup> The district court found for Edmo, and the DOC appealed.<sup>98</sup> The Ninth Circuit Court of Appeals affirmed the district court's decision and held that the Indiana DOC was deliberately indifferent to Edmo's serious medical need.<sup>99</sup> Additionally, the Ninth Circuit affirmed the district court's grant of the injunction that Edmo be provided with GCS.<sup>100</sup>

The Ninth Circuit began its opinion by defining gender dysphoria using the DSM-5 and emphasizing that the WPATH Standards Of Care are the internationally recognized and accepted standards of care regarding transgender individuals.<sup>101</sup> The court compared the WPATH Standards of Care to the "standards" of the DOC medical provider who had denied Edmo GCS and concluded that "Dr. Eliason did not follow accepted standards of care in the area of transgender health care."<sup>102</sup> The court further criticized Dr. Eliason's criteria as "apparently invented out of whole cloth" and "so far afield from the WPATH standards that we cannot characterize his decision as a flexible application of or deviation from those standards."<sup>103</sup> This flows directly from the holding in *Estelle v. Gamble*,<sup>104</sup> where the Supreme Court stated that while difference of opinion among medical professionals will not create a basis for an Eighth Amendment claim, that difference of opinion will only be insufficient for an Eighth

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<sup>97</sup> *Id.* at 776-77.

<sup>98</sup> *Id.* at 780.

<sup>99</sup> *Id.* at 785.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 769 ("And many of the major medical and mental health groups in the United States – including the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America – recognize the WPATH Standards of Care as representing the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals.").

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 791 (Dr. Eliason's standards were stated to be "(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 psychological damage.'").

<sup>104</sup> *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

Amendment claim if both medical opinions are accepted within the medical community.<sup>105</sup>

The court then went on to discuss the deliberate indifference standard as set forth in *Estelle* and held that “Dr. Eliason knew of and disregarded the substantial risk of severe harm to Edmo.”<sup>106</sup> The Ninth Circuit is the first court to hold that denying GCS to a transgender inmate with gender dysphoria who meets the WPATH Standards of Care criteria is a violation of the Eighth Amendment’s ban on cruel and unusual punishment.<sup>107</sup> The Ninth Circuit based its holding on the medical opinions of Edmo’s experts, who established that the WPATH Standards of Care are the medically accepted standards of care within the transgender medical community.<sup>108</sup> Additionally, the court also considered the severity of Edmo’s gender dysphoria diagnosis.<sup>109</sup>

### **B. The Sister Circuits Holdings that Denying GCS For a Transgender Inmate Is Not a Violation of The Eighth Amendment**

In contrast to the Ninth Circuit’s holding, the First and Fifth Circuits have both held that denying a transgender inmate GCS did not constitute deliberate indifference on the part of medical providers and the DOC, and therefore the denial was not a violation of the Eighth Amendment.<sup>110</sup> Both circuits conceded that a diagnosis of gender dysphoria constitutes a serious medical need thus satisfying the first prong of the *Estelle* test.<sup>111</sup> Both circuits found a lack of deliberate indifference for different reasons.<sup>112</sup> The First Circuit Court of Appeals in *Kosilek* emphasized safety and security concerns, as well as disagreement over whether the WPATH Standards of Care are widely accepted within the medical community in holding that denial of GCS does not violate the Eighth Amendment.<sup>113</sup> The Fifth Circuit’s

<sup>105</sup> *Edmo*, 935 F.3d 757, 769 (This was also supported by the experts that Edmo put forth at her evidentiary hearing, who described Dr. Eliason’s “criteria” as “bizarre . . . I just don’t understand what Dr. Eliason is talking about here.”).

<sup>106</sup> *Id.* at 793.

<sup>107</sup> *Id.* at 786.

<sup>108</sup> *Id.* at 785.

<sup>109</sup> *Id.* at 787-91.

<sup>110</sup> *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014); *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019).

<sup>111</sup> *Kosilek*, 774 F.3d at 86; *Gibson*, 920 F.3d at 219.

<sup>112</sup> *Kosilek*, 774 F.3d at 91-92; *Gibson*, 920 F.3d at 225-26.

<sup>113</sup> *Kosilek*, 774 F.3d at 92.



holding in *Gibson* similarly emphasized the debate on WPATH Standards of Care and additionally interpreted the Eighth Amendment from a textualist perspective.<sup>114</sup>

*i. The First Circuit*

In *Kosilek*, petitioner Michelle Kosilek was born biologically male, but identifies as female.<sup>115</sup> She was diagnosed with gender dysphoria at the start of her incarceration.<sup>116</sup> While awaiting her criminal trial, she twice attempted suicide and made one attempt at self-castration as a result of her frustration at being anatomically male.<sup>117</sup> Although she has not attempted self-mutilation for the duration of the last twenty years, she has been fighting for GCS since her sentence began.<sup>118</sup> In her first attempt at fighting for GCS, the district court denied a finding of deliberate indifference due to the DOC's unawareness of Kosilek's serious medical need for more than "supportive therapy" for her gender dysphoria.<sup>119</sup> Although the district court found for the DOC, it made clear that a failure to provide more than psychotherapy to Kosilek in the future could amount to an Eighth Amendment violation since the DOC was now on notice that gender dysphoria was found to constitute a serious medical need.<sup>120</sup> In response, the DOC revamped its "freeze frame" policy on medical treatment, and amended the policy to allow inmates to receive additional medical treatment beyond the level they were receiving prior to incarceration.<sup>121</sup> As a result of this change in policy, Kosilek received hormones, gender-appropriate clothing, and a procedure that permanently removed her facial hair, in addition to continued psychotherapy.<sup>122</sup>

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<sup>114</sup> *Gibson*, 920 F.3d at 227.

<sup>115</sup> *Kosilek*, 774 F.3d at 68.

<sup>116</sup> *Id.* at 69-70.

<sup>117</sup> *Id.* at 69.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* A "freeze frame" policy is one that does not allow for medical treatment beyond what an inmate received prior to becoming incarcerated. An example would be where an inmate was receiving hormone treatment for gender dysphoria prior to incarceration, and due to the "freeze frame" policy, hormone levels would not be allowed to be increased as needed once the prisoner started his or her incarceration.

*Id.*

<sup>122</sup> *Id.* at 69-70.

Since receiving this additional treatment, Kosilek still felt a deep sense of distress regarding her male genitalia, and was ultimately assessed for GCS by an outside medical provider, the Fenway Center, that was experienced in transgender health.<sup>123</sup> The Fenway Center's report stated that Kosilek should receive GCS because she fell within the WPATH Standards of Care guidelines, and GCS would "allow Michelle full relief of her gender dysphoria" as well as "increase her chance for survival."<sup>124</sup> Despite this report, the DOC turned to another expert who determined that "surgery . . . was not medically necessary"<sup>125</sup> for Kosilek and ultimately denied Kosilek's request for GCS.<sup>126</sup>

In its holding, the First Circuit relied on a single expert's disagreement with the WPATH Standards of Care, in addition to the DOC's safety and security concerns about allowing Kosilek's GCS to move forward.<sup>127</sup> The outside expert, Dr. Osborne, opined that she believed that a penal institution was not able to satisfy the WPATH Standards of Care requirement of control of comorbid conditions, and therefore that standard could not be applied to incarcerated persons.<sup>128</sup> Although the Fenway Center medical experts disagreed and pointed to the WPATH Standards of Care's direction that "persons receiving treatment should continue to receive appropriate treatment . . . after incarceration,"<sup>129</sup> the court reasoned that there were two alternate and adequate choices that the DOC could take in its decision.<sup>130</sup> The court said that "the law is clear" where two alternative courses of medical treatment exist, it is not the place of the court to "second guess medical judgments" or "require that the DOC adopt the more compassionate of two adequate options."<sup>131</sup>

With respect to safety and security concerns, the court determined that the reasonable concerns raised by the DOC regarding post-operative, male-to-female transgender individuals takes "no great stretch of the imagination."<sup>132</sup> The DOC's primary concerns were not

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<sup>123</sup> *Id.* at 71.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 104.

<sup>126</sup> *Id.* at 71.

<sup>127</sup> *Id.* at 72.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 90.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

related to Kosilek's safety at all. The DOC's first safety concern was that housing a formerly male inmate with a history of domestic violence within a female prison population would create safety concerns for the *other* female prisoners because some of them had been subjected to domestic violence prior to incarceration.<sup>133</sup> Similarly, DOC's second concern did not examine Kosilek's personal safety. The DOC averred that providing GCS to Kosilek would essentially be giving into her "desired benefit" and that the flood gates would burst open with threats of suicide by all prisoners who are denied their "desired benefits" in order to get their way.<sup>134</sup> The court held that great deference should be given to DOC concerns about safety and security because they have the experience and greater knowledge needed to make those kinds of determinations.<sup>135</sup>

The court's final holding rested on the fact that because the DOC had chosen to provide care that falls just short of providing GCS, there was no showing of deliberate indifference to Kosilek's serious medical need.<sup>136</sup> Thus, the court held that there was no Eighth Amendment violation.<sup>137</sup> However, the First Circuit's holding in *Kosilek* essentially placed a blanket ban on GCS availability for transgender inmates, as the Fifth Circuit pointed out in its opinion in *Gibson v. Collier*.<sup>138</sup>

## ii. *The Fifth Circuit*

The Fifth Circuit's decision in *Gibson* relied heavily on the First Circuit's holding in *Kosilek*. The court ultimately held that the denial of GCS to a transgender inmate is not a violation of the Eighth Amendment.<sup>139</sup> In addition to relying on the *Kosilek* opinion, the Fifth Circuit also interpreted the Eighth Amendment from a textualist perspective.<sup>140</sup>

In *Gibson*, the petitioner, Vanessa Lynn Gibson ("Gibson"), was born male but identified as female and was diagnosed with gender

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<sup>133</sup> *Id.* at 93 (emphasis added).

<sup>134</sup> *Id.* at 94.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Gibson v. Collier*, 920 F.3d 212, 224-25 (5th Cir. 2019).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 226-27.

dysphoria at the age of fifteen.<sup>141</sup> After being incarcerated for aggravated murder, Gibson sought GCS to alleviate her gender dysphoria.<sup>142</sup> However, the Texas Department of Criminal Justice (“TDCJ”) denied the surgery because of a policy that did not allow GCS as a treatment option for gender dysphoria.<sup>143</sup> Gibson sued claiming a violation of her Eighth Amendment rights, alleging that the TDCJ’s policy created a de facto blanket ban on GCS as a treatment option for transgender inmates.<sup>144</sup> Here, Gibson did not seek an injunction to be provided surgery, but merely to be evaluated for GCS within the TDCJ policy.<sup>145</sup>

The Fifth Circuit, like both the First and Ninth Circuits, conceded that gender dysphoria is a serious medical need and therefore satisfies the first prong of *Estelle*’s two-prong test.<sup>146</sup> However, unlike the Ninth Circuit in *Edmo*, the Fifth Circuit held that there was no deliberate indifference to a serious medical need if a “genuine debate” exists within the medical community.<sup>147</sup> To support this determination, the court proffered what is essentially a brand new standard of “universal acceptance” by the medical community<sup>148</sup> to determine the acceptable standard of care, instead of following the precedent that was established over forty years ago in *Estelle*.<sup>149</sup> The *Estelle* precedent states that the standard of care is measured by what is widely accepted within the medical community.<sup>150</sup> To further bolster its conclusion, the court cited to three experts that testified for the State, who alleged that there are “less invasive procedures that are considered adequate.”<sup>151</sup>

The Fifth Circuit in *Gibson* attempted to create a new way to interpret the Eighth Amendment in determining whether a violation has occurred.<sup>152</sup> The court said that the text and original understanding

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<sup>141</sup> *Id.* at 216-17.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 218.

<sup>145</sup> *Id.*

<sup>146</sup> *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

<sup>147</sup> *Gibson*, 920 F.3d at 220.

<sup>148</sup> *Id.*

<sup>149</sup> *Estelle*, 429 U.S. at 98.

<sup>150</sup> *Id.*

<sup>151</sup> *Gibson*, 920 F.3d at 222. The less invasive procedures include hormones and access to psychotherapy. *Id.*

<sup>152</sup> *Id.*

of the Eighth Amendment’s “cruel and unusual” language means that the punishment must be both cruel *and* unusual.<sup>153</sup> The court reasoned that denying GCS was not unusual because GCS is not widely practiced in prisons.<sup>154</sup> When *Gibson* was decided, only California in 2017, had performed GCS on a transgender prison inmate.<sup>155</sup> California only performed the GCS after a lawsuit was filed, but there was ultimately a settlement agreement that included the surgery.<sup>156</sup> The court concluded that “there is no basis in Eighth Amendment precedent as well as the text or original understanding of the Constitution that would allow a holding of deliberate indifference for not taking sides in a medical debate that is widely disputed within the medical community.”<sup>157</sup>

## VI. THE PROPOSED RULE AND WHY THE SUPREME COURT SHOULD HAVE GRANTED CERTIORARI

While the Ninth Circuit held that denial of GCS to a transgender inmate with a diagnosis of gender dysphoria violated the Eighth Amendment’s ban on cruel and unusual punishment, this was only a small win for the transgender and prison community.<sup>158</sup> The Idaho DOC ultimately petitioned the Supreme Court for certiorari, which was denied.<sup>159</sup> The Supreme Court should have granted certiorari in this instance because it would have given the Court the opportunity to make a final and binding decision on the issue, and thus establish binding precedent that would solidify the WPATH Standards of Care as the medically accepted standard of care in the field of transgender health.

For too long, transgender inmates have been subjected to significant disrespect, trauma, and abuse, not only at the hands of prison officials and fellow inmates, and in some instances even the judges presiding over their cases.<sup>160</sup> In the Fifth Circuit’s opinion in

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019).

<sup>159</sup> *ID DOC v. Edmo*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020).

<sup>160</sup> *Edmo*, 935 F.3d at 772 (discussing the several disciplinary actions Edmo faced at the hands of prison officials for presenting as female, including wearing makeup and wearing her hair in feminine hairstyles).

*Gibson*, Judge Ho repeatedly deadnamed the plaintiff, referring to Vanessa Lynn Gibson as “he” or by her given name at birth, “Scott.”<sup>161</sup> Not only does Judge Ho’s refusal to recognize Gibson’s gender constitute a great disrespect towards Gibson as an individual, it also sets the outcome of the decision without actually having to read the words of the opinion itself. One can infer from his usage of the wrong pronoun when referring to Gibson that the decision has already been made in favor of the DOC. Additionally, the Ninth Circuit’s opinion in *Edmo* references several instances where Edmo was given citations by prison officers for simply presenting as feminine and identifying as her preferred gender.<sup>162</sup>

#### **A. The Supreme Court Should Have Granted Certiorari**

The Supreme Court should have granted certiorari to the Indiana DOC. Although it was the DOC in this case that petitioned the Court to reverse the lower court’s decision and ultimately reverse the ruling that it needed to provide Edmo GCS, it would have given the Court the opportunity to clarify what medical standards are required for transgender inmates under the Eighth Amendment. The rule that should be adopted by the Court is one that provides GCS for a transgender inmate with a diagnosis of gender dysphoria and who satisfies the requirements under the WPATH Standards of Care. This rule will arguably prevent several transgender inmates from succumbing to their associated comorbid conditions such as depression and self-harm and will ultimately save lives by preventing suicide among those transgender inmates.

#### **B. The Proposed Rule**

The WPATH Standards of Care list several comorbid conditions that are associated with a diagnosis of gender dysphoria.<sup>163</sup> Comorbid conditions can include anxiety, depression, self-harm,

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<sup>161</sup> *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019). “Deadnaming” is using the name that a transgender person was given at birth and no longer uses upon transitioning. *Deadname*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deadname> (last visited Apr. 2, 2021).

<sup>162</sup> *Edmo*, 935 F.3d 757.

<sup>163</sup> WPATH STANDARDS OF CARE, *supra* note 3, at 24.

compulsivity, sexual concerns, and psychiatric disorders.<sup>164</sup> The WPATH Standards of Care states that if these conditions are left untreated, it can “complicate the process of gender identity exploration and resolution of gender dysphoria.”<sup>165</sup> Thus, hormone therapy or psychotherapy alone are not sufficient for transgender inmates who have severe diagnoses of gender dysphoria. The denial of GCS or even evaluation for GCS may likely lead to higher rates of suicide. By creating a rule that a DOC provides and pays for GCS for a transgender inmate who presents severe gender dysphoria and falls within the WPATH Standards of Care requirements for GCS eligibility can decrease the likelihood of comorbid conditions and death among transgender inmates.

Additionally, housing transgender inmates based on their biological sex and expressed gender without GCS opens up the door for abuse by prison officials and other inmates. According to the National Center for Transgender Equality (“NCTE”), transgender inmates are exposed to “horrific rates of abuse by both staff and their fellow inmates.”<sup>166</sup> A survey by the U.S. Transgender Survey (“USTS”) found that “transgender people are ten times as likely to be sexually assaulted by their fellow inmates and five times as likely to be sexually assaulted by staff.”<sup>167</sup> The NCTE also states that transgender prisoners are more likely to face “lengthy stays in solitary confinement.”<sup>168</sup> This is not conducive to the mental health of a transgender inmate who has a diagnosis of gender dysphoria, and additionally, it is more likely to result in attempts at self-harm. Accordingly, transgender inmates should be placed in a facility based on their gender identity and not their assigned sex at birth.

The First and Fifth Circuits in *Kosilek* and *Gibson* both expressed security concerns about housing and moving transgender inmates to a prison population based on transgender inmates’ gender identity rather than their assigned sex at birth.<sup>169</sup> The security concerns asserted by the DOC in *Kosilek* stated that transferring *Kosilek* to a female detention center increased the risk of escape and fear among

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 25.

<sup>166</sup> *Police, Jails & Prisons*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://www.transequality.org/issues/police-jails-prisons>. (last visited Feb. 5, 2021).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Kosilek v. Spencer*, 774 F.3d 63, 74 (1st Cir. 2014); *Gibson v. Collier*, 920 F.3d 212, 230 (5th Cir. 2019) (Barksdale, J., dissenting).

the other female prisoners who had formerly been subjected to physical and mental abuse by their partners.<sup>170</sup> However, the NCTE states that “[w]hile any prisoner is capable of engaging in abusive conduct, there is simply no evidence to believe that transgender women present any more risk to their fellow women prisoners than other women.”<sup>171</sup> Additionally, the NCTE states that “a growing number of corrections facilities for youth and adults have successfully housed transgender women alongside other women without experiencing any incidents of abuse by transgender women or other prisoners.”<sup>172</sup> To show evidence of this, the NCTE cites a statewide study in California which found that “when transgender women are automatically housed with men, they were 13 times more likely to be sexually assaulted than male prisoners in the same facilities.”<sup>173</sup> This shows that the Indiana DOC security concerns as stated in *Kosilek* lack merit, and that transgender inmates should be housed based on their expressed gender identity and not on their assigned sex at birth.

All circuits that have denied GCS for a transgender inmate have also conceded that gender dysphoria is a diagnosis that has a serious medical need.<sup>174</sup> Additionally, all circuits have cited the expert testimony of Dr. Cynthia Osborne.<sup>175</sup> In *Kosilek* and *Gibson*, the First and Fifth Circuits cited Dr. Osborne’s expert testimony in holding that denying GCS for a transgender inmate does not constitute an Eighth Amendment violation when there are “alternative methods available.”<sup>176</sup> These alternative methods that Dr. Osborne advocated for in *Kosilek* and *Gibson* referred to hormone therapy and psychotherapy.<sup>177</sup> However, in the Ninth Circuit’s decision in *Edmo*, the court recognized that Dr. Osborne had changed her views on whether GCS for transgender inmates is medically necessary.<sup>178</sup>

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<sup>170</sup> *Kosilek*, 774 F.3d at 74.

<sup>171</sup> *Ending Abuse of Transgender Prisoners: A guide to Winning Policy Change In Jails And Prisons*, NAT’L CTR. FOR TRANSGENDER EQUAL. (2018) <https://transequality.org/sites/default/files/docs/resources/EndingAbuseofTransgenderPrisoners.pdf>.

<sup>172</sup> *Id.* at 20.

<sup>173</sup> *Id.* at 20-21.

<sup>174</sup> *See Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019); *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014); *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019).

<sup>175</sup> *Edmo*, 935 F.3d at 795-96; *Kosilek*, 774 F.3d at 70-73; *Gibson*, 920 F.3d at 221-22.

<sup>176</sup> *Kosilek*, 774 F.3d at 70-73; *Gibson*, 920 F.3d at 221-22.

<sup>177</sup> *Kosilek*, 774 F.3d at 70-73; *Gibson*, 920 F.3d at 221-22.

<sup>178</sup> *Edmo*, 935 F.3d at 795-96.



Referencing Dr. Osborne’s response in *Kosilek* regarding whether she views GCS as medically necessary, the Ninth Circuit states “[t]o the extent this vague portrait of Dr. Osborne’s testimony conveys her belief that GCS is never medically necessary, she has apparently changed her view in the more than ten years since she testified [in *Kosilek*].”<sup>179</sup> Dr. Osborne now views GCS as medically necessary “for some, though not all, persons with [gender dysphoria], *including some prison inmates*.”<sup>180</sup> Dr. Osborne’s changed opinion on GCS weakens the holdings in *Kosilek* and *Gibson* because the First and Fifth Circuits gave ample weight to Dr. Osborne’s testimony in their decisions.<sup>181</sup> Dr. Osborne has changed her views on GCS, and now opines that it is medically necessary for some transgender inmates. Thus, if *Kosilek* and *Gibson* had been decided today with the same weight given to the expert testimony of Dr. Osborne, the results may likely have come out on the same side as the Ninth Circuit’s decision in *Edmo*.

The decisions rendered in *Kosilek*, *Gibson*, and *Edmo* show that the debate of GCS for transgender inmates in the medical and legal realm are still at odds. Fortunately, the change in Dr. Osborne’s opinion shows that the medical community is moving toward a consensus that the WPATH Standards of Care are the appropriate standards for transgender health and well-being. Additionally, the significant comorbid conditions associated with gender dysphoria unambiguously show that gender dysphoria is a diagnosis that constitutes a serious medical need, and thus satisfies the first prong of the test for cruel and unusual punishment established in *Estelle*.<sup>182</sup> Michelle Kosilek’s access to a variety of treatments for her gender dysphoria is a step in the right direction, but the First Circuit’s holding does not address the potential for future instances of suicide and self-mutilation, which can affect future transgender inmates. This in itself evidences a deliberate indifference to a serious medical need, the exact type of treatment that the Eighth Amendment proscribes.<sup>183</sup> The Supreme Court had the opportunity to create a rule that would significantly reduce the risk of suicide and self-harm among transgender inmates, thus bringing awareness and notice to the serious medical need of gender dysphoria and likely reducing any deliberate

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<sup>179</sup> *Id.* at 796.

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> *Kosilek*, 774 F.3d at 108-110; *Gibson*, 935 F.3d at 795-96.

<sup>182</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>183</sup> U.S. CONST. amend. VIII.

indifference to it. The Court here had the chance for a home run but chose instead to not even step up to the plate.

## VII. CONCLUSION

Although there has been significant progress regarding the LGBTQ community, the legal system is still far behind on the issue of transgender inmates. Their care and access to GCS is an important issue that needs to be addressed. As of this writing, only two transgender inmates have received GCS while in prison, one of them being Adree Edmo.<sup>184</sup> This should be seen as light at the end of the tunnel, but due to the Supreme Court's denial of certiorari on the issue, many transgender inmates like Michelle Kosilek and Vanessa Lynn Gibson may very well die trying to fight for their right to receive GCS. Outside of the prison system, GCS is readily available – one must simply fall within the purview of the requirements put forth in the WPATH Standards of Care to be deemed eligible. This begs the question of why transgender inmates are fighting for their basic right to live as they truly are while those outside the system are eligible as long as they meet the requirements.

In the words of Lisa Harvey, a transgender woman, regarding GCS: “It’s a lot of money, but it’s nothing compared to the psychological price of waiting for something you’ve wanted all your life.”<sup>185</sup> The courts should require that GCS be provided for transgender inmates who have a diagnosis of gender dysphoria and satisfy the requirements of the WPATH Standards of Care. Denying GCS to an individual who falls under these requirements is taking away a life that is worth saving and would be acting with deliberate

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<sup>184</sup> Tommy Simmons, *Idaho Transgender Inmate Becomes 2nd in Country to Receive Gender Confirmation Surgery*, IDAHO PRESS (Jul. 27, 2020) [https://www.idahopress.com/news/local/idaho-transgender-inmate-becomes-2nd-in-country-to-receive-gender-confirmation-surgery/article\\_f2aad619-2735-5040-8904-2a762f0734e9.html](https://www.idahopress.com/news/local/idaho-transgender-inmate-becomes-2nd-in-country-to-receive-gender-confirmation-surgery/article_f2aad619-2735-5040-8904-2a762f0734e9.html); Associated Press, *California Murder Convict Becomes First U.S. Inmate to Have State Funded Sex Reassignment Surgery*, L.A. TIMES (Jan. 6, 2017, 2:20 PM) <https://www.latimes.com/local/lanow/la-me-ln-inmate-sex-reassignment-20170106-story.html>.

<sup>185</sup> Lisa Harvey, *‘I Don’t Need a Vagina to Feel Like a Woman’: Why Changing Gender Wasn’t About Switching One Body For Another – It Was About Saving My Life*, GLAMOUR MAG. (Nov. 18, 2020) <https://www.glamourmagazine.co.uk/article/charlie-hill-trans-interview>.

indifference to a diagnosis with a serious medical need. It constitutes cruel and unusual punishment under the Eighth Amendment. The Court will very likely be asked to consider this issue again in the future. It is unclear just how much time will pass and how many transgender inmates will die before the Court recognizes that transgender inmate lives are worth saving.