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Transgender Inmates' Right to Gender Confirmation Surgery

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TRANSGENDER INMATES' RIGHT TO GENDER CONFIRMATION SURGERY

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The Eighth Amendment prohibits cruel and unusual punishment. It ensures that the state's power to punish is exercised within the bounds of evolving standards of human decency. At the time of its enactment in 1791, the Eighth Amendment merely protected against torture and other physically barbarous treatments. However, as society's standards of decency changed, so too did the scope of the Eighth Amendment. Today, among other protections, the Eighth Amendment mandates that prisons provide inmates with adequate conditions of confinement. This includes an obligation on the part of the prison to provide adequate medical care. But a great deal of controversy exists as to what exactly adequate medical care requires. In the context of transgender inmates, circuit courts are split over the necessity of providing gender confirmation surgery. While some courts believe that blanket bans on such surgery are constitutional, others prescribe a case-by-case analysis to determine the constitutionality of a prison's denial of gender confirmation surgery. This Note explores the divergence between these two approaches and argues that a case-by-case approach better comports with both the historical confines of the Constitution and contemporary societal values.

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INTRODUCTION

Transgender individuals[1] are incarcerated at a significantly higher rate than their cisgender[2] counterparts.[3] Due to disproportionately high rates of poverty among transgender communities and discriminatory profiling, one in six transgender individuals will be incarcerated during their lifetime.[4] Once imprisoned, transgender individuals are among the most vulnerable inmates in the prison population.[5] These inmates are subjected to unprecedented rates

1. Transgender individuals are those whose gender identity is different from their "sex assigned at birth." *Transgender Identity Terms and Labels*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender/transgender-identity-terms-and-labels [https://perma.cc/7V6C-AGWL] (last visited Apr. 14, 2021).

2. Cisgender individuals identify with the "sex they were assigned at birth." *Id.*

3. *See* Tara Dunnavant, Note, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV., no. 1, 2016, at 15, 19.

4. *Id.*

5. *See* Richard Edney, *To Keep Me Safe from Harm?: Transgender Prisoners and the Experience of Imprisonment*, 9 DEAKIN L. REV. 327, 328 (2004).

of abuse and harassment, not only from other inmates but also from the prison authorities themselves.[6]

The challenges faced by transgender inmates are visible in many different forms. For one, many transgender inmates are subjected to "humiliation and degradation" from prison staff and other prisoners.[7] Transgender inmates are considered "the lowest rung on the totem pole" and, as a result, endure verbal and physical abuse.[8]

Further, transgender prisoners often fall victim to sexual abuse.[9] Approximately 40 percent of transgender inmates report being sexually assaulted while imprisoned.[10] This rate of abuse is ten times greater than that of the general prison population.[11] This partly results from prison policies that place inmates in facilities in accordance with their genitalia and birth-assigned sex rather than by their gender identities.[12]

To compound the problem, transgender inmates often cannot seek protection. Prison officials generally "turn a blind eye" to these abuses and sometimes even encourage them.[13] In fact, transgender inmates are five times more likely than cisgender inmates to be sexually abused by prison staff.[14] If prison authorities seek to rectify this mistreatment at all, they often place the transgender inmate in solitary confinement.[15] This can cause serious psychological harm and trauma equivalent to that of torture.[16]

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6. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS, 6 (2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf [https://perma.cc/G9BD-HJVG].

7. *Id.*

8. Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 GEO. J. GENDER & L. 585, 601 (2014) (quoting SYLVIA RIVERA L. PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 26 (2007), https://srlp.org/files/warinhere.pdf [https://perma.cc/VY2E-Q6WB])).

9. *See* Dunnavant, *supra* note 3, at 19.

10. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 6, at 6.

11. *Id.*

12. Dunnavant, *supra* note 3, at 19.

13. *See* Darren Rosenblum, *Trapped in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 525 (2000).

14. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 192 (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/F689-SFCB].

15. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 6, at 6.

16. *Id.*

Additionally, transgender inmates, specifically those with gender dysphoria,[17] face serious barriers to receiving adequate medical care.[18] These inmates often seek hormone therapy, counseling, gender confirmation surgery (GCS), and other transition-related accommodations to alleviate their dysphoria.[19] However, prison officials commonly block access to such treatment through restrictive policies such as "freeze-frames" and blanket bans.[20]

In an effort to combat these oppressive policies, gender dysphoric inmates have sought recourse under the Eighth Amendment.[21] The Eighth Amendment prohibits cruel and unusual punishment.[22] The U.S. Supreme Court has held that the Eighth Amendment requires prisons to provide inmates with conditions of confinement that comport with evolving standards of decency.[23]

In litigation, gender dysphoric inmates have asserted that a prison's failure to provide transition-related medical care violates the Eighth Amendment.[24] While courts generally have acknowledged some duty on the part of prisons to provide transition-related care, the extent of such duty remains contested.[25] Specifically, much debate surrounds prisons' obligation to provide GCS.[26]

Without any guidance from the Supreme Court, circuit courts have been left to determine the constitutionality of prisons' denial of GCS.[27] The circuit courts first addressed this issue in *Kosilek v. Spencer*.[28] Although the First

17. Gender dysphoria is a medical condition characterized by significant distress or impairment resulting from an incongruence between one's gender identity and sex assigned at birth. *See infra* Part I.C.1. Some, but not all, transgender individuals suffer from gender dysphoria. Jack Drescher, et al., Expert Q & A: *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/gender-dysphoria/expert-q-and-a [https://perma.cc/XZ95-Z86B] (last visited Apr. 14, 2021). This Note focuses specifically on the Eighth Amendment remedies available for gender dysphoric inmates.

18. *See* Samantha Braver, Note, *Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals*, 120 COLUM. L. REV. 2235, 2247 (2020) (stating that it is exceedingly difficult for transgender inmates, particularly gender dysphoric inmates, to receive proper medical care).

19. *See* Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 286, 304 (2016).

20. *See Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people [https://perma.cc/3B2W-GPE9] (last visited Apr. 14, 2021). "Freeze-frame" policies "freeze treatment options for incarcerated transgender individuals at the level of treatment they received prior to their incarceration." Braver, *supra* note 18, at 2247.

21. *See, e.g.*, Mitchell v. Kallas, 895 F.3d 492 (7th Cir. 2018); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011); De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003).

22. U.S. CONST. amend. VIII.

23. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976).

24. *See infra* Part I.C.

25. *See* Jordan Rogers, Note, *Being Transgender Behind Bars in the Era of Chelsea Manning: How Transgender Prisoners' Rights Are Changing*, 6 ALA. C.R. & C.L.L. REV. 189, 195 (2015).

26. *See infra* Part III.

27. *See infra* Parts II, III.

28. 774 F.3d 63 (1st Cir. 2014).

Circuit's holding in *Kosilek* was clear—the prison's denial of GCS did not amount to cruel and unusual punishment—the implications are more obscure.[29] Both the Fifth and Ninth Circuits have relied on *Kosilek* in deciding the constitutionality of a blanket ban on GCS; however, these circuits are split on the issue.[30] On the one hand, in *Gibson v. Collier*,[31] the Fifth Circuit held that a prison's blanket ban on GCS is constitutional because such surgery is never medically necessary.[32] On the other hand, in *Edmo v. Corizon, Inc.*,[33] the Ninth Circuit found a similar blanket ban on GCS unconstitutional on the basis that such treatment can be medically necessary.[34] Accordingly, *Edmo* urged courts to undertake a case-by-case analysis to assess whether a prison's denial of GCS constitutes cruel and unusual punishment.[35]

This Note examines the aforementioned circuit split between the Fifth and Ninth Circuits in the context of the Eighth Amendment's requirement that punishments comport with evolving standards of decency. In doing so, this Note not only addresses the requirements for bringing an Eighth Amendment inadequate medical care claim but also explores whether there is a place for blanket bans within larger Eighth Amendment jurisprudence. Finally, this Note discusses this circuit split within its larger societal framework in an attempt to gauge contemporary standards of decency, considering both the increased accessibility and acceptance of GCS, and the overarching national movement to promote civil rights.

Part I of this Note provides the framework for understanding the Eighth Amendment claims brought by transgender inmates. Specifically, Parts I.A and I.B discusses the foundations of the Eighth Amendment, its connection to the evolving standards of decency, and its application to inadequate medical care claims. Part I.C then explores the conditions that prompt transgender inmates to bring such claims. Part II discusses *Kosilek*, the first case in which a circuit court addressed whether a transgender inmate has an Eighth Amendment right to GCS and explains *Kosilek*'s importance in the current circuit split. Next, Part III explores the split between the Fifth and Ninth Circuits regarding the constitutionality of prisons' denial of GCS. Lastly, Part IV takes the position that a blanket ban is contrary to the evolving standards of decency, incompatible with existing Eighth Amendment jurisprudence, inconsistent with the consensus among the medical community, and also a product of flawed case law. As a result, this part sides with *Edmo* and urges courts to engage in a case-by-case analysis.

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29. *See infra* Part II.B.
30. *See infra* Part III.
31. 920 F.3d 212 (5th Cir.).
32. *Id.* at 223, 228.
33. 935 F.3d 757 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020).
34. *See id.* at 796–97.
35. *Id.* at 796.

I. THE FRAMEWORK FOR UNDERSTANDING TRANSGENDER INMATES' EIGHTH AMENDMENT CLAIMS

This part provides the foundation for understanding the Eighth Amendment claims brought by transgender inmates. Part I.A introduces the Eighth Amendment. Part I.A discusses the Eighth Amendment's prohibition on cruel and unusual punishment, explains how courts have used this language to challenge both prisoners' sentences and conditions of confinement, and highlights the importance of adhering to evolving standards of decency. Part I.B then explores a frequently challenged condition of confinement—inadequate medical care—and lays out the two-prong test plaintiffs must satisfy to successfully establish such claims. Part I.C then focuses specifically on the context in which transgender inmates may bring inadequate medical care claims. Namely, Part I.C.1 explains gender dysphoria, a condition for which transgender inmates seek treatment from prisons, and Part I.C.2 discusses GCS, the treatment typically sought.

A. The Eighth Amendment

The Eighth Amendment prohibits "cruel and unusual punishments."[36] It ensures that the state's power to punish convicted criminals is "exercised within the limits of civilized standards."[37]

While originally drafted to protect against "physically barbarous treatment," over time, courts have extended the Eighth Amendment's protections beyond mere physical torture.[38] Today, a wide range of government actions have been held to violate Eighth Amendment scrutiny.[39] Firstly, prisoners have successfully relied on the Eighth Amendment to challenge the constitutionality of their sentences.[40] Sentences are deemed "cruel and unusual" when they are "'grossly disproportionate' to the

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

37. Trop v. Dulles, 356 U.S. 86, 100 (1958).

38. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976). The Eighth Amendment originally addressed "torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like." Ryan Dischinger, Note, *Adequate Care for a Serious Medical Need:* Kosilek v. Spencer *Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria*, 22 TUL. J.L. & SEXUALITY 169, 171 (2013) (quoting O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting)).

39. *See, e.g.*, Wilkins v. Gaddy, 559 U.S. 34, 38, 40 (2010) (holding that punching, kicking, choking, and overall excessive physical force by a corrections officer against a prisoner constitutes "cruel and unusual punishment"); Roper v. Simmons, 543 U.S. 551, 570-71 (2005) (holding that the Eighth Amendment prohibits the death penalty for criminal offenders under the age of eighteen); Walker v. Schult, 717 F.3d 119, 126–27 (2d Cir. 2013) (holding that exposing prisoners to extreme temperatures, preventing prisoners from sleeping, providing unsanitary conditions, and failing to provide toiletries and other hygienic materials may all constitute "cruel and unusual punishments").

40. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884 (2009) (stating that the Eighth Amendment limits the "criminal sentences the state may impose"); *see also Roper*, 543 U.S. at 575; Atkins v. Virginia, 536 U.S. 304, 321 (2002) (determining that inflicting the death penalty on an intellectually disabled person would be cruel and unusual punishment).

crime,"[41] are "totally without penological justification,"[42] or "involve the unnecessary and wanton infliction of pain."[43]

Secondly, prisoners also invoke the Eighth Amendment to challenge their conditions of confinement.[44] In *Estelle v. Gamble*,[45] the Supreme Court established that certain deprivations suffered during imprisonment constitute "cruel and unusual punishments" when a prison acts with deliberate indifference toward an inmate's serious need.[46] Such deprivations include failure to provide adequate food, shelter, clothing, or medical care.[47]

What constitutes cruel and unusual punishment cannot be assessed in a vacuum. Courts must evaluate punishments in accordance with the Eighth Amendment's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[48] What may have been "cruel and unusual" at the time of the Eighth Amendment's enactment in 1791 may be very different than what is cruel and unusual today.[49] As such, courts look to the "evolving standards of decency that mark the progress of a maturing society" when determining the constitutionality of a punishment.[50] A punishment is cruel and unusual if it is inconsistent with society's current standard of decency.[51]

As societal notions of decency are constantly changing, so too are the actions deemed cruel and unusual.[52] To navigate this complexity, courts generally look to objective indicia of society's standards to determine the national consensus regarding a particular punishment.[53] Such objective indicia include legislative enactments, state practices, and recent trends in the law indicating a change in direction.[54] A national consensus denouncing a

41. Dolovich, *supra* note 40, at 883–84 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

42. *Id.* at 884 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)). Retribution, deterrence, incapacitation, and rehabilitation are penological goals sufficient to justify a punishment under the Eighth Amendment. *See* Graham v. Florida, 560 U.S. 48, 71 (2010).

43. Dolovich, *supra* note 40, at 884 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

44. *See* Wilson v. Seiter, 501 U.S. 294, 297 (1991) (stating that the Eighth Amendment could be applied beyond sentencing to deprivations suffered during imprisonment).

45. 429 U.S. 97 (1976).

46. *See Wilson*, 501 U.S. at 297.

47. *See* Dischinger, *supra* note 38, at 171 (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)); *see also, e.g.*, Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) (holding that housing vulnerable inmates in hot cells without access to "heat-relief measures" is unconstitutional); Reed v. McBride, 178 F.3d 849, 856 (7th Cir. 1999) (stating that knowingly depriving a prisoner of food for three to five days violates the Eighth Amendment).

48. *See Estelle*, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

49. *See* Kennedy v. Louisiana, 554 U.S. 407, 419 (2008).

50. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

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

52. *See* Weems v. United States, 217 U.S. 349, 378 (1910) (explaining that the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice").

53. Rachael Rezabek, Note, *(D)evolving Standards of Decency: The Unworkability of Current Eighth Amendment Jurisprudence as Illustrated by* Kosilek v. Spencer, 87 S. CAL. L. REV. 389, 399 (2014).

54. *Id.*; *see also infra* Part IV.A.2 (identifying specific objective indicia relevant in assessing medical treatments).

particular punishment supports a finding that such punishment is not in line with civilized standards, decency, and humanity and thus, violates the Eighth Amendment's prohibition on cruel and unusual punishment.[55]

B. Inadequate Medical Care Claims

The adequacy of medical care is a condition of confinement that is frequently challenged.[56] Because inmates have no choice but to rely on the prison to treat their medical needs, a prison's failure to do so can cause serious pain, suffering, physical torture, or even death.[57] In *Estelle*, the Court held that a prison inflicts cruel and unusual punishment when it acts with deliberate indifference to a prisoner's serious medical need.[58] This requires a two-prong showing.[59]

First, a prisoner must satisfy an objective prong that requires proof of a "serious medical need."[60] A serious medical need is one "diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[61] Once a prisoner demonstrates a serious medical need, this prong also requires a showing that the prison provided inadequate medical care.[62] A prison facility need not provide the most ideal treatment or even the one the prisoner prefers, but the treatment provided must be "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards."[63]

If the treatment provided was adequate, it does not matter that another medical professional might have prescribed a different course of care.[64] If a treatment is deemed medically necessary, however, then no other care will be deemed adequate.[65] It follows that a prison cannot issue a blanket ban on

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55. *See* Atkins v. Virginia, 536 U.S. 304, 316 (2002) (finding that a punishment was cruel and unusual where there was a national consensus against it).

56. *See* Wilson v. Seiter, 501 U.S. 294, 311 n.1 (1991) (stating that courts have "routinely" applied the Eighth Amendment to deprivations of medical care).

57. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

58. *Id.* at 104.

59. Sarah Halbach, Comment, *Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care*, 105 J. CRIM. L. & CRIMINOLOGY 463, 475 (2015).

60. Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014). Besides gender dysphoria, other examples of recognized "serious medical needs" include "swollen ankles, inability to sleep, chills, tingling and numbness of hands, hyperventilation, severe back and leg pain, and double vision." Loadholt v. Moore, 844 F. Supp. 2d 1274, 1279 (S.D. Ga. 2012) (citing Ancata *ex rel.* Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 702–03 (11th Cir. 1985)).

61. Guadreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990).

62. *Kosilek*, 774 F.3d at 85.

63. *See* United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987).

64. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020).

65. Bethany L. Edmondson, Note, *Trans-lating the Eighth Amendment Standard: The First Circuit's Denial of a Transgender Prisoner's Constitutional Right to Medical Treatment*, 51 GA. L. REV. 585, 592 (2017).

a medically necessary treatment where no other treatment will suffice.[66] Therefore, determining the necessity of the treatment is critical in assessing the validity of these claims. Standards of care and practice in the medical community are extremely important in this analysis.[67]

Once prisoners fulfill this objective prong, they must then satisfy a subjective prong.[68] This requires proof that the prison was deliberately indifferent to that need.[69] This component is fulfilled if the prisoner can prove that a prison official knew of and consciously disregarded a substantial risk of serious harm to the inmate's health or safety.[70] Thus, mere negligence or inadvertence alone is not enough to prove deliberate indifference.[71] On the other hand, actual malice by the prison is not required.[72] The prisoner need not prove that "a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[73]

In considering this subjective prong, "security considerations inherent in the functioning of a penological institution must be given significant weight."[74] Thus, even denials of necessary medical care may not rise to the level of deliberate indifference if the prison based its decision on a legitimate concern for prisoner safety and security.[75]

Finally, like all Eighth Amendment claims, inadequate medical care claims must be decided in the context of evolving standards of decency.[76] However, the deceny analysis is not confined to either of the two prongs.[77] Instead,

66. *See* Fields v. Smith, 653 F.3d 550, 556, 559 (7th Cir. 2011) (rejecting a prison's blanket ban on hormone therapy after finding that there was no "adequate replacement" for the treatment).

67. *Edmo*, 935 F.3d at 786.

68. Perry v. Roy, 782 F.3d 73, 78 (1st Cir. 2015).

69. *Id.*

70. Farmer v. Brennan, 511 U.S. 825, 837 (1994); *see also* Gomez v. Randle, 680 F.3d 859, 865–66 (7th Cir. 2012) (holding that failure to treat an inmate's shotgun wound for four days amounted to deliberate indifference where the prison was aware of the injury and the delay in treatment caused "unnecessary pain as a result of a readily treatable condition"); Gill v. Mooney, 824 F.2d 192, 195–96 (2d Cir. 1987) (finding guards' conscious refusal to follow a physician's orders and provide an inmate access to the prison's exercise facilities constituted deliberate indifference to his neck and back pain); Nolet v. Armstrong, 197 F. Supp. 3d 298, 306 (D. Mass. 2016) (determining a prison nurse was deliberately indifferent to an inmate when she failed to refer the inmate "for further or additional treatment for his wound, despite observing Plaintiff's wound for several months [and] seeing infection and [a lack of healing]").

71. *Farmer*, 511 U.S. at 835.

72. Carrie S. Frank, Note, *Must Inmates Be Provided Free Organ Transplants?: Revisiting the Deliberate Indifference Standard*, 15 GEO. MASON U. C.R.L.J. 341, 352 (2005) (noting that deliberate indifference requires "something more than negligence, but less than malice").

73. *Farmer*, 511 U.S. at 842.

74. Kosilek v. Spencer , 774 F.3d 63, 83 (1st Cir. 2014).

75. *Id.*

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

77. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411

standards of decency are the benchmark against which each inquiry must be made, a thread woven throughout the entire decision.[78] Only by considering evolving standards of decency can courts determine what a serious medical need is, whether there was any deliberate indifference, and ultimately, what constitutes cruel and unusual punishment.[79] Despite the importance of adhering to evolving standards of decency, curiously, courts often do not explicitly examine objective indicia of society's standards.[80] Accordingly, it is often hard to pinpoint both exactly where the evolving standards of decency analysis comes into play within the two prongs and also what courts are relying on in determining that a treatment does or does not meet this standard. However, what is clear is that punishments that do not comport with society's standards of decency will be deemed cruel and unusual.[81]

C. Medical Needs Unique to Transgender Inmates

Transgender inmates with gender dysphoria, in particular, rely on the Eighth Amendment when asserting their right to receive proper medical evaluation and treatment.[82] They argue that gender dysphoria is a serious medical condition and that failure to provide transition-related accommodations, such as clothes and grooming,[83] hormone therapy,[84] and GCS, constitutes cruel and unusual punishment.[85] Although courts initially denied these claims, today, courts recognize some duty on the part of the prisons to treat gender dysphoria.[86]

(U.S. Oct. 13, 2020) (discussing evolving standards of decency before beginning the two-pronged analysis and then again in the conclusion); *Kosilek*, 774 F.3d at 96 (exploring evolving standards of decency not in the context of the two prongs but in the conclusion of the opinion).

78. *See Estelle*, 429 U.S. at 106 (stating that evolving standards of decency are the backdrop against which Eighth Amendment claims must be considered).

79. *See* Colwell v. Bannister, 763 F.3d 1060, 1066–67 (9th Cir. 2014) (considering evolving standards of decency in determining what constitutes a serious medical need); McElligott v. Foley, 182 F.3d 1248, 1254 (11th Cir. 1999) (reasoning that sufficiently harmful acts or omissions constitute deliberate indifference only when they offend evolving standards of decency).

80. Rezabek, *supra* note 53, at 412.

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

82. *See* Halbach, *supra* note 59, at 474 ("[T]ransgender prisoners have turned to the Eighth Amendment to argue that a deprivation of hormone therapy and [GCS] constitutes cruel and unusual punishment.").

83. *See, e.g.*, Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1263 (11th Cir. 2020).

84. *See, e.g.*, Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011) (discussing plaintiffs' allegation that the prison's blanket ban on hormone treatment violated the Eighth Amendment); De'Lonta v. Angelone, 330 F.3d 630, 632 (4th Cir. 2003) (restating defendant's allegation that the prison's failure to provide her with hormone therapy treatment constituted cruel and unusual punishment).

85. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020); Gibson v. Collier, 920 F.3d 212, 218 (5th Cir. 2019); Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014).

86. *See* Rogers, *supra* note 25, at 195 (stating that courts have recognized that in at least some circumstances, prisoners have a right to transition-related medical care).

1. Gender Dysphoria

According to the American Psychiatric Association (APA), gender dysphoria is a condition that involves an "incongruence between one's experienced/expressed gender and their assigned gender."[87] It is informally described as the feeling of being "trapped in the wrong body."[88] Gender dysphoria typically results in significant distress or impaired functioning.[89] Patients experiencing gender dysphoria often exhibit "depression, anxiety, compulsivity, behavior disorders, personality disorders, and tendencies toward self-harm and suicide."[90] The *Diagnostic and Statistical Manual of Mental Disorders* provides criteria for diagnosing gender dysphoria.[91] It suggests that patients must exhibit at least two of the following characteristics for at least six months to be diagnosed with gender dysphoria:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
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).[92]

A wide range of treatments have been prescribed for gender dysphoria.[93] These include counseling, hormone therapy, puberty suppression, and GCS.[94]

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87. Jack Turban, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Nov. 2020), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/QU58-4GM6].

88. *See* Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy*, 61 CLEV. ST. L. REV. 957, 960 (2013).

89. Turban, *supra* note 87.

90. Bourcicot & Woofter, *supra* note 19, at 286.

91. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013) [hereinafter DSM-5].

92. *Id.*

93. Turban, *supra* note 87.

94. *Id.*

2. Gender Confirmation Surgery

GCS is a procedure that typically consists of breast/chest surgery, genital surgery, and nongenital, nonbreast surgical interventions.[95] Some gender dysphoric inmates believe that GCS is the only adequate way to treat their condition.[96]

The World Professional Association for Transgender Health (WPATH), an international organization dedicated to advancing transgender health care, agrees that for some patients with gender dysphoria, GCS is a medical necessity.[97] To "provide clinical guidance for health professionals to assist transsexual, transgender, and gender nonconforming people," the WPATH created the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (SOC).[98] The SOC lays out the following criteria for determining whether GCS is necessary:

1. Persistent, well documented gender dysphoria;
2. Capacity to make a fully informed decision and to consent for treatment;
3. Age of majority in a given country;
4. If significant medical or mental health concerns are present, they must be well controlled;
5. 12 continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones).
6. 12 continuous months of living in a gender role that is congruent with their gender identity.[99]

Although endorsed by WPATH, the necessity of GCS is not accepted by everyone in the medical community.[100] A "minority of the medical community" refuses to accept that GCS is anything more than "cosmetic"

95. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 57 (7th ed. 2011) [hereinafter WPATH SOC], https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf?_t=1605186324 [https://perma.cc/N3QQ-CRJR].

96. *See* Rena Lindevaldsen, *A State's Obligation to Fund Hormonal Therapy and Sex-Reassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 LIBERTY U. L. REV. 15, 15 (2012) (stating that some patients with gender dysphoria believe their condition will only be alleviated through surgery).

97. WPATH SOC, *supra* note 95, at 1, 54.

98. *Id.* at 1.

99. *Id.* at 60.

100. *See* Brooke Acevedo, Note, *The Constitutionality and Future of Sex Reassignment Surgery in United States Prisons*, 28 HASTINGS WOMEN'S L.J. 81, 88 (2017).

surgery.[101] These individuals reject the conclusions and authority of WPATH and believe that the SOC are merely "guidelines."[102]

II. THE DISPUTE OVER GENDER CONFIRMATION SURGERY BEGINS IN THE FIRST CIRCUIT

In *Kosilek*, a circuit court addressed for the first time whether, under the Eighth Amendment, a prison's failure to provide GCS to a transgender inmate amounted to cruel and unusual punishment.[103] Part II.A explores the merits of Kosilek's Eighth Amendment claim. Specifically, this section discusses the court's holding that the prison was not deliberately indifferent to Kosilek's serious medical need and provided her with adequate health care. Part II.B highlights *Kosilek*'s influence in the split between the Fifth and Ninth Circuits regarding the constitutionality of a blanket ban on GCS.

A. Kosilek v. Spencer

Michelle Kosilek, a prisoner assigned male at birth, had experienced gender dysphoria since the age of three.[104] As a result of her gender identity, she endured tremendous mental and physical abuse throughout her life.[105] In 1992, Kosilek was sentenced to life without parole for first-degree murder of her then wife.[106] While in prison, Kosilek attempted suicide twice.[107] She also tied a string around her testicles to castrate herself.[108]

Kosilek filed multiple lawsuits against the Massachusetts Department of Correction (MDOC).[109] In her first suit, she alleged that the prison's failure to evaluate her for gender dysphoria and provide the requisite treatment amounted to cruel and unusual punishment under the Eighth Amendment.[110] The district court held that the health care provided was inadequate but that the prison was not deliberately indifferent.[111] To rectify this inadequacy, the prison provided Kosilek with hormones, electrolysis, feminine clothes, accessories, and therapy to alleviate her dysphoria.[112] Kosilek still sought

101. *See id.* (first citing Melissa Pandika, *A Case Against Sex Change Surgeries*, OZY (Nov. 10, 2015), https://www.ozy.com/the-new-and-the-next/a-case-against-sex-change-surgeries/39103 [https://perma.cc/9N9W-75NN]; and then citing Julie Bindel, *The Operation That Can Ruin Your Life*, STANDPOINT (Oct. 19, 2009), https://standpointmag.co.uk/the-operation-that-can-ruin-your-life-features-november-09-julie-bindel-transsexuals/ [https://perma.cc/T3FU-YCNU]).

102. *See, e.g.*, Kosilek v. Spencer, 774 F.3d 63, 76 (1st Cir. 2014) (discussing the testimony of a licensed psychiatrist and an associate director of the John Hopkins School of Medicine who stated that WPATH's SOC are just guidelines rejected by many people involved in the gender dysphoria field).

103. *Id.* at 68.

104. Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002).

105. *Id.*

106. *Kosilek*, 774 F.3d at 68–69.

107. *Id.* at 69.

108. *Id.*

109. *Id.* at 68.

110. *See Kosilek*, 221 F. Supp. 2d at 159.

111. *Id.* at 195.

112. *See Kosilek*, 774 F.3d at 89.

GCS, but the prison denied her request.[113] She filed a second suit alleging that failure to provide GCS specifically amounted to inadequate medical care for her gender dysphoria under the Eighth Amendment.[114] After over twenty years of litigation, in 2012, the district court issued an injunction ordering MDOC to provide Kosilek with GCS.[115] In 2014, the issue reached the First Circuit.[116] The First Circuit reversed the district court's grant of injunctive relief and held that MDOC's failure to provide Kosilek with GCS was constitutional.[117]

First, according to the court, Kosilek failed to satisfy the objective prong of her inadequate medical care claim.[118] The court accepted that Kosilek's gender dysphoria constituted a serious medical need.[119] This was undisputed by the state.[120] However, the court held that the prison's treatment was adequate.[121] In particular, the court found that GCS was not medically necessary to treat Kosilek's dysphoria.[122] The court noted that the prison's treatment led to a "real and marked improvement in Kosilek's mental state."[123] Kosilek's doctors testified that since receiving such treatment, she was joyful and more stable.[124] Kosilek even admitted that MDOC's treatment "led to a significant stabilization in her mental state."[125] Importantly, the court also acknowledged that a long period of time had passed since she had had suicidal ideation or attempted to castrate herself.[126] The court determined that this treatment resulted in "significant" physical changes and an "increasingly feminine appearance."[127] Additionally, the court noted that MDOC even had a plan in place to minimize the risk of future harm to Kosilek.[128]

Moreover, the court found that the district court erroneously discredited a doctor's testimony that GCS was not medically necessary for Kosilek.[129] Although the doctor did not rely on WPATH's SOC in determining that GCS was not necessary, the court nevertheless found the doctor's testimony to be

113. *See* Kosilek v. Spencer, 889 F. Supp. 2d 190, 197 (D. Mass. 2012), *rev'd*, 774 F.3d 63.
114. *Id.*
115. *Id.*
116. *See Kosilek*, 774 F.3d at 68.
117. *See id.* at 96.
118. *See id.* at 90.
119. *Id.* at 86.
120. *See id.*
121. *Id.* at 86 (stating that the prison's treatment "far exceeds a level of care that is 'so inadequate as to shock the conscience'" (quoting Torraco v. Maloney, 923 F.2d 231, 235 (1st Cir. 1991))).
122. *See id.* at 90 (stating that the prison chose one of two acceptable alternative treatments).
123. *Id.* at 89.
124. *Id.* at 90.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 86–87. According to the First Circuit, the district court ignored "critical nuance" in the doctor's testimony and relied on a "severely strained reading." *Id.* at 87.

credible.[130] The court highlighted the testimony that indicated that the SOC were flexible and a product of the "lack of rigorous research in the field."[131] The majority specifically noted that, at the time, the SOC included language that said, "all readers should be aware of the limitations of knowledge in this area."[132]

The court also determined that the subjective prong was not fulfilled.[133] The court reasoned that MDOC neither knew nor should have known that GCS was the only adequate treatment.[134] The court noted that MDOC received the opinions of multiple medical professionals and was ultimately presented with two seemingly alternative treatment plans, one that included GCS and one that did not.[135]

Further, the court found that MDOC was not deliberately indifferent given the safety concerns present in this case.[136] Specifically, the court noted the threat to safety that arises when housing a transgender female inmate "with a criminal history of extreme violence against a female domestic partner—within a female prison population containing high numbers of domestic violence survivors."[137] The court also cited the testimony of multiple prison officials who acknowledged the risk, on the other hand, of housing a transgender female prisoner in a facility for male prisoners.[138] Lastly, although Kosilek's suicidal ideation was "very real," the court found credible MDOC's concern that providing Kosilek with GCS could incentivize other inmates to threaten suicide to receive a desired treatment.[139]

In reaching its holding, the court recognized that the Eighth Amendment prohibits punishments that violate society's standards of decency.[140] However, the court did not look to any objective indicia of a national

130. *Id.*

131. *See id.* at 78, 87.

132. *Id.* at 87. However, such language has since been removed from WPATH's SOC. *See* WPATH SOC, *supra* note 95.

133. *Kosilek*, 774 F.3d at 91 (explaining that even if GCS was necessary, "it is not the district court's own belief about medical necessity that controls, but what was known and understood by prison officials in crafting their policy" (citing Wilson v. Seiter, 501 U.S. 294, 300 (1991))).

134. *Id.* at 91–92.

135. *Id.*

136. *Id.* at 92 (stating that, with issues of security, the policy decisions of prison officials "should be accorded wide-ranging deference" (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979))).

137. *Id.* at 93.

138. *See id.*

139. *Id.* at 94.

140. *Id.* at 96 ("The Eighth Amendment, after all, proscribes only medical care so unconscionable as to fall below society's minimum standards of decency." (citing Estelle v. Gamble, 429 U.S. 97, 102–05 (1976))).

consensus, as is typically done in other Eighth Amendment cases.[141] Instead, *Kosilek* relied solely on the expert testimony presented in the case.[142]

B. The Significance of Kosilek

The holding of *Kosilek* was clear: Kosilek failed to satisfy both the objective and subjective prong of her Eighth Amendment inadequate health care claim.[143] Thus, denying GCS was not cruel and unusual punishment.[144] However, the implications of this holding are ambiguous. Some courts have understood *Kosilek* to stand for the proposition that a blanket ban on GCS is constitutional, as GCS is never medically necessary.[145] Others have interpreted *Kosilek* as merely conducting a fact-specific analysis and determining that GCS was not medically necessary in that particular case.[146] Given this disagreement, as a circuit split developed among the Ninth and Fifth Circuits regarding the constitutionality of a blanket ban on GCS, courts on both sides of the debate have relied on *Kosilek* to support their holdings.[147]

III. THE FIFTH AND NINTH CIRCUITS WEIGH IN AND SPLIT

After *Kosilek*, a split emerged among the circuit courts as to the constitutionality of a blanket ban on GCS.[148] While courts have uniformly accepted that gender dysphoria constitutes a serious medical need,[149] a

141. *See* Rezabek, *supra* note 53, at 403–05 (discussing *Kosilek* and stating that "although courts purport to analyze punishment, medical care, and prison condition cases according to 'evolving standards of decency,' which requires an examination of 'objective indicia of a society's standards,' courts seem to largely ignore objective considerations in medical care cases").

142. *See Kosilek*, 774 F.3d at 86–90 (reviewing the expert testimony before determining that "DOC [had] chosen one of two alternatives—both of which [were] reasonably commensurate with the medical standards of prudent professionals").

143. *See supra* Part II.A.

144. *See Kosilek*, 774 F.3d at 96.

145. *See* Gibson v. Collier, 920 F.3d 212, 224–25 (5th Cir. 2019); Armstrong v. Mid-Level Prac. John B. Connally Unit, No. SA-18-CV-00677, 2020 WL 230887, at *5 (W.D. Tex. Jan. 15, 2020).

146. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1191 (N.D Cal. 2015).

147. *See, e.g.*, *Edmo*, 935 F.3d at 794 (citing *Kosilek* in support of its fact-specific analysis and rejection of a blanket ban on GCS); *Gibson*, 920 F.3d at 224–25 (relying on *Kosilek* to hold that a blanket ban on GCS is constitutional).

148. *Compare Edmo*, 935 F.3d at 796–97 (finding a blanket ban to be unconstitutional), *with Gibson*, 920 F.3d at 216 (accepting a blanket ban as within the bounds of the Eighth Amendment).

149. *See* Alvin Lee, Note, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 464 (2008); *see also Edmo*, 935 F.3d at 785 (acknowledging that many courts have recognized gender dysphoria as a serious medical need); *Gibson*, 920 F.3d at 219 (stating that the state does not contest that the plaintiff diagnosed with gender dysphoria has a serious medical need); *Kosilek*, 774 F.3d at 86 ("That [gender dysphoria] is a serious medical need . . . is not in dispute in this case.").

conflict centers around the necessity of GCS.[150] Part III.A of this Note examines *Gibson*, in which the Fifth Circuit held that a blanket ban on GCS does not constitute cruel and unusual punishment because GCS is never medically necessary. Part III.B of this Note explores the contrary approach adopted by the Ninth Circuit in *Edmo* and its conclusion that GCS is medically necessary in certain circumstances.

A. The Fifth Circuit: Gibson

After *Kosilek*, the Fifth Circuit in *Gibson* addressed whether it was cruel and unusual punishment to deny a transgender prisoner GCS.[151] Vanessa Lynn Gibson, the plaintiff, was a transgender female inmate in the custody of the Texas Department of Criminal Justice (TDCJ).[152] Gibson, who had been diagnosed with gender dysphoria, had identified as female since age fifteen.[153] While imprisoned for aggravated robbery, Gibson suffered from depression and "acute distress."[154] She tried to castrate herself and attempted suicide three times.[155] The prison provided Gibson hormone therapy and counseling to treat her dysphoria.[156] However, she claimed this treatment did not alleviate her distress and that without GCS, she would again attempt to commit suicide or self-castration.[157] The prison denied her repeated requests for GCS, as the prison's policy explicitly prohibited the use of GCS to treat gender dysphoria.[158] Gibson filed suit against the director of TDCJ, arguing that the blanket ban on GCS amounted to deliberate indifference because it prevented the prison from even considering whether GCS was necessary for her.[159] The Fifth Circuit rejected Gibson's claim and upheld the constitutionality of a blanket ban on GCS.[160]

1. The Objective Prong

The court held that Gibson satisfied the objective prong of her Eighth Amendment claim.[161] Gibson's gender dysphoria constituted a serious medical need as reflected by her "record of psychological distress, suicidal ideation, and threats of self-harm."[162] The court never explicitly addressed the adequacy of Gibson's treatment.[163] However, the court viewed the

150. *Compare Edmo*, 935 F.3d at 787 (stating that GCS can be medically necessary), *with Gibson*, 920 F.3d at 220–21 (finding that GCS is never medically necessary).
151. *See Gibson*, 920 F.3d at 215.
152. *Id.* at 216–17.
153. *Id.* at 217.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 217–18.
159. *Id.* at 218.
160. *See id.* at 226.
161. *See id.* at 219.
162. *Id.*
163. *See id.* (stating only that Gibson had a serious medical need before proceeding to the subjective prong of the analysis).

subjective prong, namely the prison's alleged deliberate indifference, as the only real issue in dispute.[164]

2. The Subjective Prong

The court held that Gibson's Eighth Amendment claim failed to satisfy the subjective prong.[165] The state did not act with deliberate indifference by implementing a blanket ban on GCS.[166] In so holding, the court reasoned that "there is no intentional or wanton deprivation of care" when a prison denies an inmate a treatment that is highly contested within the medical community.[167] According to the court, unless a treatment is "universally accepted" by the medical community as necessary, failure to provide such treatment cannot amount to deliberate indifference.[168] Because the court found that GCS was not universally accepted, it concluded a blanket ban on the surgery did not violate the Eighth Amendment.[169]

The court relied exclusively on the record in *Kosilek* to determine that GCS was not "universally accepted" as medically necessary.[170] First, the Fifth Circuit rejected the acceptance of the WPATH's SOC, which assert that GCS is a medical necessity.[171] According to the court, the testimony in *Kosilek* demonstrated that the SOC "reflect not consensus, but merely one side in a sharply contested medical debate over [GCS]."[172] Moreover, the court found that the record in *Kosilek* "document[ed] more than enough dissension within the medical community" to prove that GCS was not medically necessary.[173] As the court found that GCS is never required, it had no impetus to address Gibson's individualized need and instead upheld the blanket ban. [174]

Further, the court determined that blanket bans in and of themselves do not amount to deliberate indifference.[175] In upholding the blanket ban, the court relied on both the Constitution and precedent.[176] The court argued that the

164. *See id.*
165. *See id.* at 220.
166. *See id.* at 224–25.
167. *Id.* at 220 (citing Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 2019)).
168. *See id.* at 220–21.
169. *See id.* at 224.
170. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019) (per curiam) (stating that *Gibson* "coopted the record from *Kosilek*" in finding that GCS is never medically necessary), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020).
171. *See Gibson*, 920 F.3d at 223 (stating that WPATH's SOC do not reflect a medical consensus).
172. *Id.* at 221–22 (citing Kosilek v. Spencer, 774 F.3d 63, 76, 87 (1st Cir. 2014) (noting specifically that the testimonies of Dr. Chester Schmidt, a licensed psychiatrist and associate director of Johns Hopkins School of Medicine, and Dr. Stephen Levine, an author of WPATH's SOC, expressed skepticism about the efficacy of the SOC and acknowledged that many medical professionals decline to adhere to them).
173. *See id.* at 223.
174. *See id.* at 223–25.
175. *See id.* at 224–25.
176. *See id.* at 225.

Eighth Amendment permits categorical judgments in certain contexts.[177] Additionally, the court relied on *Kosilek* as precedent for condoning a blanket ban, noting that both the *Kosilek* dissent and Gibson's counsel "construed the logic" of the majority to allow for such a ban.[178]

3. Evolving Standards of Decency

Gibson recognized the importance of considering evolving standards of decency when determining which punishments are cruel and unusual.[179] Not only did the court cite numerous Supreme Court opinions to demonstrate this significance[180] but it also specifically stated that "our job is to identify the 'evolving standards of decency'; to determine, not what they *should* be, but what they are."[181] In espousing that evolving standards of decency do not reflect a national consensus regarding the necessity of GCS, the court noted that only one state at the time had ever provided GCS to an inmate.[182] Thus, denying such surgery could not be "unusual" or outside the bounds of decency.[183]

B. The Ninth Circuit: Edmo

Faced with a transgender prisoner's Eighth Amendment inadequate health care claim, the Ninth Circuit in *Edmo* rejected the blanket ban on GCS adopted by the Fifth Circuit in *Gibson*.[184] Adree Edmo, the plaintiff, was a transgender female prisoner in the custody of the Idaho Department of Correction (IDOC).[185] She had identified as female since the age of five or six.[186] Edmo was officially diagnosed with gender dysphoria after her arrest for sexual abuse of a fifteen-year-old male.[187] While incarcerated, Edmo legally changed her name to Adree and the sex on her birth certificate to

177. *See id.* The court illustrated this point by reference to the FDA. *Id.* The court explained that the Eighth Amendment does not require an individualized assessment of an inmate's need for a certain drug where the FDA has categorically banned such drug. *See id.*

178. *See id.* at 224–25 (citing Kosilek v. Spencer, 774 F.3d 63, 106–07 (1st Cir. 2014) (Thompson J., dissenting)).

179. *See id.* at 226–27 (explaining that the "fundamental flaw" in Gibson's argument is that this punishment comports with evolving standards of decency) (citing Stanford v. Kentucky, 492 U.S. 361, 378 (1989))).

180. *See id.* at 227 (first citing Harmelin v. Michigan, 501 U.S. 957, 976 (1991); then citing Stanford v. Kentucky, 492 U.S. at 361, 378 (1989); then citing Roper v. Simmons, 543 U.S. 551, 564 (2005); and then Glossip v. Gross, 576 U.S. 863, 938–39 (2015) (Breyer, J., dissenting)).

181. *Id.* (quoting Stanford v. Kentucky, 492 U.S. 361, 378 (2015)).

182. *Id.* (citing Quine v. Beard, No. 14-cv-02726, 2017 WL 1540758, at *1 (N.D. Cal. Apr. 28, 2017)).

183. *See id.* at 228.

184. Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019) (per curiam) ("We respectfully disagree with the categorical nature of our sister circuit's holding."), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020).

185. *Id.* at 767.

186. *Id.* at 772.

187. *Id.*

female.[188] She also consistently "presented" herself as female through her hairstyle and makeup.[189] The prison provided Edmo with hormone therapy.[190] Edmo gained the maximum physical changes associated with this treatment.[191] However, she continued to experience "significant distress" due to her genitalia.[192] She specifically stated she felt depressed, embarrassed, and disgusted by it.[193] While receiving hormone treatment, Edmo attempted to castrate herself twice.[194] She also cut her arms with razor blades to help alleviate "the 'emotional torment' and mental anguish her gender dysphoria cause[d] her."[195] Edmo sought GCS, but the prison denied her requests.[196] Although IDOC's policy permitted GCS when determined necessary by the treating physician, it was deemed unnecessary for Edmo.[197]

Edmo filed suit, alleging that IDOC was deliberately indifferent to her gender dysphoria by denying GCS.[198] Specifically, she sought an injunction ordering the prison to perform such surgery.[199] The Ninth Circuit affirmed the district court's grant of an injunction, holding that GCS was medically necessary to treat Edmo's dysphoria.[200] In so holding, the court rejected the blanket ban approach endorsed by *Gibson* and employed a case-by-case analysis to determine whether the denial of GCS amounted to cruel and unusual punishment.[201] The Supreme Court denied the state's application for a stay of the injunction pending appeal[202] and Edmo received her surgery on July 10, 2020.[203]

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 773–74.
195. *Id.* at 774.
196. *Id.* at 773.
197. *Id.*
198. *Id.* at 775.
199. *Id.*
200. *Id.* at 767.
201. *See id*. at 794, 797 (holding that Eighth Amendment jurisprudence requires a "fact-specific analysis" rather than a de facto ban on GCS).
202. Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *cert denied*, No. 19-1280, 2020 WL 60337411 (U.S. Oct. 13, 2020).
203. Tommy Simmons, *Idaho Transgender Inmate Becomes 2nd in Country to Receive Gender Confirmation Surgery*, IDAHO PRESS (July 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://perma.cc/FJZ3-3HXC].

1. The Objective Prong

The court found that Edmo satisfied the objective prong.[204] Edmo's gender dysphoria constituted "a sufficiently serious medical need."[205] The court recognized that gender dysphoria is a serious medical condition,[206] which caused Edmo to attempt self-castration and "to feel 'depressed,' 'disgusting,' 'tormented,' and 'hopeless.'"[207]

The court also found that the prison's treatment was inadequate under the Eighth Amendment.[208] In particular, the court held that GCS was necessary in this specific case.[209] In reaching this conclusion, the court gave weight to Edmo's experts, who explained the necessity of GCS.[210] According to the court, Edmo's experts were well qualified, "logically and persuasively" stated their opinions, and correctly applied WPATH's SOC.[211] On the other hand, the state's experts, who argued that GCS was not necessary, lacked expertise in treating people with gender dysphoria, and either incorrectly applied WPATH's SOC or failed to do so at all.[212]

2. The Subjective Prong

Further, the court concluded that Edmo's claim satisfied the subjective prong, as the prison facility consciously disregarded an excessive risk to Edmo's health.[213] The court found that the prison's psychiatrist "acted with deliberate indifference to Edmo's serious medical needs."[214] The psychiatrist knew that even with hormone treatment, Edmo had attempted to castrate herself twice, that Edmo suffered gender dysphoria and "clinically significant" distress, and that Edmo's gender dysphoria, in the pyschiatrist's words, "had risen to another level."[215] Yet, despite this knowledge, the prison psychiatrist never reevaluated or recommended a change in Edmo's treatment plan.[216]

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204. *See Edmo*, 935 F.3d at 767 (stating that Edmo had a serious medical need and that the treatment provided by the prison was inadequate).

205. *Id.* at 785 (first citing Rosati v. Igbinoso, 791 F.3d 1037, 1039–40 (9th Cir. 2015); then citing Kosilek v. Spencer, 774 F.3d 63, 86 (1st Cir. 2014); then citing De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013); then citing Battista v. Clarke, 645 F.3d 449, 452 (1st Cir. 2011); then citing Allard v. Gomez, 9 F. App'x 793, 794 (9th Cir. 2001); then citing White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988); then citing Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987); then citing Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1187 (N.D. Cal. 2015); and then citing Konitzer v. Frank, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010)).

206. *Id.* (citing DSM-5, *supra* note 91, at 453, 458).

207. *Id.*

208. *Id.* at 786.

209. *Id.* at 787.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 792–93.

214. *Id.* at 793.

215. *Id.*

216. *Id.*

3. Evolving Standards of Decency

Although the court never explicitly undertook an evolving standards of decency analysis, that principle implicitly underlies its holding.[217] The court acknowledged the important role that evolving standards of decency play in an Eighth Amendment analysis.[218] The language used by the court in its conclusion also reflects consideration of such a standard.[219] The court stated that the "increased social awareness" of transgender health care underlay the court's rejection of a blanket ban on GCS.[220] The court further noted that this holding comports with new results in medical research, the heightened experience of the medical community in dealing with individuals with gender dysphoria, and changes in the medical community's understanding of which treatments are safe and effective to treat gender dysphoria.[221]

4. Rejection of *Gibson*

The Ninth Circuit rejected the blanket ban adopted in *Gibson*.[222] The court noted that contrary to *Gibson*, there is medical consensus that GCS is effective and medically necessary in certain situations.[223] Unlike *Gibson*, the court found that the SOC, which state that GCS can be necessary, are accepted by the medical community, as they have been endorsed by numerous prominent medical associations across the country.[224] The court recognized that most courts also accept the SOC as the appropriate means to treat transgender patients.[225] Additionally, every expert in *Edmo* agreed that GCS can be medically necessary in certain situations, and the state did not dispute this contention.[226] The court also rejected *Gibson*'s view that *Kosilek* stands for the proposition that GCS is never medically necessary.[227] The court determined that the only suggestion in *Kosilek* that GCS is never medically necessary came from the testimony of Dr. Cynthia Osborne.[228] However, Dr. Osborne changed her view ten years after her testimony and

217. *See id.* at 803 (discussing how the holding comports with contemporary standards of transgender health care).
218. *See id.* at 797 n.21 (stating that evolving standards of decency are "enshrined" in the Eighth Amendment).
219. *See id.* at 803.
220. *See id.*
221. *See id.*
222. *See id.* at 795–96 (rejecting the categorical nature of *Gibson*'s decision).
223. *Id.* at 795.
224. *Id.*
225. *Id.* at 769; *see also, e.g*, Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1298 (11th Cir. 2020); De'lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013); Soneeya v. Spencer, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012).
226. *See Edmo*, 935 F.3d at 767.
227. *Id.* at 795.
228. *Id.*

had since concluded that GCS "can be medically necessary for some . . . including some prison inmates."[229]

Edmo found that *Kosilek* did not pave the way for a blanket ban on GCS.[230] Instead, the court reasoned that the Ninth Circuit simply "assess[ed] whether the record before it demonstrated deliberate indifference to the plaintiff's gender dysphoria" by employing a case-by-case analysis approach.[231] The court emphasized that *Kosilek* itself specifically stated that its opinion should not be read to create a blanket ban on GCS, as "any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs."[232] Although the *Edmo* and *Kosilek* courts reached opposite outcomes, the Ninth Circuit in *Edmo* reconciled the two cases by noting the factual differences.[233]

Lastly, the court found that a blanket ban stands in opposition to existing Eighth Amendment precedent.[234] According to the court, *Gibson*'s holding was contrary to "settled" Eighth Amendment jurisprudence, which requires a fact-specific analysis of the record in each case.[235] The Ninth Circuit also noted that *Gibson* conflicted with the "decisions of this circuit, the Fourth Circuit, and the Seventh Circuit, all of which have held that denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim."[236]

IV. CONFORMING TO THE NINTH CIRCUIT'S APPROACH

The constitutionality of a prison's failure to provide GCS should be assessed on a case-by-case basis. Courts should look to the specific facts of a case to determine whether, under the objective prong, the treatment provided was adequate and whether, under the subjective prong, the prison acted with deliberate indifference. This necessitates a rejection of the blanket ban upheld in *Gibson*. Part IV.A lays out the reasons why the case-by-case approach of *Edmo* should be implemented. Part IV.B then suggests specific factors courts should consider when applying this approach.

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229. *Id.* at 796 (quoting Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates with Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 ARCHIVES OF SEXUAL BEHAV. 1649, 1651 (2016)).

230. *Id.* at 797.

231. *Id.*

232. *Id.* (quoting Kosilek v. Spencer, 774 F.3d 63, 91 (1st Cir. 2014)).

233. *Id.* at 794. First, the court noted that there are no security concerns present, as there were in *Kosilek*. *Id.* Second, and most importantly, qualified medical experts disagreed about the necessity of GCS in *Kosilek*. *Id.* However, the court reasoned that no such disagreement occurred in *Edmo*. *Id.*

234. *Id.*

235. *Id.* (first citing Patel v. Kent Sch. Dist., 648 F.3d 965, 975 (9th Cir. 2011); then citing Rachel v. Troutt, 820 F.3d 390, 394 (10th Cir. 2016); then citing Hartsfield v. Colburn, 491 F.3d 394, 397 (8th Cir. 2007); then citing Roe v. Elyea, 631 F.3d 843, 859 (7th Cir. 2011); then citing Youmans v. Gagnon, 626 F.3d 557, 564 (11th Cir. 2010); and then citing Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998)).

236. *Id.* at 796 (first citing Rosati v. Igbinoso, 791 F.3d 1037, 1040 (9th Cir. 2015); then citing Fields v. Smith, 653 F.3d 550, 552–53, 558–59 (7th Cir. 2011); and then citing De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013)).

A. Courts Should Employ a Case-by-Case Analysis

A blanket ban on a medical treatment is contrary to existing Eighth Amendment jurisprudence. Additionally, in the context of GCS, blanket bans are contrary to evolving standards of decency and conflict with the consensus among the medical community that GCS can be medically necessary. Moreover, *Gibson*, the only authority in support of blanket bans on GCS, is riddled with flaws. It is for these reasons that courts must discard the categorical ban on GCS accepted by the Fifth Circuit in *Gibson* and instead adopt the approach of *Edmo*.

1. Eighth Amendment Jurisprudence Rejects Blanket Bans

With the exception of the Fifth Circuit in *Gibson*, every circuit has asserted the necessity of a fact-specific inquiry in assessing a prisoner's inadequate medical care claim.[237] The majority of courts have held that a blanket policy prohibiting a certain medical treatment violates the Eight Amendment, as it "does not allow for the consideration of an inmate's particular medical needs."[238] The case law overwhelmingly demonstrates that a blanket ban is impermissible under the Eighth Amendment, and *Gibson* did not cite a single case to refute this contention. Therefore, *Gibson* is merely an outlier.

2. Blanket Bans on GCS Are Inconsistent with Evolving Standards of Decency

Evaluating a society's "standard of decency" requires an analysis of "objective indicia."[239] *Kosilek*, *Gibson*, and *Edmo* all recognized the importance of evolving standards of decency in determining cruel and unusual punishments.[240] Yet, surprisingly, none of these courts adequately looked to objective indicia to determine society's standards regarding

237. *See id.* at 796–97 (rejecting a blanket ban analysis); Rachel v. Troutt, 820 F.3d 390, 394 (10th Cir. 2016) (stating that a deliberate indifference inquiry is "fact-intensive" (citing Hartsfield v. Colburn, 491 F.3d at 394, 397 (8th Cir. 2017))); Kosilek v. Spencer, 774 F.3d 63, 91 (1st Cir. 2014) (explaining that blanket policies would conflict with the Eighth Amendment's requirement for individualized medical care); De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) (finding that categorically denying evaluation for GCS establishes an Eight Amendment claim); Roe Elyea, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based."); Youmans Gagnon, 626 F.3d 557, 564 (11th Cir. 2010) (stating that deliberate indifference claims are very fact specific); Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case."); Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (finding that a blanket policy denying elective abortions "denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care").

238. Fisher v. Fed. Bureau of Prisons, 484 F. Supp. 3d 521, 543 (N.D. Ohio 2020); *see, e.g.*, *Roe*, 631 F.3d at 860 (stressing the necessity of individualized treatment under the Eighth Amendment).

239. *See supra* notes 51–55 and accompanying text (discussing the importance of objective indicia in assessing Eighth Amendment claims).

240. *See supra* Parts II.A, III.A.3, III.B.3.

GCS.[241] Just like other Eighth Amendment cases, courts facing inadequate medical care claims should consider objective indicia of society's standards regarding a treatment. In the medical care context, this means considering factors such as whether the treatment is covered under programs like Medicaid or Medicare, whether laws facilitate or discourage people from undergoing such treatment, how accessible the treatment is, and current trends in the law regarding the particular treatment.[242]

Objective indicia point toward a national consensus that categorically denying GCS would be cruel and unusual punishment. First, GCS is now frequently covered under public and private health care plans.[243] Medicaid plans in only ten states explicitly exclude GCS from coverage.[244] Moreover, Medicare no longer excludes transition-related health care, including GCS.[245] Instead, as with most other medical treatments, Medicare determines whether GCS should be covered on a case-by-case basis.[246] Additionally, more and more employers are offering health insurance plans that cover transition-related medical treatment.[247] This includes government entities, Fortune 500 companies, nonprofits, and small firms.[248] In fact, many public and private universities now cover transition-related medical treatments for students.[249]

Second, most federal and state laws no longer discourage patients from seeking GCS.[250] Although some state legislatures are trying to prevent minors from undergoing GCS, no state law currently prohibits surgeons from performing such surgeries on adults.[251]

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241. *See supra* Parts II.A, III.A.3, III.B.3.

242. *See* Rezabek, *supra* note 53, at 399, 412–13 (listing these factors as reliable indicators of a national consensus favoring or disfavoring a treatment).

243. Laura Joszt, *Gender-Affirming Surgeries Increasingly Covered by Private Insurance, Medicare, Medicaid*, AM. J. OF MANAGED CARE (Mar. 2, 2018), https://www.ajmc.com/view/genderaffirming-surgeries-increasingly-covered-by-private-insurance-medicare-medicaid [https://perma.cc/N4HB-H5X7].

244. *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, lgbtmap.org/equality-maps/healthcare_laws_and_policies [https://perma.cc/NTF3-JGGH] (last visited Apr. 14, 2021).

245. *Know Your Rights: Medicare*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/know-your-rights/medicare [https://perma.cc/QT7C-V7TQ] (last visited Apr. 14, 2021).

246. *Id.*

247. ACLU, TRANSGENDER PEOPLE AND THE LAW: FREQUENTLY ASKED QUESTIONS 14 (2019), https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochurelaw2015electronic.pdf [https://perma.cc/UE3X-CAJP] (stating that hundreds of employers are now offering plans to cover transition-related treatments).

248. *Id.*

249. *Id.*

250. *See Know Your Rights: Medicare*, *supra* note 245 (explaining that federal and state laws prohibit health insurance plans from refusing to cover transition-related care, such as GCS).

251. Scottie Andrews, *This Year, at Least Six Sates Are Trying to Restrict Transgender Kids from Getting Gender Reassignment Treatments*, CNN POLITICS (Jan. 22, 2020), https://www.cnn.com/2020/01/22/politics/transgender-healthcare-laws-minors-trnd/index.html [https://perma.cc/U2ND-NWS9].

Third, the practical barriers to receiving the surgery have decreased. Whereas, in the past, many individuals seeking GCS had to travel out of state or even out of the country,[252] GCS is now dramatically more accessible in the United States.[253] Between 2015 and 2016 alone, there was a 20 percent increase in the number of these surgeries performed in the United States.[254] As of 2019, GCS was performed with such frequency that it accounted for revenue of over $184.6 million.[255] Not only are surgeries more readily available but medical professionals are also more educated and trained regarding GCS.[256]

Further, recent legal trends support a national consensus favoring GCS. At the time of *Kosilek* and *Gibson*, GCS for prison inmates was "unprecedented."[257] Only one state—California—had ever provided the surgery to an inmate.[258] This is no longer the case.[259] As of July 2020, an Idaho prison facility provided GCS to Adree Edmo.[260] Even more indicative of the legal trend favoring GCS was the Supreme Court's refusal to stay Edmo's injunction pending a decision on the petition for writ of certiorari in that case.[261] The Supreme Court's decision allowed Edmo's surgery to go forward, making the lawsuit moot.[262]

Lastly, in determining which punishments are cruel and unusual, society's standards must be viewed in light of the national landscape.[263] Today, more than ever, there is a heightened awareness of the inequalities faced by marginalized groups and a fervent desire to protect them. In the wake of movements such as Black Lives Matter, there has been a "seismic shift in the country" toward civil rights advocacy.[264] This shift can be seen beyond just the context of racial equality. It is also evident through the Supreme Court's decision in *Bostock v. Clayton County*,[265] which marked a step toward greater

252. Rezabek, *supra* note 53, at 418.

253. Alexandra Sifferlin, *Gender Confirmation Surgery Is on the Rise in the U.S.*, TIME (May 22, 2017, 9:43 AM), https://time.com/4787914/transgender-gender-confirmation-surgery/ [https://perma.cc/7AZY-ALRX].

254. *Id.*

255. Michael Cook, *The World Market for Sex Reassignment Is Growing*, BIOEDGE (June 7, 2020), https://www.bioedge.org/mobile/view/the-world-market-for-sex-reassignment-surgery-is-growing/13458 [https://perma.cc/PPS3-MT86].

256. *See* Sifferlin, *supra* note 253.

257. *See* Gibson v. Collier, 920 F.3d 212, 228 (5th Cir. 2019).

258. *Id.* at 227.

259. *See* Simmons, *supra* note 203.

260. *Id.*

261. *See supra* note 202 and accompanying text.

262. *See supra* note 203 and accompanying text; *see also* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020) (denying a petition for writ of certiorari after Edmo's surgery).

263. *See supra* notes 48–53 and accompanying text (explaining how the Eighth Amendment and what constitutes cruel and unusual punishment are shaped by society's contemporary values).

264. *See* Giovanni Russonello, *Why Most Americans Support the Protest*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html [https://perma.cc/638U-G9S6].

265. 140 S. Ct 1731 (2020).

equality for transgender individuals.[266] Transgender inmates are among such marginalized groups in need of protection.

3. The Holding in *Gibson* Is Fatally Flawed

First, *Gibson* misinterpreted *Kosilek*, the case it purported to follow. *Kosilek* did not promote a blanket ban on GCS.[267] Instead, *Kosilek* explicitly stated that its holding should not be read to preclude future inmates from receiving GCS.[268] *Kosilek* simply performed a case-specific analysis of the facts on the record and determined that GCS was not medically necessary in that specific instance.[269] The court's holding relied heavily on language such as "on the record presented," "in this case," and "on these facts," which are all inconsistent with a categorical ban.[270] The court even spelled out the facts that doomed Kosilek's claim.[271] In stating that "this case presents unique circumstances," the court pointed to Kosilek's specific criminal history, the unique safety concerns at play, and the inconsistent expert opinions regarding the necessity of GCS for Kosilek.[272]

Second, *Gibson* applied the wrong standard in determining whether GCS was medically necessary. Gibson argued that a treatment can only be necessary if it is "universally accepted" by the medical community.[273] However, there is no support, within case law or in the Constitution, for the contention that "universal acceptance" is required.[274] In fact, the court in *Gibson* did not cite a single authority to support this claim.[275]

Further, the consequences of requiring this heightened standard are damaging. The medical community is constantly evolving. New drugs and procedures are continuously being explored and prescribed. A universal acceptance standard allows prisons to continue to offer "outdated medical treatment plans" without adapting to changes in the medical community.[276] Additionally, such a standard allows for discrimination against transgender individuals. Under this standard, just a few biased opinions from doctors in the medical community could render GCS medically unnecessary for Eighth Amendment purposes even if the majority of doctors support it.[277] Further,

266. *Id.* at 1753 (holding that employers are unable to discriminate against employees on the basis of sexual orientation or transgender status).

267. *See supra* Part III.B.4.

268. *See supra* note 232 and accompanying text.

269. *See supra* note 231 and accompanying text.

270. *See* Kosilek v. Spencer, 774 F.3d 63, 91, 96 (1st Cir. 2014).

271. *See id.* at 91.

272. *See id.*

273. *See supra* notes 168–69 and accompanying text.

274. Petition for Writ of Certiorari at 19–20, Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019) (No. 18-1586), 2019 WL 2711440, at *19–20 (stating that, in Atkins v. Virginia, 536 U.S. 304 (2002), for example, the Court determined there was a consensus against execution of the intellectually disabled although there was "nearly evenly split state legislative actions").

275. *Id.* at 19.

276. *See* Braver, *supra* note 18, at 2260.

277. *See id.* (discussing how the universal acceptance standard could allow the "stigma surrounding the transgender community" to be "improperly imputed into medical considerations").

universal acceptance is impractical and, ultimately, impossible.[278] Even with less controversial procedures, there are always doctors who have varying opinions on how to treat a patient.

Lastly, *Gibson* erroneously relied on the expert testimony in *Kosilek* to determine that GCS is never medically necessary. *Kosilek* was decided five years before *Gibson*, and the experts in *Kosilek* were opining on the consensus of GCS at the time the testimony was presented nearly thirteen years earlier.[279] But the court in *Gibson* failed to consider that in terms of GCS's acceptance, much had changed in those twenty years.[280] At the time of *Kosilek*, most health care plans did not cover the surgery, most legislation precluded individuals from receiving GCS, and the surgery was largely inaccessible to individuals in the United States.[281] Moreover, even the state's main expert, Dr. Osborne, changed her opinion about the necessity of GCS during that period.[282] By relying on outdated testimony to conclude that GCS was not medically necessary, *Gibson* failed to account for all the changes that occurred between *Gibson* and *Kosilek*.[283] This surely could not be the type of analysis our founders expected to comport with evolving standards of decency.

4. Consensus Among the Medical Community That GCS Can Be Necessary

When a treatment is medically necessary, failure to provide such treatment constitutes an Eighth Amendment violation.[284] Because there is a consensus among the medical community that GCS can be medically necessary, a blanket ban must be rejected. First, the American Medical Association (AMA), the largest and oldest association of medical professionals in the United States,[285] recognizes that GCS is medically necessary for some patients experiencing gender dysphoria.[286] Moreover, WPATH's SOC support the necessity of GCS for some patients.[287] WPATH's SOC are widely accepted. They have been endorsed by the AMA; the Endocrine Society; the APA; the American Psychological Association; the American Academy of Family Physicians; the American Medical Student Association; the National Commission on Correctional Health Care; the American Public Health Association; the National Association of Social Workers; the

278. *See id.*
279. *See supra* note 170 and accompanying text; *see also* Kosilek v. Spencer, 774 F.3d 63, 74–79 (1st Cir. 2014) (stating that the expert testimony was presented in 2006).
280. *See infra* Part IV.B.
281. *See* Rezabek, *supra* note 53, at 417–18.
282. *See supra* 229 and accompanying text.
283. *See infra* Part IV.B.
284. *See supra* notes 64–65 and accompanying text.
285. Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1176 (2020).
286. *See Issue Brief: Health Insurance Coverage for Gender-Affirming Care of Transgender Patients*, AM. MED. ASS'N (2019), https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf [https://perma.cc/B7L2-HNRC].
287. *See supra* Part I.C.2.

American College of Obstetricians and Gynecologists; the American Society of Plastic Surgeons; the World Health Organization; the American College of Surgeons; GLMA: Health Professionals Advancing LGBTQ Equality; the HIV Medicine Association; the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus; and Mental Health America.[288] Further, with the exception of the Fifth Circuit in *Gibson*, most courts recognize that WPATH's SOC are the proper guidelines for the treatment of gender dysphoria.[289] Even more compelling, there are "no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups."[290] As such, there is a medical consensus that GCS is necessary for some individuals with gender dysphoria.

B. Tools to Conduct a Case-by-Case Analysis

Given the fact-specific nature of this inquiry, courts should consider the totality of the circumstances in deciding the constitutionality of a prison's denial of GCS.[291] If, from the totality of the circumstances, a court determines that GCS is necessary to alleviate an inmate's gender dysphoria, such denial will violate the Eighth Amendment. That being said, there are a number of factors that should weigh heavily in a court's assessment of the necessity of GCS.

First, courts should consider whether an inmate's symptoms persisted after receiving other treatment. If, after receiving alternative treatment, a prisoner's actions indicate that their symptoms are alleviated, this would signal the adequacy of the treatment provided.[292] However, if after receiving treatment, their actions suggest that their symptoms have persisted or worsened, then this would indicate that GCS might be necessary.[293] This could be evidenced by the fact that, for example, even after being prescribed hormones or other dysphoria treatments, the inmate continues to exhibit symptoms of depression and continues to engage in acts of self-harm.

Second, courts should consider the patient's own evaluation of the treatment provided. Doctors rely heavily on their patients' statements in

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288. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019) (per curiam), *reh'g denied*, 949 F.3d 489 (9th Cir. 2020), *stay denied sub nom.* Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (Kagan, J., in chambers), *and cert. denied*, No. 19-1280, 2020 WL 6037411 (U.S. Oct. 13, 2020); *WPATH Policy Statements: Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (Dec. 21, 2016), https://www.wpath.org/newsroom/medical-necessity-statement [https://perma.cc/DJJ3-9WNN].

289. *See supra* note 225 and accompanying text.

290. *See* Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018), *aff'd in part, vacated in part sub nom.* Edmo v. Corizon, Inc., 935 F.3d 757.

291. *See supra* Part III.B.4 (discussing the fact-specific nature of Eighth Amendment claims).

292. *See supra* notes 121–27 and accompanying text (discussing that the treatment provided was adequate where it led to a significant improvement in the defendant's condition).

293. *See supra* Part III.B.2 (explaining that the prison was aware of the inadequacy of the treatment provided where symptoms persisted and worsened).

prescribing treatments.[294] Take, for example, a patient who complains of a pain on the lower right-hand side of the body. The doctor may ask the patient to describe the pain on a scale of one to ten to determine the appropriate treatment. If the patient rates the pain as a one, the doctor may determine that it is likely only soreness or a cramp and prescribe an aspirin. If, on the other hand, the patient describes the pain as a nine or a ten, the doctor may have reason to believe this is appendicitis and prescribe further testing and maybe even hospitalization. Thus, a patient's own assessment of symptoms is crucial to diagnosis and treatment. There is good reason for this. First, doctors cannot follow their patients around twenty-four hours a day, so they cannot truly see the symptoms of the patients. Second, many ailments do not have overtly physical manifestations and, thus, a doctor must rely on the patient's own description. This should be no different in the context of a transgender prisoner.

Although weighing the inmate's own evaluation could in theory create incentives for inmates to make empty threats of self-harm, lie, or otherwise exaggerate their illnesses to receive their desired treatments, this should not be of substantial concern.[295] Inmates' statements are only one of many factors that courts should consider in determining the necessity of GCS. Thus, courts should be able to ferret out the artificial or exaggerated claims by considering the totality of the circumstances. Moreover, this "problem" is not unique to inmates seeking GCS but rather is applicable to all inmates seeking a specific treatment.[296] And yet, in other inadequate medical care contexts, courts have mandated consideration of inmates' own complaints.[297] Thus, there is no reason to treat claims for GCS any differently.

Third, courts should rely heavily on the testimony of medical experts in determining an inmate's need for GCS. Courts already depend on expert testimony when assessing medical claims "[b]oth inside and outside the

294. *See* Peter R. Lichstein, *The Medical Interview*, *in* CLINICAL METHODS: THE HISTORY, PHYSICAL, AND LABORATORY EXAMINATIONS 29, 29 (H. Kenneth Walker et al. eds., 3d ed. 1990) (stating that the patient interview is the greatest diagnostic tool, producing more value than either the physical examination or laboratory results).

295. *See supra* note 139 and accompanying text.

296. Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 943 (1992) ("[M]alingering [is] very common among inmates. . . . [Prisoners] avail themselves of prison health services because they are bored, they are lonely, they seek excuses from assigned work, or they simply seek numbing medication."(footnote omitted)).

297. *See* De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013) (holding that the plaintiff stated a cause of action for deliberate indifference where, "despite her repeated complaints to [the prison] alerting them to the persistence of her symptoms and the inefficacy of her existing treatment," the prison failed to change her course of treatment); Easter v. Powell, 467 F.3d 459, 464 (5th Cir. 2006) (holding that the defendant's allegation that a prison nurse ignored his complaints of chest pain was sufficient to state an Eighth Amendment claim); Greeno v. Daley, 414 F.3d 645, 654–55 (7th Cir. 2005) (finding that the plaintiff stated a claim for deliberate indifference where the prison refused to alter the defendant's treatment "despite his repeated reports that the medication was not working and his condition was getting worse"); Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 756 (5th Cir. 2001) (stating that ignoring inmates' complaints can amount to deliberate indifference).

Eighth Amendment context."[298] This standard should apply with equal force in the context of inmates seeking GCS. Evaluating the adequacy of a medical treatment is "typically beyond the competence of a non-medical professional."[299] Moreover, courts should pay particular attention to the expert's familiarity in treating transgender individuals.[300] The more experience a medical professional has with transgender health issues, the more credibility the opinion should be given.

Finally, courts should consider whether an inmate qualifies for GCS under WPATH's SOC. The SOC lay out criteria that, if met, indicate the necessity of GCS.[301] The SOC were specifically created to assist medical professionals in determining the best treatment for transgender patients.[302] Moreover, the SOC are widely endorsed in the medical community.[303] Therefore, they are a valuable and credible diagnostic source in determining the necessity of GCS. However, because WPATH acknowledges that the SOC are just "guidelines" and that treatment should be determined on an individualized basis, courts should not just blindly adhere to them.[304] It is for this reason that WPATH's SOC should just be one of the factors courts consider when conducting a case-by-case analysis.

CONCLUSION

The Eighth Amendment was designed to respect fundamental human dignity, to ensure that the needs of prisoners are adequately met, and ultimately, to adapt and evolve alongside society's values. In the wake of heightened social awareness and a nationwide movement toward equality, it would be contrary to the foundational principles of the Eighth Amendment to broadly ignore the needs of transgender inmates. Instead, courts must determine on a case-by-case basis the necessity of GCS and whether a prison's denial constitutes an Eighth Amendment violation. Any other finding would simply be cruel and unusual.

298. *See* Braver, *supra* note 18, at 2270; *see also* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002); Daubert v. Merrell Dow Pharms., 509 U.S. 579, 588 (1993).

299. Pearson v. Prison Health Servs., 850 F.3d 526, 536 (3d Cir. 2017).

300. *See* Braver, *supra* note 18, at 2270 (stating that evaluating the adequacy of a prison's treatment of gender dysphoria requires testimony from "medical professionals familiar with the diverse needs of individuals with gender dysphoria").

301. *See supra* Part I.C.2.

302. *See supra* Part I.C.2.

303. *See supra* Part IV.A.4.

304. *See supra* note 102.