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# In Need of Transition: Transgender Inmate Access to Gender Affirming Healthcare in Prison, 55 UIC L. Rev. 773 (2022)

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# IN NEED OF TRANSITION: TRANSGENDER INMATE ACCESS TO GENDER AFFIRMING HEALTHCARE IN PRISON

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## I. INTRODUCTION

> It started the very moment I was arrested and the police flipped my dress up to show the fellow officers my anatomy as 'proof' that I wasn't a 'real woman.'…And then, I entered a cell that had blood and feces in it and they left me there, stark naked.[1]

As an Afro-American trans woman, Janetta Johnson was subjected to horrendous treatment, neglect, and outright abuse that would seem in direct violation of the Eighth Amendment's[2] protections against cruel and unusual punishments.[3] After

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1. Janetta Johnson, *A Story of Strength from a Transgender Person in Prison*, NAT'L CTR. FOR TRANSGENDER EQUAL. (April 30, 2019), www.transequality.medium.com/a-story-of-strength-from-a-transgender-woman-in-prison-7b17461794b [perma.cc/BDJ4-YGGS].

2. U.S. CONST. amend. VIII.

3. Johnson, *supra* note 1. Ms. Johnson routinely had to defend herself against her cellmate who repeatedly attempted to rape her, was placed in

surviving these cruel punishments and other abuse during her three and a half years of confinement in a federal prison, Ms. Johnson was, finally, released.[4] She now serves as the Executive Director of the Transgender Gender-Variant & Intersex Justice Project ("TGIJP"), a non-profit based in San Francisco that advocates for the rights of transgender, gender variant, and intersex people in California prisons.[5] The treatment of transgender and nonbinary inmates is an urgent problem that is routinely swept under the rug by policy makers and prison wardens alike.[6] Prisons and jails have "almost universally inadequate policies for evaluating and treating gender dysphoria, a serious medical

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solitary confinement with an inmate who touched himself in front of her, and was forcibly stripped outside in the recreation yard in front of the entire prison after attempting to defend herself from an attack. *Id.*

4. Jaimee A. Swift, *The Radical Perseverance of Janetta Louise Johnson*, BLACK WOMEN RADICALS (March 14, 2020), www.blackwomenradicals.com/blog-feed/janetta-johnson [perma.cc/NF9M-KG6F].

5. *Id.* After serving three and a half years in a federal prison, she moved to San Francisco and was inspired to fight for transgender people and the right of self-determination and liberation in California and beyond. *Id.*

6. PASCAL EMMER ET AL., HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS (2011). In a survey sent to transgender and gender non-conforming inmates incarcerated in the state of Pennsylvania, the inmates described shocking experiences of indifference or outright abuse perpetrated or condoned by correctional officers and wardens alike. *Id.* at 1. For example, when a transgender woman was raped and reported it the wardens, the response was that the inmate "brought it on [themselves] because of [their] sexuality." *Id.* at 22. When another transgender woman inmate was searched, she reported that the correctional officer said "'I'm not stripping the queer.'" *Id.* at 30. Additionally, recent national data from the Department of Justice shows that transgender inmates are ten times more likely to be victims of sexual assault while incarcerated, committed by both other inmates and prison staff; 39.9% of transgender respondents reported incidents of sexual assault compared to an overall 4.0% of inmates generally. ALLEN J. BECK, U.S. DEPT. OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 (2013); ALLEN J. BECK, U.S. DEPT. OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES (2014). Finally, in 2019, 25 Illinois Department of Correction employees were found to have been participating in two different, private, Facebook groups that mock, demean, and belittle transgender people. Emily Hoerner, *Prison Guards Mocked Transgender Inmates in Two Private Facebook Groups*, INJUSTICE WATCH, (OCT. 17, 2019) www.injusticewatch.org/news/2019/prison-guards-mocked-transgender-inmates-in-two-private-facebook-groups/ [perma.cc/69RX-QDZ5]. The posts were written by low-level officers, sergeants, lieutenants, and other correctional employees across the state. *Id.* The employees had even divulged private information about specific transgender inmates which included alleged sexual activities and medical treatments they were receiving. *Id.* One particularly disturbing post was written by a correctional officer who was complaining about a transgender woman inmate being transferred to a women's facility, saying "The state is stupid I'd chop his pecker off for him than [sic] he can be 'female.'" *Id.*

condition that many transgender people have."[7] Additionally, the transgender community is disproportionately incarcerated, with transgender people of color experiencing the highest rates of imprisonment.[8] Black transgender women are ten times more likely to be incarcerated than the general population.[9] These disproportionate incarceration rates, the well-documented ignorance of the needs of transgender people among prison wardens and administrators[10], combined with the outright abuse suffered by

7. *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and their Legal Rights*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 2018) www.transequality.org/transpeoplebehindbars [perma.cc/3HUQ-YNPW]. This publication describes itself as a "guide" for understanding the experiences of transgender people in prisons. *Id.* Gender dysphoria, as defined by the American Psychiatric Association, is a medical condition marked by clinically significant distress or impairment associated with the incongruence between an individual's gender identity and the gender they were assigned at birth. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-5, 427 (Fifth Ed. 2013) [Hereinafter "DSM-5"].

8. S.E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 194 (2016) [Hereinafter "USTS"].

9. *Id.* A survey of almost 28,000 transgender adults showed that, in the past year, 2% of them had been incarcerated, which is more than twice the rate of the general population (0.87%), and 9% of Black transgender women reported having been incarcerated in the last year, ten times the rate of the general population. *Id.*

10. For example, Angelina Resto made history in 2020 for being the first trans woman inmate in Massachusetts to be transferred from a men's to a women's facility. Puja Patel, *Transgender Prison Activist Uses Experience to Push for Change*, B.U. NEWS SERV. (January 21, 2020) www.bunewsservice.com/former-transgender-inmate-details-prison-experience-and-pushes-for-change/ [perma.cc/NJ8A-FXEW]. Ms. Resto was convicted of a non-violent drug offense and was sentenced to 4 years of incarceration at Massachusetts Correctional Institution at Norfolk, a men's prison. *Id.* Despite being 55 years old and having lived for 40 years publicly as a woman, she was placed in a men's facility where she was "ridiculed and sexually harassed daily." *Id.* Ms. Resto's claim was filed under the Americans with Disabilities Act, arguing that the distress from her gender dysphoria was debilitating and in violation of the ADA. Doe v. Mass. Dep't of Corr., 2018 WL 2994403 at *1 (D. Mass. 2018). The department of corrections filed a motion to dismiss claiming that gender dysphoria did not fall under the protection of the ADA due to an exclusionary provision in the statute, but the judge denied their motion. *Id.* The judge specifically did not agree with the department's argument that gender dysphoria falls under the exception in 42 U.S.C. § 12211(b)(1) that "lists '(1) transvestism, transsexualism, pedophilia, gender identity disorders not resulting from physical impairments, or other sexual behavioral disorders' as conditions which are outside the scope of the statute's definition of 'disability.'" *Id.* at *6. The department argued that gender dysphoria and gender identity disorders were, essentially the same thing, but Judge Stearns disagreed, writing that not only had the DSM definitions been updated, but also that the exclusion only applied to "'gender identity disorders not resulting from physical impairments,'. . .and Doe has raised a dispute of fact that her GD may result from physical causes." *Id.* The court found an additional reason to rule against the department, holding that it was able to choose between competing interpretations of statute due to the doctrine of constitutional avoidance. *Id.* at

transgender inmates,[11] demonstrate the urgency to create uniform guidelines and standards of care for transgender inmates as it relates to their access to gender-affirming medical care, including gender confirmation surgery. The lack of universal guidelines or standards has forced transgender inmates to fight to receive any medical care related to their transition or gender identity at all despite consensus in the medical community that this care is necessary.[12]

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*7. The constitutional concern here was that the department's interpretation of the ADA would infringe the Equal Protection Clause of the Fourteenth Amendment by excluding an entire group of inmates based on their gender identity. *Id.* Judge Stearns held that it was:

> virtually impossible to square the exclusion of otherwise bona fide disabilities with the remedial purpose of the ADA, which is to redress discrimination against individuals with disabilities based on antiquated or prejudicial conceptions of how they came to their station in life. . .The court is of the view that, to the extent that the statute may be read as excluding an entire category of people from its protections because of their gender status, such a reading is best avoided. *Id.* at *8.

According to Ms. Resto, she received more harassment and mistreatment from the staff than from other inmates and continued to receive discriminatory treatment from a staff member at the women's facility after her transfer. Patel, *supra.* Although there were still staff members who treated her poorly, she said it did not compare to her treatment at the men's facility and that the day she was transferred "was one of the happiest of [her] life." *Id.*

11. One in five (20%) respondents to the USTS reported being sexually assaulted by facility staff or other inmates—significantly higher than the rates of sexual assault by staff or another inmate in prisons (4%) and in jails (3.2%). USTS *supra* note 8, at 191. A respondent to the USTS reported that after being booked into jail, "the officers asked very intrusive questions about [their] genitalia in a very nonprofessional manner and laughed about it." *Id.* at 188.

12. Cristina Nichole Iglesias, *The Federal Bureau of Prisons is Still Delaying My Health Care, Despite a Court Order*, ACLU (Jan. 31, 2022), www.aclu.org/news/lgbtq-rights/the-federal-bureau-of-prisons-is-still-delaying-my-health-care-despite-a-court-order [perma.cc/NW9D-EKUQ]. Ms. Iglesias is a trans woman, currently incarcerated, who has been housed in men's prisons for decades despite the Bureau of Prisons being aware that she is trans since 1994. *Id.* In December of 2021, a federal court "ordered the Bureau of Prisons — for the first time ever — to finally evaluate [Ms. Iglesias] for gender-affirming surgery." *Id.* A month after this order, Ms. Iglesias found out that the Bureau of Prisons, despite recommending her for surgery on paper, would be delaying actually referring her to a surgeon until mid-April 2022. *Id.* In Ms. Iglesias' own words:

> Getting medical care is necessary to allow me to finally live my life fully as the woman I am. Living with gender dysphoria — and being denied the treatment I need — has caused me torture every day. Gender-affirming surgery would help end that torture and remove one of the biggest obstacles facing me for decades. . . I wish that prison officials and other people understood how hard it is to be transgender in prison because we have to fight not just for our basic rights, like medical care, but also for our safety. I have faced violence and discrimination from staff and other prisoners just for being who I am, and it has not been easy. I want the Bureau of Prisons to do the right thing and give me the surgery I need. It shouldn't take a court order for me and other

To fully examine and recommend strategies to ensure that transgender inmates have access to gender-affirming care, it is necessary to explain what gender affirming care is, the constitutional framework used by the circuit courts to grant or deny requests for medical care, the state of medical care for inmates today, generally, and how to incorporate all of this into prisons and jails across America. Gender-affirming care is routinely misunderstood and denied even for transgender people who are not incarcerated.[13] Part II of this comment will explore and define important medical terminology and the specific needs of transgender inmates as ignorance in these areas is a significant contributor to the current problem and a clear understanding is fundamental to the solution. Then, it is necessary to evaluate the existing framework applicable to *all* incarcerated people to understand how transgender inmate care is considered by the courts. Part III explores the circuit court split on what level of care is constitutionally guaranteed for transgender inmates under the current interpretation of the Eighth Amendment. Additionally, with the recent Supreme Court decision in *Bostock*[14] recognizing the intersection of gender and sex, a heightened scrutiny may apply in these types of cases which has important implications for transgender and non-binary inmates alike. Part IV then discusses the solutions currently utilized by certain states and in other countries to create a blueprint for prisons and jails across the country.

## II. BACKGROUND

This section begins with defining important terms used throughout the comment, what gender affirming care is, and the standards of care promulgated by the World Professional Association for Transgender Health ("WPATH"). Having set out those terms, it then investigates the types of routine medical care given to inmates by exploring the current legal framework used to analyze an inmate's access to medical care and the different interpretive tests adopted by the circuit courts for analyzing that

transgender people to get adequate health care, as has happened in the past. A federal judge has already ordered the Bureau of Prisons to evaluate me for surgery, but they are still dragging their feet. I want them to stop creating barriers — and to understand that we are human, too. *Id.*

13. USTS *supra* note 8, at 96. 33% of survey respondents who had seen a healthcare professional in the past year had negative experiences, including having to teach the provider about transgender care, being asked invasive or unnecessary questions about being transgender and 8% of respondents had been refused transition-related care outright. *Id.*

14. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020) (holding "it is impossible to discriminate against a person for being…transgender without discriminating against that individual based on sex.").

framework. Finally, it lays out the current split between circuits on whether gender-affirming care is a constitutionally protected right.

## *A. Important Terms and Definitions*

Throughout this comment, terms like gender, sex, transgender, and gender non-conforming are used that may be confusing to a reader not familiar with the topic area. Particularly, it is important to note the distinction between the terms "sex" and "gender," as these are commonly used interchangeably despite having separate and distinct meanings.

"Sex" refers to the classification of people as male or female, usually at birth, based on factors like external genitalia, internal genitalia, chromosomal sex, and hormonal sex.[15] On the other hand, "gender" refers to the socially constructed norms typically associated with a person's sex.[16] People may also use the term "assigned sex at birth" to describe the label assigned at birth, typically by medical professionals and/or the child's parents, based on factors like hormones, chromosomes, and, most commonly, observation of genitals.[17] For example, "assigned female at birth" individuals generally have XX chromosomes and observable female reproductive organs (i.e. vulva, clitoris, a vaginal opening, etc.) whereas "assigned male at birth" individuals generally have XY chromosomes and observable male reproductive organs (i.e. penis, testicles, scrotum).[18] "Gender identity" refers to an individual's innate sense of being male, female, an alternate gender, or outside of the binary altogether and "gender expression" is how the individual then represents that identity to others (ex. wearing traditionally "feminine" clothes).[19]

"Transgender" (often shortened to "trans") is a broad term used to describe people whose gender identity differs from the sex they were assigned at birth.[20] "Non-binary" can refer to people who either do not identify as either wholly male or female and/or people who identify as a combination of male and female.[21]

"Gender transition" refers to the process of a person beginning

15. Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 288 (2016).

16. *Id.*

17. *Sex and Gender Identity*, PLANNED PARENTHOOD, www.plannedparenthood.org/learn/gender-identity/sex-gender-identity [perma.cc/5TQV-3C6G] (last visited November 3, 2020).

18. *Id.*

19. *Understanding Transgender People: The Basics*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 2016) www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Short-July-2016_0.pdf [perma.cc/6MUD-ZHHU].

20. *Id.*

21. *Id.*

to live in accordance with their gender identity instead of their assigned sex at birth.[22] This looks different for each trans person, but some common steps are changing their clothing or hairstyle, legally changing their name and identity documents, and medical treatment like hormone therapy.[23] "Gender confirmation surgery" refers to the various surgical procedures used to further feminize or masculinize the body to conform with their gender identity.[24] While less common than other forms of gender affirming care, trans people should have the option to pursue this route of treatment if necessary.[25]

When a person is born, they are typically assigned a gender at birth based on the doctor's observance of anatomy and chromosomes.[26] For most people, this assignment also corresponds to their expressed and innate gender identity.[27] The term "cisgender" is used to describe those people whose gender identity conforms with their biological sex or assigned sex at birth.[28] However, some people experience a "marked incongruence between their experienced or expressed gender and the one they were assigned at birth."[29] In 2012, the American Psychological Association ("APA") updated the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") to reclassify what was once called "gender identity disorder" to "gender dysphoria," removing the diagnosis from the section on sexual dysfunctions and creating its own section that emphasized an individual's own feelings rather than observations of "cross-gender behavior."[30] Although gender dysphoria is no longer considered a mental illness, it is still considered a medical condition that can greatly affect a patient's mental and physical health.[31] A respondent to the 2015 U.S. Transgender Survey explained that they had "suffered from anxiety and depression as a direct result of gender dysphoria."[32] Gender dysphoria can also cause strain in relationships with friends, family, and peers in various ways due to the enduring cultural

22. *Id.*

23. USTS, *supra* note 8 at 39-40.

24. Garima Garg et al., *Gender Dysphoria (Sexual Identity Disorders)*, (July 2020) www.ncbi.nlm.nih.gov/books/NBK532313/ [perma.cc/2C26-73LC].

25. USTS, *supra* note 8 at 103. While 58% of respondents had received counseling, 49% had received hormone therapy, and only 25% had undergone some type of gender confirmation surgery. *Id.*

26. Garg, *supra* note 24.

27. *Id.*

28. *Cisgender*, MERRIAM-WEBSTER DICTIONARY (1st ed. 2016).

29. DSM-5 *supra* note 7.

30. Mark Moran, *New Gender Dysphoria Criteria Replace GID*, PSYCHIATRY ONLINE, (Apr. 5, 2013) www.psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2013.4a19 [perma.cc/CLY3-UFED].

31. *Id.*

32. USTS *supra* note 8 at 106. The respondent went on to say that it was only after their state expanded Medicaid that they were able to access medical care to deal with the issues gender dysphoria had caused which finally allowed them to be a productive member of society. *Id.*

stigmatization of transgender and nonbinary people.[33]

## *B. Gender Affirming Care – what is it and why does it matter?*

The WPATH is the leading global authority on medical care for people with gender dysphoria.[34] Its work includes disseminating standards of care for transgender patients that have become accepted by the APA and are "considered scientific consensus by psychologists and gender specialists."[35] Gender-affirming care comes in many iterations and the needs of each transgender person are unique, just like the needs of cisgender people.[36] Common forms of gender-affirming care are changes in gender expression and role (this can include living part or full time in the gender role consistent with their gender identity), hormone therapy to feminize or masculinize the body, psychotherapy, and surgeries to change primary and/or secondary sex characteristics.[37] These treatments are also usually accompanied with other forms of care to help alleviate gender dysphoria, such as hair removal through electrolysis or waxing, and breast binding or padding.[38] Just as the treatment plans for two people with the same cancer can differ, so too can the treatment plan for two people struggling with gender dysphoria.

This lack of uniformity is another reason why prisons and jails struggle to accommodate the needs of these inmates. Twenty-five states and the District of Columbia have official policies regarding the treatment of trans inmates, nineteen states have no policies directly addressing trans inmates, and a handful of states have some policies in place regarding trans inmates, but lack specific

33. *Id.* at 4. "One in ten (10%) of respondents who came out to their immediate family reported that a family member was violent towards them because they were transgender and 8% were kicked out of the house because they were transgender." *Id.*

34. ELI COLEMAN ET. AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE at 2-3 (7th ed. 2011).

35. Morgan S. Mason, *Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria*, 71 VAND. L. REV. EN BANC 157, 160 (2018).

36. Coleman, *supra* note 34 at 2. The WPATH notes that there may be clinical departures from their standards of care for myriad reasons including, but not limited to, a patient's unique anatomic or psychological needs; lack of resources in various parts of the world; or the need for specific harm reduction strategies. *Id.* The WPATH also notes that any departures from the standards of care should be recognized as such, clearly explained to the patient, and documented for purposes of informed consent. *Id.*

37. *Id.* at 9-10.

38. *Id.* at 10. Gender affirming care can also include non-medical steps like changing their legal name and identity documents which can help allow the individual to live more openly in their gender identity.

guidance on trans inmate healthcare.[39] This lack of a unified standard of care necessitates an explanation of why gender-affirming care is so important and also why the current patchwork system cannot continue.

In 2020, 4.9% of all adults over the age of 18 had serious thoughts of suicide and 0.5% of Americans attempted suicide.[40] By comparison, patients living with gender dysphoria have a 20%-30% suicide rate when untreated and only a 1%-2% suicide rate if they receive gender-affirming care.[41] This staggering difference in suicide rates alone illustrates the importance of receiving gender-affirming care. Case law is similarly full of examples of trans inmates attempting suicide or mutilating their genitals after prison officials or courts denied their access to gender-affirming care while incarcerated.[42] In addition to the mental, physical, and emotional toll of gender dysphoria, trans inmates are also empirically more likely to face dangerous situations in prison than their cisgender counterparts.[43] This is likely due—not only to the cultural

39. Mason, *supra* note 35 at 172. "Currently, 39 states have started to address the unique situation that transgender inmates pose for the correctional system. Of these states, a majority recognize the condition and diagnosis of gender identity disorder and/or gender dysphoria." See also Douglas Routh, et al., *Transgender Inmates in Prisons: A Review of Applicable Statutes and Policies*, 61 INT'L J. OFFENDER THERAPY & COMPAR. Criminology 12 (2015). (stating that only thirteen states allow inmates to begin hormone treatment after their incarceration). Id. Arkansas provides for "appropriate treatment to inmates [who] [meet] the criteria for GD in the DSM-IV" from counseling, up to gender confirmation surgery, whereas Kansas only provides "essential medical services" with no separate policies for trans inmates. Id. at 13-14.

40. SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., HHS PUBL'N NO. PEP21-07-01-003, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2020 NATIONAL SURVEY ON DRUG USE AND HEALTH (2021).

41. Mason, *supra* note 35 at 160.

42. *E.g.* Adams v. Fed. Bureau of Prisons, 716 F.Supp.2d 107, 109 (D. Mass. 2010) (challenging the "freeze-frame" policy of the Federal Bureau of Prisons where treatment for transgender inmates was "frozen" at the level of care they were receiving when entering the prison after an inmate struggling with gender dysphoria mutilated her genitals after being denied hormone therapy); Supre v. Ricketts, 792 F.2d 958, 960 (10th Cir. 1986) (reinstating an award of attorney's fees for the Plaintiff, a transgender woman, who had to have her testicles surgically removed due to continued attempts at self-mutilation after being denied hormone therapy); De'Lonta v. Angelone, 330 F.3d 630, 632 (4th Cir. 2003) (reversing a lower court dismissal of a case where a transgender inmate stabbed or cut her genitals on more than 20 occasions after her hormone therapy was abruptly stopped).

43. Lori A. Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUST. Q. 835 (2010). When comparing "inmates in U.S. and California men's prisons—by all reports, populations that have also suffered high rates of physical abuse—transgender people experienced more than five times as many incidents of non-sexual physical victimization. Even when compared to other relatively vulnerable populations, transgender people are perilously situated." *Id.* at 857. Throughout their lifetimes, 10.5% of the general population of the United States have been victims of either rape or attempted rape. *Id.* at 878. Comparatively, 70.7% of

stigmatization of transgender people generally— but also in part to the policies and behaviors of prisons and jails and their staff.[44]

## *C. How is medical care given in prisons?*

To analyze and propose solutions to this problem, it is important to lay out the constitutional framework whereby inmates receive medical care. The Supreme Court has held that the Eighth Amendment prohibits punishments "which are incompatible with the 'evolving standards of decency that mark the progress of a maturing society.'"[45] Under the current interpretation of the Eighth Amendment, prisons violate an inmate's constitutional rights when they show a "deliberate indifference" to the serious medical needs of an inmate.[46] This *sounds* like an easy hurdle to clear, however, real-life application is further complicated by the fact that the Court went on to say that mere negligence in diagnosing or treating an inmate does not rise to the level of a cognizable injury under the Eighth Amendment.[47] Later, the Court further clarified that, to determine whether a prison or its staff acted with deliberate indifference in regards to an inmate's medical needs, their actions should be evaluated under the lens of "subjective recklessness."[48]

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trans inmates in California men's prisons reported "ever [having] to do sexual things against [their] will in [their] lifetime." *Id.*

44. Mason, *supra* note 35 at 171. The article notes that even changes in public policy due to the medical consensus regarding transgender healthcare does not necessarily translate to better treatment for trans inmates. *Id.* at 172. This is largely due to the current system of housing all inmates based on their sex assigned at birth or via observation of their external genitalia. *Id.* at 164. These types of housing policies do not take into consideration the gender identity of the inmate, nor the advances in medicine acknowledging the legitimacy of trans people. *Id.*

45. Estelle v. Gamble, 429 U.S. 97, 102-03 (1976), quoting Trop v. Dulles, 356 U.S. 86, 100 (1958).

46. *Estelle*, 429 U.S. at 104. The Ninth Circuit held in 2019 that "[b]ecause 'society takes from prisoners the means to provide for their own needs,' the government has an 'obligation to provide medical care for those whom it is punishing by incarceration.'" Edmo v. Corizon, Inc., 935 F.3d 757, 785 (9th Cir. 2019) quoting Brown v. Plata, 563 U.S. 493, 510 (2011) and *Estelle*, 429 U.S. at 103, respectively.

47. *Estelle*, 429 U.S. at 106. This is based on previous Eighth Amendment cases wherein the Court found that an accident does not rise to the level of "wanton infliction of unnecessary pain." *Id.* at 105. *See e.g.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 465-66 (1947) (holding it was not unconstitutional to force a prisoner to undergo a second execution attempt after the first attempt failed to electrocute him due to a mechanical malfunction).

48. Farmer v. Brennan, 511 U.S. 825, 839-40 (1994). Justice Souter, writing for the majority, analyzed the different standards proposed to determine if conduct rose to the level of deliberate indifference before holding that, "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for 'deliberate indifference' under the Eighth Amendment." *Id.* at 839-40.

While this framework requires further exploration, it is also relevant to note here that, despite the lack of clear-cut guidelines, federal courts have tended to strike down rules or practices that either are, or amount to, blanket bans on various kinds of gender-affirming medical care.[49]

The WPATH and the APA have both classified gender dysphoria as a serious medical condition, but courts have been more reluctant to uniformly classify it as such.[50] For example, a federal court in Iowa held that an inmate's diagnosed gender dysphoria was not a serious medical condition because the inmate had other, concurrent, psychological conditions.[51] This is especially shocking when "federal circuit courts have held that asthma, Hepatitis C, a dislocated finger, preliminary symptoms of a heart attack, heartburn and vomiting, and minor burns satisfy this prong."[52] This non-serious classification presents a unique challenge for transgender inmates attempting to receive adequate gender-affirming care, but it is only one half of the test.[53]

Inmates must not only prove that they (1) have gender dysphoria and, depending on the circuit, that it's a serious medical need, but they must also prove that (2) the prison officials or doctors acted with deliberate indifference, thereby exposing the inmate to a "sufficiently substantial 'risk of serious damage to [their] future health.'"[54] Any "inadvertent or negligent failure to provide adequate medical care is insufficient to establish a claim under the Eighth Amendment."[55] Additionally, the determination of what conduct constitutes deliberate indifference has been defined in a subjective manner where the intent of the prison staff or warden can be determinative.[56] While the Court did opine that this standard "does

49. *See e.g.* Allard v. Gomez, 9 F. App'x 793, 795 (9th Cir. 2001) (noting that a blanket ban on providing hormone therapy would constitute "deliberate indifference"); Fields v. Smith, 653 F.3d 550, 556-57 (7th Cir. 2011) (striking down a Wisconsin statute that attempted to prevent the use of state funds to provide hormone therapy to transgender inmates); and Rosati v. Igbinoso, 791 F.3d 1037 (9th Cir. 2015) (invalidating a policy within the prison that banned providing gender confirmation surgery).

50. Coleman, *supra* note 34 at 68. *See e.g.* Young v. Adams, 693 F.Supp.2d 635, 640 (W.D. Tex. 2010) (holding that hormone therapy is not constitutionally guaranteed and reaching its decision by "assuming, without deciding, that transsexualism does present a serious medical need"). *But see* Long v. Nix, 877 F.Supp. 1358, 1366 (S.D. Iowa 1995) (comparing the present facts with *Farrier* to hold that a transgender inmate's gender dysphoria was not a serious medical need as the inmate had other psychological conditions).

51. *Long*, 877 F.Supp. at 1366.

52. Dan Schneider, *Decency Evolved: The Right to Transition in Prison*, 2016 WIS. L. REV. 835, 857 (2016).

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

54. *Id.* at 843 quoting Helling v. McKinney, 509 U.S. 25, 35 (1993).

55. Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019) citing *Estelle*, 429 U.S. at 105-06.

56. *Farmer*, 511 at 828. The Supreme Court held that "[s]ubjective recklessness, as used in the criminal law, is the appropriate test for 'deliberate

not mean that prison officials will be free to ignore obvious dangers to inmates[,]" it went on to say that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[57] This has allowed non-medical professionals like wardens and administrators within prisons and jails across the country to create their own ad-hoc systems of determining and delivering what they believe to be appropriate care—meaning some inmates are lucky, while others are decidedly not.[58]

To determine what kind of care is medically acceptable, the standards of care and practice within the associated medical community are "highly relevant."[59] While differences of opinion related to treatment plans, including what kind of care should be given, typically do not go beyond the bounds of Eighth Amendment prohibitions, this is only true if the medical opinions are considered medically acceptable within the associated community.[60] To complete the analysis under the Eighth Amendment, it is necessary to review the record and case specific facts, the judgment of prison and medical officials, and the views of professionals in the associated medical field, generally, to determine if an individual's treatment or care was medically acceptable.[61] For example, expert consensus on gender dysphoria highlights the importance and medical necessity of individualized diagnoses and care such that, if a prison were to give "perfunctory psychological evaluations by nonspecialists," that could constitute inadequate medical care and would not constitute a mere difference of medical opinion.[62]

### *D. Current Circuit Court Guidelines and Split*

Currently, there is a split among the circuit courts on how to

indifference.'" *Id.*

57. *Id.* at 828, 837.

58. Elliot Oberholzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL'Y INITIATIVE (Nov. 8, 2017), www.prisonpolicy.org/blog/2017/11/08/transgender/ [perma.cc/G54Z-BCHH]. In evaluating policies from prisons across the country, the author noted that "while a trans person incarcerated in Delaware should be able to access basic rights like protection from baseless invasive physical searches and some say in their housing safety, someone incarcerated in Oklahoma or Tennessee cannot." *Id.*

59. *Edmo*, 935 F.3d at 786. The Court went on to say that, typically, a difference of opinion between a doctor and an inmate, or even between two doctors, about what medical care is appropriate given the circumstances does not rise to the level to amount to deliberate indifference to an inmate's serious medical needs. *Id.*

60. *Id. See e.g.* Kosilek v. Spencer, 774 F.3d 63, 90 n.12 (1st Cir. 2014) (clarifying that prison officials cannot simply find a single practitioner willing to attest that a medically-accepted procedure or treatment is not needed to prove a differing opinion within the medical community and therefore deny gender-affirming care).

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

62. Mason, *supra* note 35 at 187.

classify and provide adequate medical care to transgender inmates.[63] The First (with exceptions)[64], Seventh[65], and Ninth Circuits[66] have ruled in favor of transgender plaintiffs, while the Eleventh[67] and Fifth Circuits[68] have tended to rule in favor of the State for differing reasons. The Supreme Court has never directly addressed this issue; however, it did deny certiorari in both the Ninth and Seventh Circuit cases where the trans inmate was ultimately given access to gender-confirmation surgery.[69] In fact, some have argued that the right to access gender affirming care is one of the matters "involving the most intimate and personal choices a person may make in a lifetime" and "central to personal dignity and autonomy"[70] to which Justice O'Connor refers in *Planned Parenthood v. Casey*.[71] However, there are competing claims on part of the prisons arguing that security and safety concerns are paramount in a prison and trans inmates may implicate these concerns. For example, in 2020 the Florida Department of Corrections argued that, if a trans woman were allowed to fully transition while incarcerated, this process would present a security concern not only on behalf of the trans inmate who would fear attack from other inmates, but also for the prison guards who would have to protect the trans inmate.[72]

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63. *See* Bourcicot & Woofter, *supra*, note 15 at 295-97 (briefly summarizing the current circuit court split on the issue of gender-affirming care in prisons and highlighting that gender dysphoria is recognized as a serious medical need in seven circuits, currently).

64. Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014) (*en banc*).

65. Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Fields v. Smith, 653 F.3d 550, 556-57 (7th Cir. 2011).

66. *Edmo*, 935 F.3d at 803.

67. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257 (11th Cir. 2020).

68. Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019).

69. Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 610 (2020); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 566 U.S. 904 (2012). *But see* Gibson v. Collier, 920 F.3d 212 (5th Cir.), *cert. denied*, 140 S. Ct. 653 (2019).

70. Sydney Scott, *"One Is Not Born, But Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities*, 15 U. PA. J. CONST. L. 1259, 1288 (2013).

71. On June 24, 2022, *Planned Parenthood v. Casey* was overruled by Dobbs v. Jackson Women's Health Org., No. 19–1392, 2022 U.S. LEXIS 3057, at *21 (June 24, 2022), however the basis for this ruling was limited to the right to an abortion within the scope of the 14th amendment. *Id.* While this may impact inmate access to healthcare in the future, the simple fact that *Casey* has been overruled does not negate that gender-affirming care is a personal choice that should be made with dignity and autonomy.

72. *Keohane*, 952 F.3d at 1275-76. The Eleventh Circuit found this argument convincing, holding that even a complete denial of care on the basis of safety concerns did not violate the Eighth Amendment. *Id.* at 1276 (citing Kosilek v. Spencer, 774 F.3d 63, 83 (1st Cir. 2014) (*en banc*)).

## III. ANALYSIS

Circuit courts like the Ninth and Seventh have taken more progressive approaches than the majority of courts regarding trans inmate healthcare by allowing access to gender-affirming medical care all the way up to, and including, gender-confirmation surgery.[73] Other circuits like the First and Eleventh Circuit Courts have tried a balancing approach where the medical needs of the inmate are balanced against the security concerns in the prison.[74] Departments of Correction across different states have maintained arguments that there are certain risks inherent in allowing transgender inmates to fully transition including risk to the inmate themselves, risk to the prison guards who must protect the inmate, and security concerns for other inmates who may be distressed at having a transgender inmate in their cell.[75] The Fifth Circuit takes the most-strict view against transgender inmates receiving gender-affirming care, as no gender-confirmation surgery had ever been performed in a prison.[76] Finally, it is important to review how attitudes have shifted in the legal and medical communities to analyze the issue and inform any proposals for change.

### *A. Current Circuit Court Split*

The struggle for trans inmates' access to gender-affirming medical care is not new. As early as 1987, some courts were willing to recognize that gender dysphoria, left untreated, violated the Constitution; however, these decisions were few and far between and did not address the issues of trans inmates with standards of care specific to them.[77] In *Meriwether v. Faulkner*, the Seventh

73. Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); *Fields*, 653 F.3d at 559; *Edmo*, 935 F.3d at 767.

74. *Kosilek*, 774 F.3d at 96; *Keohane*, 952 F.3d at 1274-77.

75. *See Keohane*, 952 F.3d at 1264. (Writing that the Florida department of corrections had argued "that granting Keohane's social-transitioning requests would pose unacceptable security risks."); *Kosilek*, 774 F.3d at 69. (Discussing the district court's holding that "the [Massachusetts] DOC's failure to provide treatment was rooted, at least in part, in 'sincere security concerns.'").

76. Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019).

77. *Meriwether*, 821 F.2d at 413. In Meriwether, the plaintiff was a transgender inmate who had been receiving hormone therapy, living as a woman since the age of 14 and had even had some surgical procedures to alter her hips, facial structure, and breasts prior to becoming incarcerated. *Id.* Despite these factors and the fact that the Department of Correction's Reception-Diagnostic Center had examined her and agreed that her evaluation supported a diagnosis of gender dysphoria, the prison staff decided to treat the inmate as if she were "any other anatomical male." *Id.* She was then assigned to the Indiana State Prison with neither a prescription for continued hormone therapy nor authorization to receive hormone supplements. *Id.* As she began to go through withdrawal from the hormone therapy, the plaintiff also suffered extreme abuse and indifference from both the prison staff and other inmates leading her to file a complaint alleging various constitutional harms. *Id.* While

Circuit held there was no reason to treat gender dysphoria differently than any other psychiatric disorder and the plaintiff had clearly demonstrated the severe nature of her ongoing medical distress.[78] This new distinction was due to previous cases where courts throughout the country had ruled that gender dysphoria was a serious and complex medical issue; however, *Meriwether* was the first time this had also applied to prison inmates.[79] While by today's standard this may seem obvious, at the time it was groundbreaking because the Seventh Circuit explicitly rejected the idea that this type of medical care or surgery was cosmetic in nature.[80] In fact, even by modern standards, this was groundbreaking because, as recently as 2016, insurance carriers were explicitly defining gender-affirming care and surgery as cosmetic and, therefore, not essential healthcare.[81]

### *1. All in Favor*

The Seventh Circuit revisited this issue in 2011 when it held that a Wisconsin statute containing a blanket ban on hormone therapy or gender confirmation surgery for inmates violated inmates' Eighth Amendment rights and was unconstitutional.[82] In that case, *Fields v. Smith*, the Seventh Circuit also evaluated the claims that gender-affirming care like hormone therapy and similar treatments were too expensive.[83] In an earlier case, *Maggert v.*

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the Court ultimately held that gender dysphoria is a serious medical concern and that the plaintiff was entitled to some medical treatment, it stopped short of saying that there is a constitutional guarantee for hormone therapy or even a specific type of treatment. *Id.*

78. *Id.*

79. *See generally* Doe v. Minnesota Dep't of Public Welfare, 257 N.W.2d 816, 819 (Minn. 1977) (ruling that "transsexualism" is a serious medical need and extending medical welfare benefit coverage to individuals suffering from gender dysphoria); J.D. v. Lackner, 80 Cal. App. 3d 90, 95 (1978) (holding that gender-confirmation surgery is medically necessary as there was no "wildest stretch of the imagination" that could logically characterize gender-confirmation surgery as cosmetic).

80. Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 48 BUFFALO L. REV. 835, 870 (1995).

81. Alisha Haridasani Gupta, *Transgender People Face New Legal Fight After Supreme Court Victory*, N.Y. TIMES (September 3, 2020) www.nytimes.com/2020/09/03/us/transgender-supreme-court-healthcare.html [perma.cc/39UU-XRPY]. In July 2016, the Obama administration issued a new rule explicitly stating that the Affordable Care Act prohibited discrimination on the basis of sex, which included gender identity. *Id.* This made it illegal for health insurance providers to deny coverage for gender transition-related treatment or to exclude this care from their plans. *Id.*

82. Fields v. Smith, 653 F.3d 550, 559 (7th Cir. 2011).

83. *Id.* at 555. The Court discussed its two prior cases, the previously examined *Meriwether* case as well as *Maggert v. Hanks*. *Id.* In *Maggert*, the Seventh Circuit wrote in dicta that "esoteric" treatments like hormone therapy were not guaranteed as a right under the Eighth Amendment because they are expensive and generally unavailable to even the general public. Maggert v.

*Hanks*, the Seventh Circuit ruled against a trans inmate who requested hormone therapy saying, in dicta, that "[w]ithholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. . . . We do not want transsexuals committing crimes because it is the only route to obtaining a cure."[84] Over a decade later, much had changed within both the legal and medical fields, and the Seventh Circuit noted that, now, they would be able to judge more accurately the cost of this kind of gender-affirming care.[85] The Seventh Circuit ultimately held that the prison's decision to place a blanket ban on gender-affirming care "served no valid penological purpose and amounted to torture."[86]

More recently, the Ninth Circuit ruled on a similar issue in a case where, while both parties agreed that the inmate suffered from gender dysphoria and that the WPATH sets appropriate standards of care, there was a disagreement about whether gender-confirmation surgery was necessary for the plaintiff.[87] In *Edmo v. Corizon Inc.*, the plaintiff, Adree Edmo, a trans woman, attempted self-castration twice while incarcerated due to her severe gender dysphoria.[88] After reviewing the district court's findings, including a lengthy evidentiary hearing, the Ninth Circuit affirmed the ruling below that gender-confirmation surgery was a medical necessity for the plaintiff.[89] Specifically, the Ninth Circuit went so far as to say

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Hanks, 131 F.3d 670, 671-72 (7th Cir. 1997).

84. *Maggert*, 131 F.3d at 671-72.

85. *Fields*, 653 F.3d at 555. During the initial trial, defendants in *Fields* stipulated that the cost of providing hormone therapy to an inmate was somewhere between $300-$1,000 per inmate per year. *Id.* As a comparison, it cost the Department of Corrections more than $2,500 per inmate per year for a common antipsychotic drug, quetiapine. *Id.* Additionally, while gender-confirmation surgery is more expensive, costing approximately $20,000, the Department of Corrections had paid "$37,244 for one coronary bypass surgery and $32,897 for one kidney transplant surgery." *Id.* In fact, the district court had even concluded that the Department of Corrections may be spending more money by denying hormonal therapy because the inmates likely would end up needing more expensive medical care or increased monitoring by the prison guards due to the likelihood that the inmate may attempt suicide or other bodily harm. *Id.*

86. *Id.* at 557.

87. Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019).

88. *Id.* The prison had been supplying her with hormone therapy in an attempt to alleviate her gender dysphoria, but the prison guards were, at the same time, doling out disciplinary offense reports to the plaintiff as she would wear her hair in feminine styles and request female commissary items like women's underwear: both violations of prison policy. *Id.* After her second attempt at self-castration was unsuccessful, the inmate filed a complaint alleging various claims under the Eighth Amendment, the Fourteenth Amendment, and other statutory violations. *Id.*

89. *Id.* at 786. The Ninth Circuit distinguished that this was not a case of dueling medical opinion as the medical experts provided by the defense lacked expertise in the field as the plaintiff's experts were not only her own doctors but also had treated thousands of patients with gender dysphoria. *Id.* at 787. The

that when "responsible prison officials deny such treatment with full awareness of the prisoner's suffering, those officials violate the Eighth Amendment's prohibition on cruel and unusual punishment."[90]

### *2. All Abstentions*

Despite the Seventh and Ninth Circuit's more progressive stances on access to gender-affirming medical care and gender-confirmation surgery within the prison system, other circuits have either taken the opposite approach or landed somewhere in the middle.[91] The First Circuit illustrated how the lack of Supreme Court precedent creates confusion and leads to inconsistent rulings through a series of holdings in *Kosilek v. Spencer*.[92] Despite the fact that the plaintiff, Michelle Kosilek, had been diagnosed by several medical experts with gender dysphoria and the fact that multiple specialists prescribed gender-confirmation surgery to her, the prison kept requesting evaluations until it found a doctor who recommended against this surgery.[93] Once that occurred, the Massachusetts Department of Corrections prepared a report alleging numerous safety concerns that would make it unsafe for Kosilek to receive the prescribed surgery while simultaneously recommending that she not be transferred to a women's prison, as this would cause distress to the other female inmates.[94] The district court held that gender-confirmation surgery was the proper medical care for the plaintiff and ordered the Department of Corrections to provide this treatment to Kosilek.[95] However, after this decision, the First Circuit went on to reverse their initial affirmation of the district court *en banc* in *Kosilek v. Spencer (IV)*.[96]

Instructive to the First Circuit in *Kosilek* was that alternate methods of treatment had been made available to the plaintiff.[97] The court gave weight to the fact that the plaintiff in *Kosilek* was provided access to medical care related to her gender dysphoria in the form of hormone replacement therapy, facial hair removal, and regular mental health treatment, and that she could wear feminine clothing and accessories.[98] The plaintiff argued that this was not

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Court noted as well that medical consensus and social awareness around transgender healthcare had changed as more information has become available. *Id.* at 803.

90. *Id.* at 803.

91. Mason, *supra* note 35 at 183.

92. *Id.* at 184. (Describing the history of *Kosilek I-IV*).

93. *Id.*

94. *Id.*

95. *Id.* at 185. The First Circuit initially affirmed the district court on appeal but later reversed its decision *en banc*.

96. Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014) (*en banc*).

97. *Id.* at 90. The court noted that, while there was a serious risk of suicidal ideation, this risk was due to the plaintiff's gender dysphoria. *Id.*

98. *Id.*

enough, emphasizing that the district court had overwhelmingly found in her favor that gender-confirmation surgery was necessary, but the First Circuit did not agree.[99] While they understood that the plaintiff may not like a medical diagnosis or treatment plan, the First Circuit held, nevertheless, that the Massachusetts Department of Corrections had chosen a form of treatment that was "reasonably commensurate with the medical standards of prudent professionals, and . . . provide[d] Kosilek with a significant measure of relief."[100]

More recently, the Eleventh Circuit also tried to maintain a balance between the medical needs of trans inmates and the security concerns raised by the Florida Department of Corrections.[101] In *Keohane v. Florida Department of Corrections*, the plaintiff was a trans woman who had requested various medical accommodations and treatment for her gender dysphoria only to have the requests denied due to a "freeze-frame" policy in Florida prisons.[102] These kinds of policies "freeze" the treatment of trans inmates at whatever level of care they had been receiving prior to their incarceration.[103] This can actually prevent trans inmates from receiving appropriate care because someone who had not been prescribed hormones prior to their incarceration would be prevented from receiving them while incarcerated even if the prison doctor and warden agreed the medical care was necessary.[104]

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99. *Id.*

100. *Id.*

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

102. *Id.* at 1264-63. The "freeze-frame" policy mandated that transgender inmates suffering from gender dysphoria receive the same type of care for their dysphoria that they were receiving prior to their incarceration. *Id.* Over two years the plaintiff made repeated requests for various accommodations like socially transitioning which were denied by the Department of Corrections over security concerns despite Keohane's repeated attempts to self-harm including trying to hang herself, attempted castrations, and other suicide attempts. *Id.*

103. *Id.*

104. In 2015, the Department of Justice filed a Statement of Interest in a case challenging the Constitutionality of Georgia Department of Correction's freeze-frame policy that "prohibits initiating new treatments for gender dysphoria for prisoners who either did not receive such treatments in the community, or who were not identified as transgender and referred for such treatment during the intake process." Statement of Interest of the U.S. at 6, Diamond v. Owens, 131 F. Supp. 3d 1346 (M.D. Ga. Sept., 14, 2015) (No. 5:15-CV-50), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/03/diamond_statement_of_interest.pdf [perma.cc/8UWC-TC39]. In Ms. Diamond's case, a prison staff member had misidentified as her as male during her intake, which caused the prison to stop the hormone therapy treatment Ms. Diamond had been receiving for seventeen years prior to her incarceration. *Id.* at 5. Despite the GDOC's own doctors recommending Ms. Diamond be allowed to resume hormone therapy, the "GDOC officials told her that such treatment was either not available or prohibited by GDOC's freeze-frame policy." *Id.* at 6. The Statement of Interest in Ms. Diamond's case advised that "proscriptive freeze-frame policies are facially unconstitutional under the Eighth

Interestingly, in the weeks after the federal complaint was filed, the Florida Department of Corrections made two major policy changes affecting the analysis of the case.[105] Even more interestingly, the same doctor who evaluated Ms. Kosilek in the previously mentioned First Circuit case, also evaluated Ms. Keohane. In both cases, the doctor recommended against surgery despite evidence from other doctors that it was necessary for the plaintiffs. [106]

With the repeal of the freeze-frame policy and Keohane now receiving hormone therapy, the parties were in agreement that gender dysphoria is a serious medical concern, but continued to disagree over the subjective portion of the Eighth Amendment deliberate indifference test that related to whether the particular type of treatment Keohane was requesting was medically necessary.[107] This argument was not fully considered on the merits, however, as the Eleventh Circuit ruled that the issue was now moot with respect to most of the plaintiff's claims with the policy repeal.[108]

### *3. All Those Opposed*

Finally, the Fifth Circuit takes the most conservative approach

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Amendment because they do not provide for individualized assessment and treatment." *Id.* at 2. Despite her initial case being settled, and GDOC rescinding its freeze-frame policy, when Ms. Diamond was arrested for a parole violation in 2019, she was once again housed in a men's facility and denied hormone therapy proving this problem still needs serious intervention. Shaila Dewan, *Back in Prison, Transgender Woman Faces an Old Horror, Sexual Assault*, N.Y. TIMES (Nov. 23, 2020) www.nytimes.com/2020/11/23/us/ashley-diamond-transgender-prison.html [perma.cc/FDH8-5APX].

105. *Keohane*, 952 F.3d at 1263. The Department of Corrections referred Keohane to an endocrinologist who prescribed her hormone therapy to begin immediately two weeks after the complaint was filed and six weeks after the complaint was filed, the Department formally repealed its freeze-frame policy replacing it with a policy calling for individual assessment and treatment.

106. Aviva Stahl, *Prisoners, Doctors, and the Battle Over Trans Medical Care*, WIRED (Jul. 8, 2021) www.wired.com/story/inmates-doctors-battle-over-transgender-medical-care/ [perma.cc/Y8EN-HRAV]. Dr. Levine recommended against surgery in both cases and would go on to evaluate trans inmates at other prisons including "reevaluat[ing] 12 prisoners who had requested gender confirmation surgery" after "the health clinic the [Massachusetts Department of Corrections] used to provide care for trans prisoners had recommended surgery for all of them." *Id.* Although he claims to have laid out treatment plans that could lead to surgery in the future, Dr. Levine ultimately "recommended against surgery for all of them[.]" *Id.*

107. *Keohane*, 952 F.3d at 1266. The Eleventh Circuit did agree with the district court at trial that the "freeze-frame" policy was a form of deliberate indifference because the Department of Corrections had conceded that gender dysphoria was a serious medical need and that to ignore this due only to a prison policy would amount to a "shoulder-shrugging refusal," which is the definition of deliberate indifference.

108. *Id.* at 1272. The Court held that all the allegations except the plaintiff's request to socially transition were moot due to the Department of Correction's policy change. *Id.*

of any circuit, stating in a recent decision that "[a] state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate."[109] In *Gibson v. Collier*, the Fifth Circuit distinguished that, while the Eighth Amendment protections prevent the outright denial of medical care, states are not required to provide the exact care an inmate desires.[110] Despite the fact that no evaluation was ever conducted for the inmate who requested gender-confirmation surgery, the court held that this was not a blanket ban because Texas had never created trans specific healthcare policies and no inmate had ever received the care requested in *Gibson*.[111] The Fifth Circuit did note that gender dysphoria was a serious medical concern especially considering the plaintiff's "record of psychological distress, suicidal ideation, and threats of self-harm."[112] The final deciding factor was what the Fifth Circuit referred to as a lack of medical consensus due to the WPATH having flexible guidelines for treatment of transgender individuals.[113] The court ultimately held that, as it was not unusual for gender-confirmation surgery to be denied in prisons "across the country", denying this type of care did not violate Eighth Amendment protections against cruel and unusual punishment.[114]

While the Supreme Court has never directly addressed this issue, there is precedent for remedies at the federal level for inmates who allege violations of their Eighth Amendment rights due to the deliberate indifference of wardens and correctional officers with regards to the inmate's medical care.[115] The *Bivens* remedy comes from a case wherein the Supreme Court held that federal government officials can be held personally liable for violations of an individual's constitutional rights.[116] This remedy

109. Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019).

110. *Id.* at 216.

111. *Id.* The court went on to compare the case to if the FDA had banned a particular drug in that there would be no constitutional violation for an inmate to then be denied an evaluation for that FDA-banned drug. *Id.*

112. *Id.* at 219.

113. *Id.* at 223. The court cited the WPATH in the portion of their standards of care that states "this field of medicine is evolving." *Id.*

114. *Id.* at 226.

115. Carlson v. Green, 446 U.S. 14, 18 (1980). In *Carlson*, the mother of an inmate who had died while incarcerated brought a *Bivens* action against a prison official alleging their deliberate indifference to the inmate's medical needs. *Id.*

116. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 389 (1971). In *Bivens*, the plaintiff filed a complaint alleging violations of his Fourth Amendment rights when Federal Bureau of Narcotics agents arrested him in front of his wife and children and searched his apartment. *Id.* The plaintiff successfully argued that he had suffered great humiliation, that the search was unconstitutional, and the arrest made without probable cause. *Id.* at 389-90. The Court ultimately held that an agent, even when acting unconstitutionally, has far greater possibility of harm than the average private citizen and the Fourth Amendment limits the exercise of their power regardless of whether the State would similarly punish a private citizen engaged in the same behavior.

was extended to inmates in *Carlson v. Green* when an inmate died after his medical needs were deliberately ignored by prison officials and employees.[117] The availability of a remedy under *Bivens* is a potential route trans inmates could attempt to take in order to receive adequate medical care in federal prisons, as it is a remedy "despite the absence of any statute conferring such a right."[118] For example, in *Carlson*, the Court stated that there were no special factors that counsel hesitation and "no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy." These two prongs of a *Bivens* case form the barriers for plaintiffs seeking this type of remedy.[119] While the Court has since been hesitant to extend *Bivens*,[120] it still shows that the Supreme Court recognizes the serious nature of Eighth Amendment violations and the medical needs of inmates.

## *B. Changing Medical Opinion*

It is also important to include the growth within the medical field related to trans health care because the general standards of care have changed rapidly as the medical field learns more about trans people generally.[121] In 1979, the Henry Benjamin

*Id.* at 392.

117. *Carlson*, 446 U.S. at 16.

118. *Id.* at 18.

119. *Id.* at 19. The Court went on to say, even if there were special factors which would counsel hesitation on behalf of the Court, that the qualified immunity protections afforded to federal government officials more than protects them in these cases and that nothing in the Federal Tort Claims Act showed that Congress meant to preclude a *Bivens* remedy in these cases. *Id. But see* Minneci v. Pollard, 565 U.S. 118 (2012) (holding that, as alternative remedies existed for the inmate alleging violations of his Eighth Amendment rights, a *Bivens* remedy was not appropriate); Sosa v. Bustos, 2020 U.S. Dist. LEXIS 71362, at *14 (S.D.N.Y. Apr. 22, 2020) (ruling that courts in its district have found that, post-Abbasi, "the FTCA as a potential remedy counsels hesitation in extending a Bivens remedy").

120. Egbert v. Boule, __ S.Ct. __, 2022 U.S. LEXIS 2829, at *65 (June 8, 2022). Just this past term, Justice Thomas, writing for the majority held that "rather than dispense with Bivens altogether, we have emphasized that recognizing a cause of action under Bivens is 'a disfavored judicial activity.'" *Id.* As such, while the remedy does exist, it is still a high hurdle for plaintiffs to overcome.

121. *See generally A Major Win for Transgender Rights: UN Health Agency Drops 'Gender Identity Disorder', as Official Diagnosis*, UN NEWS (May 30, 2019), www.news.un.org/en/story/2019/05/1039531 [perma.cc/CG4C-2Z9Q] (writing that the U.N. Department of Reproductive Health and Research voted to reclassify gender identity disorder such that being transgender, or having GID is no longer considered a mental disorder. Instead, a new chapter on sexual health is being drafted that will include GID in order to reduce stigma as the "health agency now had a 'better understanding that it was not actually a mental health condition.'"); *Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (2013)

International Gender Dysphoria Association (now known as WPATH) created its first version of Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People.[122] In 2009, the Endocrine Society put together brief clinical practice guidelines and in 2014, a government appeals board ruled that Medicare must cover gender confirmation surgery, reversing a decades-old policy to the contrary first implemented in the 1980s.[123] This slow but steady march in the medical community towards recognizing the serious medical needs of trans people has not been as quickly nor uniformly accepted in prisons, jails, and courtrooms, leading to the continued mistreatment of trans inmates across the country. Despite the fact that the WPATH has been disseminating and updating its standards of care since 1979, and that gender confirmation surgery and gender affirming care is no longer seen as experimental or new, the legal system has struggled to stay current.[124]

## *C. The Concerns*

While trans medical care is more readily available now than it was even 15 years ago, there are still those who voice concern that inmates are receiving care potentially unavailable to law-abiding citizens.[125] An important clarification needs to be made, however, as there appears to be two distinct groups of complainants: ordinary citizens and those involved in the legal system, whether as lawyers, judges, or jurists. For example, there seems to be a general idea among people who have not been incarcerated that inmates are receiving care they themselves cannot access.[126] While there are stories of specific complaints surrounding trans inmates receiving gender-affirming care, the majority of these complaints seem to

www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [perma.cc/V6SX-MEH2] (describing the updates to the DSM-5 related to gender dysphoria that were made due to better understanding of the condition and to "respect the individuals identified by offering a diagnostic name that is more appropriate to the symptoms and behaviors they experience without jeopardizing their access to effective treatment options.").

122. Farah Naz Khan, *A History of Transgender Health Care*, SCI. AM. (Nov. 16, 2016), www.blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/ [perma.cc/3T9S-BDBK].

123. *Id.*

124. *Id.*

125. Carrie S. Frank, *Must Inmates Be Provided Free Organ Transplants?: Revisiting the Deliberate Indifference*, 15 GEO. MASON U. C.R. L.J. 341, 342-44 (2005) (the article, describing the "outrage" that erupted in California when an inmate received a heart transplant, with one individual saying that people "who can't afford a heart transplant should rob a bank" argues that the Eighth Amendment protections "[do] not include a requirement that prisons fund lifesaving organ transplants.").

126. *Id.* The author noted that "California citizens were recently outraged when the state spent approximately one million taxpayer dollars to fund a heart transplant for a jailed felon." *Id.*

center more around the fact that inmates are *guaranteed* healthcare while those outside the carceral system must secure it for themselves.[127] These complaints, while valid, are not within the purview of this comment as they relate more to America's lack of universal healthcare. The concerns raised by judges or other court officials, however, can limit the medical treatment received by both transgender and cisgender inmates.

One chief complaint, discussed previously, is the cost of medical care.[128] In determining exactly what level of care is appropriate, while "cost is not a valid justification for failing to provide constitutionally required medical care, cost is a valid factor to consider when determining what medical care is constitutionally required."[129] Courts have uniformly held that budgetary concerns are a valid method of limiting or evaluating what type of care will be given to an inmate.[130] However, courts have also reminded prisons that simply raising the argument that gender-affirming care is expensive will not automatically bar inmates from receiving the care if it is medically, and therefore, constitutionally, necessary.[131]

While cost is a valid concern[132], the most expensive inmates to

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127. *See* Ryan Smith, *Pretty in Prison: Cross-Dressing Wife-Killer Wants Smooth Legs*, CBS NEWS (Aug. 10, 2009), www.cbsnews.com/news/pretty-in-prison-cross-dressing-wife-killer-wants-smooth-legs/ [perma.cc/NH8Q-ACRT] (Describing "outraged" calls to a local radio talk show that came after the topic of whether trans inmates should receive gender affirming care was posed on the show); Jeffrey E. Keller, MD, *Who Gets the Best Care in America? Prisoners* (May 17, 2018) www.medpagetoday.com/blogs/doing-time/72935 [perma.cc/X4YX-A29G] (Writing that "[i]nmates are the only residents of the United States with a constitutional guarantee of medical care.").

128. *See supra* note 85 and accompanying text.

129. Frank, *supra* note 125, at 358.

130. *See*, *e.g.*, Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977) (holding that care can be "limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable"); United States v. DeCologero, 821 F.2d 39, 42 (1st Cir. 1987) (ruling that an inmate is not entitled to "the most sophisticated healthcare money can buy"); Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) (noting that the expense of a treatment should be considered when evaluating a claim for an unconstitutional denial of care).

131. Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 336-337 (3d Cir. 1987) (citing numerous cases holding that cost cannot justify unconstitutional prison conditions); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 (11th Cir. 1985) (holding that "lack of funds for facilities cannot justify an unconstitutional lack of competent medical care"); Hamm v. DeKalb County, 774 F.2d 1567, 1573 (11th Cir. 1985) (ruling that a state's interest in limiting cost will not justify prison conditions below a constitutionally adequate level).

132. *See* Kil Huh, et. al, *Prison Health Care: Costs and Quality*, 30 PEW CHARITABLE TR. (2017) (measuring costs of care for various inmate populations while accounting for the universal lack of a "mechanism for reporting comparable performance data."). The article notes that as the population of women inmates varies drastically from state to state; in some states women are 11% of the incarcerated population, whereas in others, they account for less

house are actually the elderly.[133] A recent Federal Sentencing Report showed that "the median healthcare spending per inmate in the 10 states with the highest percentage of inmates age 55 and older averaged $ 7,142, while the 10 states with the lowest percentage of these inmates averaged $ 5,196 per inmate."[134] The average inmate costs $5,720 per year in medical expenses.[135] Not only are elderly inmates more expensive, the cost of their care is also rising at much faster rates than that of their younger counterparts.[136] Spending thousands of dollars on inmate care may seem unfair for ordinary citizens, however, this cost is actually much less than the cost of healthcare for the average citizen: $9,990.[137] When taking into consideration the fact that elderly, not trans, inmates account for the highest medical costs, that the cost of care for inmates is still less than that of the average citizen, and that the Constitution requires adequate medical care for inmates, the only next step is to determine a pathway for the states and federal government to provide this necessary care.

## IV. PROPOSAL

After a review of the background and analysis it is clear that the system of delivering healthcare and medicine to trans inmates needs serious changes. The current ad hoc system where each circuit, state or prison gets to determine the level of appropriate care leads to severe health consequences for trans inmates across

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than 5% of inmates. *Id.* at 29. The authors then go on to note that there is no disaggregated data for women inmates. *Id.* As such, it is difficult to say what the average per inmate cost is for a trans inmate, specifically, but it is accurate to say that trans inmates generally, are decidedly not the most costly inmates to house though individual procedures may be expensive.

133. In a recent Federal Sentencing Reporter, "correctional healthcare spending rose in 41 states by a median of 13 percent during the 5-year period from FY 2007 to FY 2011. The report indicates that states generally incurred higher inmate healthcare spending where aging inmates represented a larger proportion of the inmate population." Off. Inspector Gen., U.S. Dep't Just., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 32 FED. SENT. R. 294 (2020).

134. *Prison Health Care: Costs and Quality*, 6, PEW CHARITABLE TRUSTS (Oct. 2017) www.prisonlegalnews.org/media/publications/SFH_Prison_Health_Care_Costs_and_Quality_final.pdf [perma.cc/W8BG-C63V]. The Bureau of Prisons defines "elderly" as ages 55 or older when collecting statistics.

135. *Id.*

136. "[T]he cost of incarcerating aging inmates grew 23 percent, from $715 million in FY 2010 to $881 million in FY 2013, while the cost of incarcerating younger inmates grew 3 percent, from $3.5 billion to $3.6 billion over the same period." *Id.*

137. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-379, BOP: BETTER PLANNING AND EVALUATION NEEDED TO UNDERSTAND AND CONTROL RISING INMATE HEALTH CARE COSTS 20 (2017).

the country.[138] Instead, gender affirming care should be deemed medically necessary under the Eighth Amendment protections, like any other routine care within the penal system. Certain prisons in the United States have already begun adopting this policy and the policies of certain other countries are instructive here as well.

## *A. How Some States Have Taken Steps in the Right Direction*

While being housed in a facility that corresponds to an inmate's gender identity will not prevent every abuse, being placed in the correct housing is intimately connected with inmate access to medical care and safety.[139] After a lawsuit involving the ACLU, Delaware created a two-part policy in order to provide Prison Rape Elimination Act ("PREA") compliant and humane treatment policies for transgender inmates.[140] This policy change made prison officials seriously consider a "transgender offender's own views with respect to their safety . . . including whether they believe they would be more safely housed in a male or female facility."[141] Similarly, in Illinois, a recent court ruling is creating sweeping change with regards to how prison officials must treat transgender inmates.[142] Among the various victories, committees within the prisons will no longer be tasked with determining what kind of care transgender inmates receive — instead the decision will be between the inmate and their doctor.[143] While these lawsuits and others have been

138. *See supra* notes 11-12, 42-44, 102 and accompanying text.

139. For example, "correctional institutions often routinely place transgender inmates in some form of segregation or isolation 'against their will, allegedly for their own good'. . . Correctional agencies justify such segregation on the theory that it protects transgender inmates from violence that they would otherwise face in the general population[.]" *Chapter Three: Classification and Housing of Transgender Inmates in American Prisons*, 127 HARV. L. REV. 1746, 1748-49 (2014). *See also* Drake Hagner, *Fighting for Our Lives: The D.C. Trans Coalition's Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities*, 11 GEO. J. GENDER & L. 837, 860-61 (2010) (stating that "ample research and case law indicate that transgender individuals are at greater risk of abuse when classified and housed based on birth sex or genitalia . . . a transgender or gender-variant inmate's sense of safety and gender identity and expression must be of primary concern during housing and classification decisions.").

140. Margie Fishman, *Delaware Prisons Beef Up Transgender Protections* (Feb. 15, 2017) www.delawareonline.com/story/news/local/2017/02/15/delaware-prisons-beef-up-transgender-protections/97891438/ [perma.cc/HDT6-PFYA].

141. *Id.*

142. Angie Leventis Lourgos, *Federal Judge Orders Sweeping Reforms of Treatment of Transgender Inmates in All Illinois Prisons*, CHI. TRIB. (Dec. 20, 2019) www.chicagotribune.com/news/breaking/ct-illinois-judge-orders-reforms-transgender-prisoners-20191221-inz4oo6m3fhotg4h53dgo5khta-story.html [perma.cc/F2Z4-7GCF].

143. *Id.*

successful, more sweeping, permanent reform is still needed.

The state of California has taken a huge step forward in the treatment and understanding of trans inmates with the passage of Senate Bill 132.[144] This Act, passed September of 2020, allows inmates to live in housing that matches the gender with which they identify–not necessarily their assigned sex at birth.[145] The bill also punishes routinely reported abuses committed by correctional officers and prison staff, including purposefully using incorrect gender pronouns, names, and honorifics.[146] It also lays out search protocols and housing protocols that must be followed, allowing trans inmates to be searched according to the search policy for their gender identity and housed in facilities corresponding to their gender identity.[147] California is not the only state to adopt policies and procedures that give access to gender-congruent housing and other important measures for transgender inmates. Connecticut and Massachusetts enacted similar policies which allow transgender inmates to be housed in facilities that correspond with their gender identity.[148] Inmates in Illinois and North Carolina have also successfully sued for the right to transfer to women's prisons as well.[149]

The Central Medical Facility, a male-only prison in Vacaville, California, has been designated as a hub for trans inmates by the California Department of Corrections and Rehabilitation ("CDCR").[150] This designation of certain prisons as "hubs" for trans inmates allows support services, medical, and mental health

144. CAL. PENAL CODE § 2605, TRANSGENDER RESPECT, AGENCY, AND DIGNITY ACT (West 2020). This Act was created, partially, in response to the murder of a trans woman inmate at the hands of her cellmate. Miranda Leitsinger, *Transgender Prisoners Say They 'Never Feel Safe.' Could a Proposed Law Help?* KQED (Jan. 8, 2020), www.kqed.org/news/11794221/ [perma.cc/W8V4-G984]. Carmen Guerrero, a transgender woman incarcerated at Kern Valley State Prison, was filling out forms prosecutors believed were going to be used to initiate a transfer to a different cell or different prison before she was murdered by her cellmate, Miguel Crespo. *Id.* A witness who testified the trial, recounted how they had heard Crespo telling prison guards he would murder Guerrero if he had to share a cell with her, but they placed the two in a cell together anyway. *Id.* Prison guards told Crespo that this placement would be temporary but, less than nine hours later, they were called back to the cell by Crespo who had murdered Guerrero in that time, saying "'[y]ou didn't believe me. I told you I was gonna kill [Guerrero.]'" *Id.*

145. *Id*.

146. CAL. PENAL CODE § 2605, TRANSGENDER RESPECT, AGENCY, AND DIGNITY ACT (West 2020).

147. *Id.*

148. Leitsinger, *supra* note 144. After Ms. Resto successfully petitioned the Massachusetts' courts to allow her to be transferred to a female facility, another inmate was given the same opportunity and then Massachusetts adopted this policy into law. *Id.*; *see also* Patel, *supra* note 9.

149. Leitsinger, *supra* note 144.

150. Monica Lam, *Out on the Inside: Transgender Women Share Stories From a California Prison*, KQED (June 26, 2020) www.kqed.org/trulyca/3165/ [perma.cc/PKX3-EYYC].

resources to be clustered together to provide better assistance to trans inmates.[151] Amy Miller, Associate Director of CDCR's Female Offender Programs and Services remarked, "the sentence in coming to state prison, that's the punishment. Right? You shouldn't be required to identify a different way simply because you committed a crime and you've been given a sentence."[152] The Central Medical Facility has roughly two dozen trans women living with the population of 2,500 male prisoners, but the hub of trans women has allowed for certain activities and accommodations that are not common in other prisons.[153] For example, one of the newest activities is a trans women's workout group, put together by one of the women, Jazzie Paradize Scott, that allows for the women to work out together in sports bras and tank tops – something that would potentially be dangerous in a mixed group of cisgender men and trans women.[154] For many trans inmates, the Central Medical Facility is the "first prison [they've] ever been to that actually had a transgender community" rather than one or two trans inmates at an individual prison or jail.[155]

## *B. Looking to Cuba for Examples of Gender Affirming Policies*

Interestingly, Cuba, a country that historically imprisoned LGTBQ+ individuals for decades under the regime of Fidel Castro[156], has become a leader in healthcare for trans people.[157] In 2008, Cuba'sMinister of PublicHealth, José Ramón Balaguer Cabrera, signed Resolution 126 which made gender confirmation surgery and hormone replacement therapy available free of charge under Cuba's national healthcare system.[158] It may be facially confusing that a country with such an historically bad record on

151. *Id*.

152. Leitsinger, *supra* note 144.

153. Lam, *supra* note 150.

154. *Id.* Transgender women incarcerated at the Central Medical Facility said that, while there were disagreements among the women about how to best protect incarcerated transgender women, they felt "especially safe at CMF." *Id.*

155. *Id.*

156 Trudy Ring, *Fidel Castro Leaves Legacy of Oppression, Say Many LGBT Cubans*, ADVOC. (Nov. 27, 2016) www.advocate.com/world/2016/11/27/fidel-castro-leaves-legacy-oppression-say-many-lgbt-cubans [perma.cc/CP2W-7HR5] (detailing how Castro sent gay men to military camps in the 1960s and quarantined people with HIV/AIDS in sanitariums, only apologizing for this in 2010—two years after he had acceded power to his son).

157. Lydia Smith, *Inside Cuba's LGBT Revolution: How the Island's Attitudes to Sexuality and Gender Were Transformed*, INDEPENDENT (Jan. 4, 2018) www.independent.co.uk/news/world/americas/cuba-lgbt-revolution-gay-lesbian-transgender-rights-havana-raul-castro-a8122591.html [perma.cc/Z4RS-8UYS].

158. Emily J. Kirk, *Transsexuals' Right to Health? A Cuban Case Study*, 20(2) HEALTH & HUM. RTS. 215, 215 (2018).

LGBTQ+ rights would take such a drastic step as becoming the first country in Latin America to guarantee this type of medical care. However, this care is guaranteed because Cuba treats the issue of trans healthcare, not as a gender or sex rights-based issue, but rather as a healthcare issue.[159]

In the United States, there is no right to healthcare or medical care and trans inmates must fight to petition courts for gender affirming care. In Cuba, citizens have a right to healthcare and medical services but some "view Cuba as a place where the government uses a heavy hand in the lives of individuals, often quashing civil disobedience," meaning trans citizens would have a much harder time protesting or petitioning the government for medical care.[160] This places the United States and Cuba diametrically opposed in an interesting way. On one hand, the United States gives citizens the right to protest and petition the government[161] if they believe their healthcare needs are not being met, but does not guarantee healthcare as a right. On the other hand, Cuba views healthcare as an intrinsic right and provides government funded medical care for trans people but has much stricter laws about protest and petitioning the government for redress of grievances.[162] While it is possible that the United States may move to a more publicly funded healthcare system like Cuba's, the reality is that is too far away in the future for trans inmates to wait.

## *C. The Proposal*

The current system where trans inmates are at the mercy of whichever administration is currently in control of the federal and state governments, or even the individual prisons and their staff, leads to irreparable harm.[163] Even the previously mentioned

159. *Id*.

160. *Id.*

161 U.S. CONST. amend I.

162. *Id.*

163. *See* Gammett v. Idaho State Bd. Of Corr., No. CV05-257-S-MHW, 2007 WL 2186896 (D. Idaho 2007) (holding that a prison must provide a specific prisoner hormone therapy, only after she had made over seventy requests and finally had removed her own testicles). A story made headlines when Strawberry Hampton was moved from a men's correctional facility in Illinois to a women's facility. Janelle Griffith, *Transgender Inmate Who Alleged Abuse Is Transferred to Female Prison*, (Dec. 27, 2018) www.nbcnews.com/news/us-news/transgender-inmate-who-alleged-abuse-transferred-female-prison-n952486 [perma.cc/DCZ5-XMGH]. Ms. Hampton, who had been transitioning from male to female since the age of 5, was convicted for burglary and is currently serving a 10-year sentence. *Id.* She alleged violent sexual and physical attacks as well as emotional abuse at the hands of not only the inmates but the staff themselves. *Id.* The allegations continue on to say that while at Pinckneyville Correctional Center guards there "sexually assaulted her and forced her to have sex with her cellmate for their entertainment." *Id.*

"better" facility, the Central Medical Facility in Vacaville, is not a paragon of how to treat trans inmates.[164] In 2017, a federal audit found that CDCR's policy of housing trans inmates using their biological sex as the guideline violated the Prison Rape Elimination Act ("PREA").[165]

The first step in any changes to the guidelines or practices for prisons must be stricter punishments for prisons and their staff found in violation of existing federal law. Currently, if states fail to certify their compliance with PREA policies and standards, they can lose 5% of federal funding provided through criminal justice grant programs.[166] If a state is not in compliance but files an assurance that they are working towards compliance, the grant money is reallocated to assist the state in reaching its goals.[167] There are no financial penalties for individual jails and prisons under this system which could force prisons and jails that are complying to lose funding or have to subsidize the bad actions of prisons and jails within the state that are not in compliance. A better system would be to actually hold individual prisons and jails liable for the mistreatment of their trans inmates who have been denied medical care. This could be accomplished through creating causes of action specific to medical neglect, via statutes imposing fines or loss of facility funding, or through more serious criminal penalties for government officials found violating these statutes. Alternatively, a federal law could create systems similar to those in California, which would allow transgender inmates to be housed together. This could help centralize staff and medical professionals who are more well-versed in the unique needs of transgender inmates.

The second important prong in this system is to have a universally recognized understanding that trans healthcare is routine and must be administered by the prisons and jails like any other medical care. There are many avenues that individual states and the federal government can take to address this serious issue;

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164. Ryan McCarthy, *Psychologist at Vacaville State Prison Says Transgender Advocacy Led to Demotion*, DAILY REPUBLIC (Jan. 7, 2018), www.dailyrepublic.com/all-dr-news/solano-news/vacaville/psychologist-at-vacaville-state-prison-says-transgender-advocacy-led-to-demotion/ [perma.cc/3TMF-QAJ7]. A psychologist who worked at the prison filed a lawsuit alleging a "homophobic and transphobic environment" at Central Medical Facility that led to her being demoted when she filed complaints about the treatment of LGBTQ+ inmates at the prison. *Id.*

165. Leitsinger, *supra* note 144. Harper Jean Tobin, the policy director at the National Center for Transgender Equality, said that most of these policies are not followed or enforced and exist only on paper. *Id.*

166. Derek Gilna, *Five Years after Implementation, PREA Standards Remain Inadequate*, (November 2017), www.prisonlegalnews.org/news/2017/nov/8/five-years-after-implementation-prea-standards-remain-inadequate/ [perma.cc/WK8W-MGA8]. Audit Year 2 of the first three-year PREA audit cycle which covered the time from August 20, 2014 to August 19, 2015 showed that only 10 states had certified compliance while 38 states and the District of Columbia filed assurances that they were working towards full compliance. *Id.*

167. *Id.*

however, the marginalized status of trans inmates means these concerns largely fall to the wayside. This understanding can be achieved in various ways: courts could take judicial notice that WPATH's Standards of Care are widely accepted by the medical community and represent a consensus about how to treat trans patients; prisons and jails could have mandatory trainings with actual punishments for staff who fail to comply with these policies; or the federal government could give a stronger bite to PREA and include harsher penalties for states that fail to comply or are taking advantage of the fact that they can file assurances, passing the buck to the next state administration or the next year.

## V. CONCLUSION

Existing as a trans person comes with its own unique dangers and issues that are only now being taken seriously by the medical and legal community. The law has always been an inherently reactive system, and this is painfully evident in its treatment and consideration of trans people. By modifying existing policies and listening to the needs of trans inmates, the justice system can take huge steps in making the lives of trans inmates less difficult and safer, overall. These policies and procedures, while seemingly small, would make a huge difference in the lives of some of the most marginalized people in our system, would not be costly to implement or sustain, and would afford trans inmates the dignity of living as their authentic selves.