

Breaking the Binary: How Shifts in Eighth Amendment Jurisprudence Can Help Ensure Safe Housing and Proper Medical Care for Inmates with Gender Dysphoria

The Eighth Amendment prohibition against imposing cruel and unusual punishments requires correctional facilities to provide their inmates adequate medical care and reasonably safe housing accommodations. Those with gender dysphoria have unique needs and vulnerabilities related to housing and healthcare while incarcerated. Under the current framework for adjudicating inmates’ Eighth Amendment claims, defendants are frequently able to avoid liability, leaving many transgender plaintiffs without legal recourse for constitutional violations. This Note addresses that framework’s shortcomings and proposes shifts in Eighth Amendment jurisprudence that would comport with Supreme Court precedent, adhere to expert medical consensus, and hold defendants more consistently accountable for failing to provide transgender inmates safe housing and proper medical care. This Note calls on correctional facilities to abandon strict adherence to the gender binary and embrace prudent professional standards regarding treatments for gender dysphoria, which would ultimately require providing inmates gender-confirmation surgeries and housing reassignments in certain circumstances.

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INTRODUCTION

In 2002, Kelly McAllister was incarcerated in a correctional facility controlled by the Sacramento, California Sheriff’s Department.¹ Kelly was a transgender woman—she was slight of frame with fully developed breasts, long hair, and feminine features.² She had been living as a woman for years before her incarceration.³ Administrators at the facility were aware that Kelly was transgender, yet they decided to house her in a cell with a male inmate, who then violently sexually assaulted her.⁴

A few years later, prison officials in Florida abruptly terminated the hormone therapy that an inmate named Anna had

1. Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 GEO. J. GENDER & L. 585, 585 (2014).

2. *Id.*

3. *Id.*

4. *Id.*

been receiving as treatment for gender dysphoria⁵ for five years.⁶ After losing the only medication that eased the anxiety caused by her gender dysphoria, Anna became depressed, experienced frequent headaches and vomiting, suffered severe breast pain, and felt like she wanted to “crawl out of [her] skin.”⁷ Prison officials repeatedly denied her requests to restart hormone therapy.⁸ After suffering for weeks from severe withdrawal symptoms, Anna attempted suicide.⁹

American prison systems rely almost entirely on a gender binary: inmates are incarcerated in either all-male or all-female facilities, usually depending on the prisoner’s genitalia or sex assigned at birth.¹⁰ This framework has proven painfully inadequate for addressing the needs of transgender inmates. Whether seeking medical care to treat symptoms of gender dysphoria or safe housing options to protect themselves from sexual assault, transgender prisoners are disproportionately subjected to cruel and unusual punishments.

In Part I, this Note provides background on gender dysphoria and explains how current prison policies lead to the mistreatment of transgender inmates. In Part II, it outlines the current jurisprudential framework for Eighth Amendment claims and explains how the framework’s shortcomings often leave transgender inmates without legal recourse for constitutional violations. Part III proposes solutions to better ensure access to proper medical care and safe housing accommodations for transgender inmates and explains the potential effects of proposed jurisprudential changes. It asserts that there are instances in which prison facilities are constitutionally required to provide gender-confirmation surgeries for inmates with severe gender dysphoria, who must then be transferred to sex-corresponding facilities. It also recommends that prison facilities help provide constitutionally adequate housing and medical care by adopting holistic, nonbinary policies designed to protect transgender inmates’ safety, dignity, and identity.

5. See *infra* note 12 (Gender dysphoria is defined as a “marked difference between an individual’s expressed or experienced gender and the gender that others would assign him or her that continues for at least six months”).

6. Laura R. Givens, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 579 (2013).

7. *Id.* at 579–80 (citing CRUEL AND UNUSUAL (Outcast Films 2006)).

8. *Id.* at 580.

9. *Id.*

10. *Chapter Three: Classification and Housing of Transgender Inmates in American Prisons*, 127 HARV. L. REV. 1746 (2014) [hereinafter *Chapter Three*].

I. BACKGROUND

A. *Gender Dysphoria*

An individual is transgender if his or her gender identity differs from the sex he or she was assigned at birth.¹¹ Once known as “Gender Identity Disorder” (GID), the American Psychological Association (APA) renamed the condition “gender dysphoria” in its Diagnostic and Statistical Manual of Mental Disorders (DSM-5) in 2012.¹² The APA no longer conceptualizes gender dysphoria as a mental illness, but does consider it a medical condition that can greatly affect a patient’s mental and physical health.¹³ The APA defines gender dysphoria as a “marked difference between an individual’s expressed or experienced gender and the gender that others would assign him or her that continues for at least six months.”¹⁴ It can cause “clinically significant distress or impairment in social, occupational, or other important areas of functioning” and can be manifested in a variety of ways, including the “strong desire to be treated as the other gender and the strong desire to rid oneself of one’s sexual characteristics.”¹⁵

The World Professional Association for Transgender Health (WPATH) is the leading global authority on medical care for persons with gender dysphoria—it promulgates standards that are embraced by the APA and considered scientific consensus by psychologists and gender specialists.¹⁶ The WPATH also considers gender dysphoria to

11. Walter Bockting, *The Psychology of Transgender*, AM. PSYCHOL. ASS’N (Nov. 19, 2015), <http://www.apa.org/news/press/releases/2015/11/psychology-transgender.aspx> [<https://perma.cc/55E5-X6R9>].

12. AM. PSYCHOL. ASS’N, DIAGNOSTICS AND STATISTICAL MANUAL FOR MENTAL DISORDERS X (5th ed. 2013).

13. *Id.*

14. *Id.*

15. *Id.*

16. Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, WORLD PROF. ASS’N FOR TRANSGENDER HEALTH 5 (7th ed.2011), [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) [<https://perma.cc/A3BX-9WDW>]. See also *Diamond v. Owens*, 131 F.Supp. 3d 1346, 1354 n.3 (M.D. Ga. 2015) (asserting that the standards of care for gender dysphoria promulgated by the WPATH are recognized “as ‘the authoritative and clinically accepted treatment . . . by the American Psychiatric Association, the American Medical Association, courts that have considered the issue, and members of the medical community at large’ ”); Hana Church, *Prisoner Denied Sexual Reassignment Surgery: The First Circuit Ignores Medical Consensus in Kosilek v. Spencer*, 57 B.C. L. REV. E. SUPP. 17, 24–25 (2016) (asserting that the First Circuit erred by declining to follow the WPATH’s guidelines for transgender inmate’s medical care, as the WPATH represents the widespread medical consensus on treatments for gender dysphoria).

be a serious medical condition that carries a high risk of suicide and attempted self-surgery if left untreated.¹⁷ Indeed, case law on prisoners with untreated gender dysphoria is rife with examples of inmates committing self-harm, often by mutilating or attempting to remove their own genitals.¹⁸ Receiving gender-confirming therapy is vital for many transgender individuals. Gender dysphoria patients have a 20% to 30% suicide rate if left untreated, compared to only a 1% to 2% rate if receiving proper medical care.¹⁹ The fact that treatment makes persons with gender dysphoria 10 to 30 times less likely to commit suicide puts its importance into sharp relief.²⁰

Appropriate treatment for gender dysphoria differs based on the patient; the WPATH recommends individualized treatment plans that typically include counseling, hormone treatment, living in accordance with one's gender identity, or some combination thereof.²¹ Since effective treatment varies greatly by individual, transgender healthcare demands specific diagnoses from trained medical experts.²² Gender identity specialists recommend gender-confirmation surgery (also known as sexual reassignment surgery, or SRS) when hormone therapies and other methods do not adequately relieve the patient's distress.²³ It is widely accepted among transgender health specialists that in severe cases of gender dysphoria, "breast augmentation, facial feminization, genital reconstruction, and other gender confirming surgeries" are neither elective nor cosmetic; rather, they are medically necessary procedures required to alleviate emotional distress and prevent self-harm.²⁴

Gender-confirmation surgery is rare, in part because many transgender persons neither prioritize nor medically require the

17. Coleman, *supra* note 16, at 68.

18. See, e.g., *Battle v. Perry*, No. 3:16-cv-293-FDW, 2016 WL 4487888 (W.D.N.C. Aug. 25, 2016) (the transgender plaintiff was denied hormone therapy, leading to depression, suicidal thoughts, and attempted self-castration); Givens, *supra* note 6. See *infra* Part I.B.2, specifically text accompanying notes 88–92, for additional cases involving transgender inmates harming themselves after being denied proper treatment for gender dysphoria.

19. Etheridge, *supra* note 1, at 608–09; SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLES IN NEW YORK STATE MEN'S PRISONS 28 (2007) [hereinafter SRLP], <http://srlp.org/files/warinhere.pdf> [<https://perma.cc/2UUU-5G4M>].

20. Etheridge, *supra* note 1, at 608–09; SRLP, *supra* note 19, at 28.

21. Coleman, *supra* note 16, at 68 (living one's life as one's gender identity can include wearing identity-corresponding clothing and/or using an identity-corresponding name).

22. Tara Dunnavant, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV. 15, 26 (2016); Coleman, *supra* note 16, at 9–10.

23. Coleman, *supra* note 16, at 68.

24. Dunnavant, *supra* note 22, at 18; Coleman, *supra* note 16, at 5. Obviously, this includes mastectomies or facial masculinization when appropriate.

procedure.²⁵ However, for those with severe gender dysphoria, SRS can be life saving.²⁶ Due to high poverty rates among the transgender community, paying for gender-confirmation surgery is often an insurmountable barrier, but the costs of hormone therapy and gender-confirmation surgery are actually “comparable to, and often cheaper than, the costs of other drugs and surgeries.”²⁷ For example, hormone therapy typically costs between \$300 and \$1,000 per inmate per year, while one common antipsychotic drug costs prisons more than \$2,500 per inmate per year.²⁸ Furthermore, at least one court found that gender-confirmation surgery would cost \$20,000, while the state department of corrections had spent over \$37,000 for an inmate’s coronary bypass surgery and roughly \$33,000 for a kidney transplant.²⁹

B. Transgender Inmates in U.S. Prison Facilities

Transgender individuals are more likely than their cisgender³⁰ peers to be incarcerated, an issue many advocates attribute, at least in part, to diminished economic and educational opportunities stemming from their gender nonconformity.³¹ Transgender persons commonly face abuse from an early age, and many report being made to leave their homes because of their gender identities or expressions.³² Those that enter foster care facilities, most of which are segregated by birth sex, often experience harassment by staff and residents.³³ Homeless shelters are also usually segregated by birth sex or genitalia; they tend to either turn away transgender individuals outright or refuse to

25. *Myth #1: Surgery is a Top Priority for all Transgender People*, HUMAN RIGHTS CAMPAIGN (Mar. 6, 2014), <http://www.hrc.org/blog/watch-debunking-the-myths-on-transgender-health-well-being> [https://perma.cc/X4PY-QMSB].

26. *Id.*

27. Dunnivant, *supra* note 22, at 30; *see also* Fields v. Smith, 653 F.3d 550, 555–56 (7th Cir. 2011).

28. Fields, 653 F.3d at 555; Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?*, 61 CLEV. ST. L. REV. 957, 965 (2013).

29. Fields, 653 F.3d at 555; Bendlin, *supra* note 28, at 965.

30. A person whose gender identity corresponds with his or her sex assigned at birth. *Cisgender*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

31. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 217 (Paisley Currah et al. eds., 2006).

32. *Id.* at 219.

33. *Id.* *See also* Doe v. Bell, 754 N.Y.S.2d 846 (Sup. Ct. 2003) (holding that a group home with a policy forbidding transgender youth from wearing traditionally feminine clothing failed to make reasonable accommodations for a minor at the facility diagnosed with gender dysphoria).

house them according to their gender identities.³⁴ Transgender individuals face further discrimination in the job market and are “routinely fired for transitioning on the job or when their gender identities . . . come to their supervisor’s attention.”³⁵ Transgender persons even have a more difficult time accessing entitlement programs designed to aid the poor than their gender-conforming peers.³⁶

Workplace discrimination, reduced access to the welfare system, and a dearth of viable foster care and homeless facilities “leave a disproportionate number of [transgender] people in severe poverty and dependent on criminalized work such as prostitution or the drug economy,” which results in disproportionate rates of imprisonment.³⁷ Once incarcerated, transgender inmates face unique hardships—their welfare is frequently threatened by a lack of both proper medical treatment and tenable housing options.³⁸ It is perhaps beyond the scope of the U.S.’s court system to ameliorate the socioeconomic conditions that cause transgender individuals to be disproportionately imprisoned, but courts must at least ensure that their constitutional rights are not violated when they find themselves incarcerated.

1. Assignments, Housing, and Sexual Assault

Upon entering the prison system, transgender inmates are usually assigned to all-male or all-female facilities based on their sex assigned at birth or external genitalia.³⁹ When facilities place transgender inmates (especially transgender women with feminine characteristics) among the general prison population, or in cells with cisgender prisoners, they are frequently targets of violence and sexual assault.⁴⁰ Many of the examples cited in this Note focus on

34. Lisa Mottet & John M. Ohle, Nat’l Gay & Lesbian Task Force, *Transitioning our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* 3 (2003), <https://srlp.org/wp-content/uploads/2012/08/TransitioningOurShelters.pdf> [<https://perma.cc/632S-ZKDG>].

35. Spade, *supra* note 31, at 219. *See also* Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00–3114, 2002 WL 31098541, at *1–2 (E.D. La. Sept. 16, 2002) (discussing a grocery store loader and truck driver who was fired after being seen “cross-dressing” outside of the workplace).

36. Spade, *supra* note 31, at 219 (“Discrimination on the basis of gender identity occurs in welfare offices, on workfare job sites, [and] in Medicaid offices . . .”).

37. *Id.* at 219–20.

38. *See infra* Parts I.B.1–I.B.2.

39. *See Chapter Three, supra* note 10, at 1746.

40. AMNESTY INT’L USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 88–89 (2005)

transgender women incarcerated in male facilities simply because the “vast majority” of transgender prisoners are transgender women.⁴¹ However, transgender men housed in women’s facilities are also routinely abused, and most of the legal arguments made in this Note apply with equal force to all transgender and gender nonconforming prisoners.⁴²

Transgender women housed in male facilities are particularly vulnerable to harassment, abuse, and sexual violence from both prisoners and prison staff.⁴³ They are assaulted with such alarming frequency that it has become “well-known in the jail industry that transgender inmates, especially transgender female inmates, are easy targets” for predation.⁴⁴ Though born anatomically male, transgender women identify as female—many live as women and/or receive hormone treatments to align their appearances with their identities.⁴⁵ The risk of physical and sexual violence makes housing a cisgender woman in a male prison unthinkable. Yet, prisons routinely assign transgender women to male facilities, regardless of their personal identities or levels of feminization, based solely on their external

(“[T]ransgender women in particular may be at heightened risk of torture or ill-treatment if they are placed in male jails or holding cells . . .”). See also Lila Leonard, *Gender Reassignment Surgery in Prisons: How the Eighth Amendment Guarantees Medical Treatments Not Covered by Private Insurance or Medicare for Law-Abiding Citizens*, 11 RUTGERS J.L. & PUB. POL’Y 626, 642, 646 (2014) (“There is an inherent risk of sexual assault in prison,” but the risk for transgender inmates is significantly greater).

41. Nina Garcia, *Starting with the Man in the Mirror: Transsexual Prisoners and Transitional Surgeries Following Kosilnek v. Spencer*, 40 AM. J.L. & MED. 442, 449 (2014). See also Valerie Jenness & Sarah Fenstermaker, *Agnes Goes to Prison: Gender Authenticity, Transgender Inmates in Prisons for Men, and Pursuit of “The Real Deal”*, 28 GENDER & SOC’Y 5, 5 (2014).

42. SRLP, *supra* note 19, at 7 (The “vast majority of SRLP’s . . . clients were housed in men’s facilities.” However, “it is critical to note that many transgender . . . people in women’s prisons . . . have reported similarly harsh treatment to that reported in men’s prisons”).

43. Dunnivant, *supra* note 22, at 19; Am. C.L. Union, *Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners*, NAT’L CTR. FOR LESBIAN RTS. (Dec. 1, 2014), <http://www.nclrights.org/wp-content/uploads/2013/07/RightsofTransgenderPrisoners.pdf> [<https://perma.cc/RP36-3H6V>].

44. *Doe v. District of Columbia*, No. 13-878 (RDM), 2016 WL 6088262, Dkt. 76-1 at 79 (Ex. 15) (Oct. 18, 2016).

45. See, e.g., Whitney E. Smith, *In the Footsteps of Johnson v. California: Why Classification and Segregation of Transgender Inmates Warrants Heightened Scrutiny*, 15 J. GENDER, RACE & JUST. 689, 689 (2012) (“Even though Jackie had developed breasts and lived and dressed as a woman, she was incarcerated” in an all-male facility); *Transgender Health*, AM. MED. STUDENT ASSOC. (2017), <https://www.amsa.org/advocacy/action-committees/gender-sexuality/transgender-health/> [<https://perma.cc/68MJ-CVVA>] (“Many transgender people choose to undergo hormone replacement therapy to more closely align their bodies with their identities.”).

genitalia or the sex listed on their birth certificates.⁴⁶ Consequently, examples of such inmates being beaten and sexually abused are as numerous as they are appalling.⁴⁷

For example, the plaintiff in *Diamond v. Owens* was a transgender woman whose seventeen years of hormone therapy had caused her to develop “female secondary sex characteristics, including ‘full breasts, a feminine shape, soft skin, and . . . a reduction in male attributes.’”⁴⁸ After being convicted of a nonviolent offense, Diamond was housed with the general population of an all-male maximum-security prison, despite the authorities’ awareness that she was transgender and receiving hormone treatments.⁴⁹ Within one month, Diamond was “brutally sexually assaulted” by a group of six inmates.⁵⁰ She was later transferred to a different all-male maximum-security facility, where she was again housed among the general population and again sexually assaulted.⁵¹ When Diamond reported these assaults, the facilities responded deplorably: one prison official told her that she brought the attack upon herself by being transgender, and one of the facilities placed her in solitary confinement as punishment for “pretending to be a woman.”⁵²

In 2011–12, 4% of the federal and state prison population reported having been sexually assaulted in the past twelve months; for transgender inmates, the number skyrocketed to 39.9%, nearly ten times the average rate.⁵³ For inmates in local jails, 3.2% of the general population had been sexually assaulted in the preceding year, compared to 26.8% of transgender inmates, nearly nine times the average rate.⁵⁴ Furthermore, when a cisgender prisoner sexually assaults a transgender prisoner, one study shows that “the incident is more likely to involve the use of a weapon, yet less likely to evoke

46. *Id.*

47. *See, e.g.,* Farmer v. Brennan, 511 U.S. 825 (1994) (a transgender woman placed in the general prison population was beaten and raped by a fellow inmate); Doe v. District of Columbia, 215 F.Supp. 3d 62 (D.D.C. 2016) (a transgender inmate with feminine characteristics was placed unattended overnight with a straight cellmate, who sexually assaulted her).

48. 131 F.Supp. 3d 1346, 1355 (M.D. Ga. 2015).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1355–56.

53. Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. DEPT OF JUSTICE (2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf [https://perma.cc/K8GB-J4AJ].

54. *Id.*

medical attention if needed.”⁵⁵ Clearly, the threat to transgender inmates’ safety is too great to continue to allow prison facilities to make housing decisions based solely on genitalia or sex assigned at birth.

Since the threat of sexual assault against transgender inmates is so well-known within the prison industry,⁵⁶ facilities often place transgender inmates in solitary confinement or protective custody units, segregating them from the general population entirely and indefinitely.⁵⁷ But resorting to isolated or segregated housing is not an adequate solution for inmates with gender dysphoria. Prisoners still face violence while in protective custody units. In *Greene v. Bowles*, for example, the transgender plaintiff was placed in a protective custody unit where she was repeatedly assaulted by a fellow inmate, culminating in a “severe attack” during which she was struck with a “fifty-pound fire extinguisher.”⁵⁸ Furthermore, isolating or segregating transgender inmates increases their risk of being abused by prison personnel,⁵⁹ exacerbates preexisting psychological issues,⁶⁰ and reduces or eliminates their access to prison activities like rehabilitation, education, and vocational programs.⁶¹ Such tactics also further stigmatize transgender prisoners since they are normally used

55. Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons*, 27 JUST. Q. 835, 838 (2010) (data collected on California prisons shows that transgender inmates are assaulted at a disproportionate rate and experience different institutional responses to those assaults) (citing Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, Center for Evidence-Based Corrections, University of California, Irvine (2007)).

56. See *supra* note 44 and accompanying text.

57. See, e.g., *Greene v. Bowles*, 361 F.3d 290, 292–93 (6th Cir. 2004) (a transgender inmate was housed in the segregated Protective Custody Unit for an extended period of time); *Lucrecia v. Samples*, No. C–93–3651–VRW, 1995 WL 630016, at *1 (N.D. Cal. Oct. 16, 1995) (a transgender inmate at federal prison in California was housed in a segregated cell). See also Etheridge, *supra* note 1, at 598 (“Transgender people . . . often find themselves railroaded into punitive isolation . . .”); Smith, *supra* note 45, at 689 (because an inmate was transgender, she was “classified as a ‘Total Separation’ (T-Sep) inmate”).

58. 361 F.3d at 292–93.

59. See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1194 (9th Cir. 2000) (a transgender female inmate was sexually assaulted by a prison guard while being housed in a unit separate from the general population).

60. See, e.g., Jason Breslow, *What Does Solitary Confinement Do to Your Mind?*, PBS FRONTLINE (Apr. 22, 2014), <http://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/> [<https://perma.cc/UHL9-RFNE>] (discussing a Harvard Medical School study that found “solitary can cause . . . hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, concentration and memory”).

61. Etheridge, *supra* note 1, at 598; SRLP, *supra* note 19.

as punishment for inmates that violate the facility's rules.⁶² As such, segregating transgender prisoners who have not violated any of the prison's policies makes being transgender appear inherently wrong.⁶³ Additionally, extended periods of isolation potentially violate the Eighth Amendment's prohibition against cruel and unusual punishment.⁶⁴

The federal government has taken steps to reduce the prevalence of sexual assault in U.S. prisons without the use of extended isolation. The Prison Rape Elimination Act of 2003 (PREA) called on the U.S. Department of Justice (DOJ) to enact rules designed to prevent sexual violence in incarceration facilities.⁶⁵ The DOJ issued standards in 2012 that contained provisions aimed at gender nonconforming inmates.⁶⁶ The regulations call "for screening of individuals who may be at heightened risk of abuse because of transgender status," considering factors beyond their genitalia when deciding on a transgender inmate's facility, and exploring alternatives before placing transgender prisoners in administrative segregation.⁶⁷

Though certainly a step in the right direction, PREA has many shortcomings. First, it is only legally binding on federal detention centers, meaning that it directly applies to the 211,000 adults in federal prisons, but not the roughly 2,000,000 inmates currently incarcerated in state prisons and local jails (i.e., it only covers about

62. Etheridge, *supra* note 1, at 598. *See also* Smith, *supra* note 45, at 689–690 ("Although T-Sep classification is usually reserved for inmates who violate prison rules ... all transgender inmates share this classification regardless of their behavior or propensity for violence.").

63. Etheridge, *supra* note 1, at 598.

64. U.S. CONST. amend. VIII. *See* Hope v. Pelzer, 536 U.S. 730, 744 (2003) (a prison official's qualified immunity defense can be defeated if his conduct violated an established right of which a reasonable person would have been aware); Farmer v. Brennan, 511 U.S. 825, 849 (1994) (deliberate indifference to an inmate's serious medical need, including inhumane conditions of confinement, violates the Eighth Amendment); Hudson v. McMillan, 503 U.S. 1, 10–12 (1992) (unnecessary pain prohibited by the Eighth Amendment also includes psychological pain); Farmer v. Carlson, 685 F.Supp. 1335, 1338 (M.D. Pa. 1988) (a transgender inmate alleged an Eighth Amendment violation after a prison facility held her in administrative segregation for over 130 days). *But see* Sandin v. Conner, 515 U.S. 472, 485–88 (1995) (solitary confinement is constitutionally permissible as a punishment for inmates). However, in considering *Sandin*, it is important to note that while segregation has been approved as a form of punishment, it is not necessarily constitutional to impose it indefinitely on an inmate who has not violated prison rules.

65. Prison Rape Elimination Act, 28 C.F.R. § 115.5 (2017); Dunnivant, *supra* note 22, at 37.

66. *Supra* note 65.

67. *Supra* note 65.

10% of the total adult prison population).⁶⁸ The only enforcement mechanism at the state level is the potential loss of 5% of the state's prison grant money,⁶⁹ while local jails face no penalties whatsoever for noncompliance.⁷⁰ Furthermore, prison facilities are only audited for compliance once every three years, and "PREA does not give prisoners the right to sue for violations of its standards."⁷¹ Lastly, since PREA's protections come from DOJ regulations, rather than from a judicial decree based on prisoners' constitutional rights, its policies are more vulnerable to reversal or atrophy from an unsympathetic administration.⁷²

Several other jurisdictions have also enacted more flexible transgender housing policies.⁷³ For instance, the Washington, D.C. Department of Corrections has established a transgender committee made up of a medical practitioner, correctional supervisor, mental health clinician, chief case manager, and a volunteer who is either a member of the transgender community or an expert in gender identity.⁷⁴ When a transgender individual is incarcerated, the

68. Dunnivant, *supra* note 22, at 38; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLY INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html> [<https://perma.cc/CJ93-ZRYA>].

69. That figure does not daunt many states; Texas, for example, simply chose to ignore the standards and incur the penalty. See Laura Sullivan, *Enforcing Prison Rape Elimination Standards Proves Tricky*, NPR (Apr. 2, 2014, 4:13 PM), <http://www.npr.org/2014/04/02/298332579/enforcing-prison-rape-elimination-standards-proves-tricky> [<https://perma.cc/GS48-JJ25>].

70. Dunnivant, *supra* note 22, at 38; Sullivan, *supra* note 69.

71. Dunnivant, *supra* note 22, at 38. Although, if a transgender prisoner were repeatedly sexually assaulted in a facility that had refused to adopt the federal standards, the inmate might have a stronger claim that his or her Eighth Amendment rights were violated. See Dunnivant, *supra* note 22, at 38; Sullivan, *supra* note 69.

72. See, e.g., John Byrne, *Emanuel Doubts Trump Will Cut Funding for Sanctuary Cities*, CHI. TRIB. (Nov. 16, 2016, 5:09 PM), <http://www.chicagotribune.com/news/local/politics/ct-chicago-city-council-roundup-met-20161116-story.html> [<https://perma.cc/A6B5-CAMS>] (discussing how the Department of Justice could effectuate President Donald Trump's campaign promise to crack down on illegal immigrants by withholding federal grant money from "sanctuary cities"); Eric Posner, Opinion, *And if Elected: What President Trump Could or Couldn't Do*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/opinion/campaign-stops/and-if-elected-what-president-trump-could-or-couldnt-do.html> [<https://perma.cc/BSZ9-8RPC>] (discussing how a president can wield power by influencing the Department of Justice).

73. See, e.g., *Dep't Order No. 4005.1: Transgender and Gender-Variant Inmates*, DENVER SHERIFF DEPT (2012), <https://s3.amazonaws.com/static.nicic.gov/Library/026337.pdf> [<https://perma.cc/2V8L-CQTH>] (outlining Denver, CO's updated housing policy, which embraces a holistic approach that allows transgender inmates to be placed according to their personal gender identities).

74. *Chapter Three*, *supra* note 10, at 1758; *Program Statement No. 4020.3E: Gender*

committee makes a case-specific determination on whether he or she should be housed in a male or female facility and whether among the general population or in protective custody.⁷⁵ In making its decision, the group considers the inmate's safety needs, genitalia, gender identity, and potential vulnerability (factoring in the individual's perception of his or her own vulnerability).⁷⁶ The inmate remains in protective custody while the committee makes its decision.⁷⁷ After placement, prison officials use gender-neutral forms of address and provide the inmate identity-appropriate clothing.⁷⁸

Holistic transgender placement policies are still rare, and further protections are needed to ensure access to safe housing for transgender prisoners in all jurisdictions.⁷⁹ However, flexible housing policies like those followed in Washington, D.C. are an effective option for correctional facilities seeking to safeguard their transgender inmates' constitutional rights.⁸⁰

2. Medical Care for Gender Dysphoria

On top of their difficulties finding safe housing, transgender prisoners are also often unable to obtain proper medical care while incarcerated. Healthcare in American prisons can be woefully

Classification and Housing, D.C. DEP'T OF CORR. (2014), <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PP%204020.3E%20-%20Gender%20Classification%20and%20Housing%205-1-14.pdf> [<https://perma.cc/8P36-YQQ9>].

75. *Supra* note 74. See also Etheridge, *supra* note 1, at 611–12 (arguing that the easiest solution is often to house transgender women in female facilities and vice versa).

76. *Supra* note 74.

77. The committee is allotted seventy-two hours to make a determination. *Chapter Three*, *supra* note 10, at 1758–59.

78. *Id.*

79. *Id.* at 1747; See *infra* Part III.

80. The National Center for Transgender Equality and the National Gay and Lesbian Task Force both recommend that prison facilities adopt flexible policies that ensure each transgender inmate is housed according to his or her gender identity, unless the classification clearly puts the inmate's safety in jeopardy. *Id.* at 1757; Jody Marksamer & Harper Jean Tobin, *Standing with LGBT Prisoners: An Advocate's Guide to Ending Abuse and Combatting Imprisonment*, NAT'L CENTER FOR TRANSGENDER EQUAL. 40 (2014), http://www.transequality.org/sites/default/files/docs/resources/JailPrisons_Resource_FINAL.pdf [<https://perma.cc/3HW9-QWF7>]. It is also worth noting that a handful of jurisdictions around the world have taken the more radical approach of opening correctional facilities exclusively for transgender inmates. See, e.g., Etheridge, *supra* note 1, at 586 (the LAPD operates America's first detention center made solely to accommodate transgender persons, but it is only used while the inmates are being held for arraignment); *Italy "to Open First Prison for Transgender Inmates"*, BBC NEWS (Jan. 12, 2010, 6:08 PM), <http://news.bbc.co.uk/2/hi/europe/8455191.stm> [<https://perma.cc/6LTD-4NFC>] (discussing how Italy opened a medium-security prison exclusively for transgender women, which provides inmates psychological support and individualized rehabilitation plans).

inadequate for all inmates,⁸¹ but it is even more difficult for those with gender dysphoria to secure necessary treatment.⁸² Despite medical consensus that gender dysphoria is a legitimate condition, prison staff commonly view gender-related services as cosmetic rather than medical and often deny or delay requisite treatment.⁸³

Without access to gender-confirming medical treatment, transgender prisoners are more likely to suffer from depression and anxiety.⁸⁴ Abruptly ending a gender dysphoric inmate's preexisting hormone therapy—which often occurs when an inmate transfers to a new facility—is also dangerous;⁸⁵ symptoms include vomiting, nausea, bruising, severe pain, and a desire to mutilate one's genitals.⁸⁶ As discussed in Part I.A, the suicide rate for those with untreated gender dysphoria is 20% to 30%, but only 1% to 2% for those receiving gender-confirming therapies.⁸⁷ Thus, adequate medical care—whether in the form of counseling, hormone treatment, behavioral adaptations, gender-confirmation surgery, or some combination thereof—is essential for prisoners with gender dysphoria.

For example, *De'Lonta v. Angelone* involved a transgender female inmate who had undergone medical procedures to appear more feminine and was on estrogen treatment to slow her hair growth and develop female physical characteristics.⁸⁸ Upon transfer to a new facility, her hormone treatment was ended abruptly, causing her nausea, severe itching, and depression.⁸⁹ De'Lonta also developed an uncontrollable urge to self-mutilate—she cut or stabbed her genitals more than twenty times after her therapy was terminated.⁹⁰

81. See Etheridge, *supra* note 1, at 607–08 (“The root problem is that the country has tacitly decided to starve the prison system of medical care, even though . . . roughly one in six inmates suffers from a serious mental illness.”) (citing Editorial Desk, *Death Behind Bars*, N.Y. TIMES (Mar. 10, 2005), <http://www.nytimes.com/2005/03/10/opinion/death-behind-bars.html> [<https://perma.cc/9UAY-948N>]); SRLP, *supra* note 19, at 26 (“It is well documented that healthcare in U.S. prisons, jails, and detention centers is severely inadequate in terms of both accessibility and quality.”).

82. See SRLP, *supra* note 19, at 27 (“Exacerbating these barriers to adequate healthcare, transgender . . . people in prison receive additional forms of care-related discrimination and neglect.”).

83. Etheridge, *supra* note 1, at 607–08; SRLP, *supra* note 19, at 27.

84. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 755 (2008).

85. See, e.g., Givens, *supra* note 6, at 579–80 (describing one inmate's experience after being denied hormone therapy); *infra* notes 88–92 and accompanying text.

86. Spade, *supra* note 84, at 755 n.109.

87. Etheridge, *supra* note 1, at 608–09; SRLP, *supra* note 19, at 28.

88. 330 F.3d 630, 632 (4th Cir. 2003).

89. *Id.*

90. *Id.*

Similarly, the plaintiff in *Supre v. Ricketts* was a transgender inmate who was denied her repeated requests for estrogen treatment.⁹¹ Without hormone therapy for her gender dysphoria, she continually self-mutilated until her testicles became so damaged that they had to be surgically removed.⁹²

Medical consensus regarding healthcare for those with gender dysphoria has influenced some positive change in law and public policy,⁹³ but it has not necessarily translated into better treatment for transgender prisoners. It is now the accepted view among transgender medical specialists, the WPATH, and the APA that breast augmentation, facial feminization, genital reconstruction, and other gender-confirming surgeries are medically necessary for individuals whose psychological distress is not alleviated by other treatments alone.⁹⁴ Indeed, there is now “unanimity in the medical community regarding the baseline medical needs” of those with gender dysphoria,⁹⁵ and this concurrence has led to some legal progress for the transgender community. In 2010, for example, the United States Tax Court held that the costs of feminizing hormones and sexual reassignment surgery were tax deductible for certain individuals as a form of necessary medical care.⁹⁶ Given that ruling and the APA’s updated classification of gender dysphoria,⁹⁷ a diagnosis from a medical professional can now justify using insurance coverage for gender-confirmation surgery, as well as other procedures attendant with a transition.⁹⁸

Furthermore, federal courts have trended toward using the Eighth Amendment to strike down blanket state and prison policies that bar any particular type of medical treatment for inmates.⁹⁹

91. 792 F.2d 958, 960 (10th Cir. 1986).

92. *Id.*

93. *See infra* 94–103 and accompanying text.

94. *See Owens*, 131 F.Supp. 3d at 1354 n.3; Dunnivant, *supra* note 22, at 18; Coleman, *supra* note 16, at 54–55. It is also considered vital that transgender individuals who are institutionalized receive medical care that mirrors, as closely as possible, treatment available to those who are not institutionalized. Coleman, *supra* note 16, at 67–68.

95. Garcia, *supra* note 41, at 455.

96. *O’Donnabhain v. C.I.R.*, 134 T.C. 34, 70 (U.S. Tax Court, 2010) (finding that gender-confirming surgical procedures do not fit the definition of “cosmetic” under the Internal Revenue Code, section 213(d)(9)(b) for certain individuals diagnosed with severe gender dysphoria).

97. *See supra* text accompanying notes 12–14.

98. Leonard, *supra* note 40, at 631.

99. Karen Moulding & the National Lawyers Guild, Lesbian, Gay, Bisexual, and Transgender Committee, *Transgender prisoners—Access to medical treatment*, 1 SEXUAL ORIENTATION AND THE LAW § 10:22 (October, 2017).

Several courts have found that the Constitution requires individualized medical assessments, rather than prison policies that prohibit “entire classes of treatment.”¹⁰⁰ In all such cases, courts gave weight to expert medical testimony on the harmful effects of withholding “hormone therapy and other medically necessary treatment for persons who suffer from profound gender dysphoria.”¹⁰¹ This recent judicial hostility toward policies against treating gender dysphoria has led many modern prisons to offer hormone treatments “to at least some transgender prisoners,”¹⁰² though they are often difficult to obtain,¹⁰³ and surgical treatments have remained largely off the table.¹⁰⁴ The Federal Bureau of Prisons also made progress in 2011 by repudiating its “freeze-frame” policy (meaning that the facility halts, or “freezes,” treatment for the inmate at the level he or she was receiving prior to incarceration) following a suit from a North Carolina inmate who was repeatedly refused hormone therapy for her gender dysphoria.¹⁰⁵

However, many with gender dysphoria “continue to struggle to receive gender-affirming healthcare while behind bars.”¹⁰⁶ Nineteen states do not have policies that directly address treatment for transgender inmates.¹⁰⁷ A handful of states have some policies in place regarding transgender prisoners, but lack specific guidance on providing healthcare for those individuals.¹⁰⁸ Twenty-five states and

100. Moulding, *supra* note 99. *See, e.g.*, Rosati v. Igbinoso, 791 F.3d 1037 (9th Cir. 2015) (disallowing a prison policy that banned providing gender-confirmation treatment); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011) (invalidating a Wisconsin statute that sought to prevent the use of state money to provide SRS or hormone therapy to transgender prisoners); Gammett v. Idaho State Bd. Of Corr., No. CV05-257-S-MHW, 2007 WL 2186896 (D. Idaho July 27, 2007) (ordering a prison to provide a specific prisoner hormone therapy, albeit after she had made over seventy requests and finally removed her own testicles); De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003) (rejecting a prison's refusal of hormone therapy because it was based on a blanket policy, rather than on a medical assessment for the specific prisoner).

101. Moulding, *supra* note 99.

102. *Id.*

103. *See supra* text accompany notes 81–85.

104. *See, e.g.*, Kosilek v. Spencer (IV), 774 F.3d 63 (1st Cir. 2014) (upholding the Massachusetts Department of Correction's decision not to provide sexual reassignment surgery to an inmate with severe gender dysphoria, despite the procedure having been recommended by multiple medical specialists).

105. Dunnivant, *supra* note 22, at 27; Memorandum for Chief Executive Officers, U.S. Department of Justice, Federal Bureau of Prisons (May 31, 2011) (<http://www.glad.org/uploads/docs/cases/adams-v-bureau-of-prisons/2011-gid-memo-final-bop-policy>) [<https://perma.cc/J732-Z72U>].

106. Dunnivant, *supra* note 22, at 27.

107. Givens, *supra* note 6, at 583.

108. *Id.*

the District of Columbia do have official treatment policies, but they often still fail to guarantee proper care.¹⁰⁹ States like Florida, for example, hold that being transgender does not present a “medical necessity” for treatment purposes and call for temporary discontinuation of any treatment that an incoming prisoner was receiving preincarceration (including hormone therapy for gender dysphoria).¹¹⁰ Many prison facilities still employ freeze-frame policies for gender dysphoria treatments, despite the Federal Bureau of Prisons’s updated policy¹¹¹ and objections from both medical professionals and transgender advocates.¹¹²

Even states that allow transgender inmates to receive gender-confirming care typically make treatment “contingent on the approval of medical professionals.”¹¹³ This means that incoming inmates with gender dysphoria must either possess clear documentation showing that their treatment was prescribed by a physician, which is exceedingly rare due to the high rate of indigence in the transgender community,¹¹⁴ or the facility must be willing to provide a medical specialist to approve the inmate’s treatment. State governments and their prison facilities are often reluctant to provide gender specialists, or to mandate treatment for transgender inmates, because they feel pressure from taxpayers not to spend money on transgender prisoners’ medical care.¹¹⁵ Though gender-confirming treatments are “comparable to, and often cheaper than, the costs of other drugs and

109. *Id.* at 583–84.

110. *Id.* at 584. Although such blanket policies have become constitutionally suspect, and in some cases have been invalidated, *see supra* notes 99–101, they remain prevalent.

111. *See supra* text accompanying note 105.

112. Dunnivant, *supra* note 22, at 27; Coleman, *supra* note 16, at 68.

113. Givens, *supra* note 6, at 584.

114. *See supra* text accompanying notes 30–36. *See also* George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORRECTIONAL HEALTH CARE 280, 284 (2009) (“[T]he probability of inmates being able to provide such documentation in the context of social marginalization, poverty, and lack of access to health care is generally low.”).

115. *See* Dunnivant, *supra* note 22, at 17 (“When a prisoner receives tax-payer funded knee replacement surgery, it typically does not incite a prolonged legal battle, public outrage or legislators speaking out against it, but the possibility of a transgender woman receiving gender[-]confirmation surgery while behind bars stirred up just such political controversy and opposition.”). *See also* *Kosilek v. Spencer (II)*, 889 F.Supp. 2d 190, 214–16 (D. Mass. 2012) (explaining that a Department of Correction commissioner refused gender-confirmation surgery for transgender inmate and continually sought a medical expert who would recommend against it in part because he feared public criticism and political backlash if he allowed the procedure).

surgeries,”¹¹⁶ using state monies to treat prisoners’ gender dysphoria elicits public outcry, while providing more traditional operations with taxpayer money does not.¹¹⁷

Despite the constitutional prohibition against imposing cruel and unusual punishments, transgender inmates in American prisons are routinely placed in dangerous housing situations, physically and sexually assaulted, and denied access to adequate medical care. Reform measures currently in place have failed to ameliorate these issues. Thus, federal courts must assume a larger role in protecting transgender inmates by clarifying and expanding upon existing Eighth Amendment jurisprudence to ensure their access to *any* necessary gender-confirming therapies, including surgical treatments, as well as to reasonably safe housing accommodations.

II. THE EIGHTH AMENDMENT AS APPLIED TO TRANSGENDER PRISONERS

The Eighth Amendment of the U.S. Constitution states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹¹⁸ The Supreme Court has read the cruel and unusual punishments clause as requiring correctional facilities to provide inmates humane conditions of confinement, including proper medical care, adequate shelter, and protection from violence at the hands of other prisoners.¹¹⁹

A. Framework for Proving Eighth Amendment Violations

Two seminal Supreme Court cases establish how prisoners may allege Eighth Amendment violations related to their medical care or

116. *Dunnivant, supra* note 22, at 30; *see* *Fields v. Smith*, 653 F.3d 550, 555–56 (7th Cir. 2011) (comparing the costs of hormone therapy and sex reassignment surgery to the costs the Department of Corrections paid for other inmate drugs and surgeries).

117. *Kosilek v. Spencer (II)*, 889 F.Supp. 2d 190, 203 (D. Mass. 2012); *Dunnivant, supra* note 22, at 17; *see also* Kristine Guerra, *A Convicted Killer Became the First U.S. Inmate to Get State-funded Gender-reassignment Surgery*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/10/a-transgender-inmate-became-first-to-get-state-funded-surgery-advocates-say-fight-is-far-from-over/?hpid=hp_hp-more-top-stories_gender-change-1145am%3Ahomepage%2Fstory&utm_term=.97e622578aec [<https://perma.cc/9J48-9J4K>] (quoting the Director of Policy for the National Center for Transgender Equality: “Medical needs for trans people are . . . not even treated as medical issues; they’re treated as a political issue.”).

118. U.S. CONST. amend. VIII.

119. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

housing.¹²⁰ In *Estelle v. Gamble*, an inmate brought a civil rights action under 42 U.S.C. § 1983¹²¹ against the state Department of Corrections' medical director, claiming that he received inadequate treatment for a back injury in violation of the Eighth Amendment.¹²² The Court held that "deliberate indifference" to an inmate's serious medical need constituted cruel and unusual punishment.¹²³ The Eighth Amendment proscribes more than "physically barbarous" penalties.¹²⁴ Rather, it bars punishments "which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'" as well as those "which 'involve unnecessary and wanton infliction of pain.'"¹²⁵ The Court held that the Eighth Amendment requires the government to provide prisoners adequate medical care since they are entirely dependent on the State for such provisions.¹²⁶ As such, ignoring prisoners' medical needs amounts to unnecessary and wanton infliction of pain, and could impermissibly result in suffering that serves no penological purpose.¹²⁷ This holding applies to prison facilities' medical staffs, guards, and any other officials that intentionally deny, delay access to, or interfere with an

120. The Eighth Amendment prohibition against cruel and unusual punishments has been made applicable to the states through the Fourteenth Amendment; thus, state correctional facilities are also bound by its requirements. *See* U.S. CONST. amend. XIV ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law"); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment to the states through the Fourteenth Amendment).

121. 42 U.S.C. § 1983 (2012):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

The overwhelming majority of Eighth Amendment claims discussed in this note were brought under 42 U.S.C. § 1983.

122. *Estelle*, 429 U.S. at 98–99.

123. *Id.* at 104. However, the court held that *Estelle* could not prove his claim since he saw the facility's medical staff seventeen times in three months and was provided all necessary medical tests and treatments. *Id.* at 107–08.

124. *Id.* at 102.

125. *Id.* at 102–03 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) and *Gregg v. Georgia*, 428 U.S. 153, 172 (1976) respectively). *See also* *Givens*, *supra* note 6, at 602 (stating that courts have found that for Eighth Amendment purposes, psychiatric disorders should not be treated differently than other medical conditions when considering whether denying treatment would be cruel and unusual).

126. *Estelle*, 429 U.S. at 103.

127. *Id.* at 104.

inmate's necessary medical treatment.¹²⁸ However, to establish deliberate indifference, an inmate must show that the defendant-official's actions went beyond mere negligence.¹²⁹ By recognizing the obligation to provide adequate medical care, *Estelle* opened the door for transgender inmates to sue facilities that denied them gender-confirming treatments.

The Court again considered the Eighth Amendment in *Farmer v. Brennan*. The plaintiff-inmate in *Farmer* was a transgender woman who was beaten and raped after being placed among the general population at a high-security facility.¹³⁰ She alleged that officials were deliberately indifferent to her safety, since they were aware of her particular vulnerability to sexual attack if housed with cisgender inmates.¹³¹ The Court held that a prison official may offend the Eighth Amendment by denying a prisoner humane conditions of confinement, but only if that official knew that the inmate faced a substantial risk of serious harm and failed to take reasonable action to abate it.¹³²

Prison officials must ensure that inmates receive “adequate . . . medical care” and are protected from “violence at the hands of other prisoners.”¹³³ But the Eighth Amendment is only violated if the deprivation was sufficiently serious and the official was deliberately indifferent to the inmate's health or safety.¹³⁴ The Court described deliberate indifference as “subjective recklessness”—more than negligence, but less than purposefulness.¹³⁵ A defendant must disregard a risk of which he was aware, requiring a determination of the official's state of mind.¹³⁶ Yet, a court may find that an official knew of a substantial risk “from the very fact that the risk was

128. *Id.* at 104–05.

129. *Id.* at 105–06. This standard was clarified in *Farmer*. See *infra* text accompanying notes 134–137.

130. *Farmer v. Brennan*, 511 U.S. 825, 824–25 (1994).

131. *Id.* at 830.

132. *Id.* at 847.

133. *Id.* at 832.

134. *Id.* at 834.

135. *Id.* at 839–40.

136. *Id.* at 841–42.

obvious,”¹³⁷ and a prisoner need not have actually suffered an assault to sustain a claim.¹³⁸

As such, the Court reversed summary judgment for defendants in part because the inmate was young and “feminine in appearance,” which made prison officials aware that she was likely to face “a great deal of sexual pressure” in prison.¹³⁹

Thus, *Farmer* established a two-part test for evaluating inmates’ Eighth Amendment claims against prison officials. The inmate must show that (1) he or she was incarcerated under conditions that posed a substantial risk of serious harm (objective prong);¹⁴⁰ and that (2) the defendant acted with deliberate indifference—meaning that the official actually inferred that there was a substantial risk to the inmate’s health or safety, but disregarded that risk (subjective prong).¹⁴¹ The legal framework created in *Estelle* and *Farmer* (the “Farmer-Estelle Framework”) applies to inmates’ Eighth Amendment claims regarding both medical treatment and housing. Because courts do not treat transgender persons as a suspect class for Equal Protection purposes,¹⁴² this Eighth Amendment framework is the main avenue through which transgender inmates challenge conditions of their confinement.¹⁴³

137. *Id.* at 842. The Court cited a case recognizing that courts may infer subjective awareness of risk when a plaintiff’s characteristics make his or her vulnerability to sexual assault particularly obvious. *Id.* at 849; *Farmer v. Carlson*, 685 F.Supp. 1335, 1342 (M.D. Pa. 1988) (“Clearly, placing . . . a twenty-one-year-old transsexual, into the general population at . . . a high-security institution, could pose a significant threat . . . to plaintiff in particular.”).

138. *Farmer*, 511 U.S. at 845. *See also* *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition.”); *Dunnivant*, *supra* note 22, at 18 (stating that jurisprudence establishes that a clear risk of future harm can sustain an Eighth Amendment claim).

139. *Farmer*, 511 U.S. at 848.

140. A medical need is objectively serious when inadequate care results in a substantial risk of harm to the prisoner; it can be diagnosed by a doctor, or so obvious that a layperson would assume treatment were necessary. *Farmer*, 511 U.S. at 834; *Church*, *supra* note 16, at 20.

141. *Doe v. District of Columbia*, No. 13-878 (RDM), 2016 WL 6088262, at *9 (D.D.C. Oct. 18, 2016).

142. Thus, when transgender inmates challenge the use of extended solitary confinement on equal protection grounds, for example, courts are highly deferential and plaintiffs must show their placement was not reasonably related to a penological purpose. *See, e.g.*, *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (rejecting an inmate’s equal protection claim partially out of deference to prison officials’ placement decisions); *Chapter Three*, *supra* note 10, at 1755–56. As such, prisons escape liability simply by claiming that the placement was for the inmate’s own safety. *See Chapter Three*, *supra* note 10, at 1756.

143. *See Chapter Three*, *supra* note 10, at 1751 (citing *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

B. Shortcomings of the Current Eighth Amendment Framework

The Farmer-Estelle Framework presents formidable barriers to proving constitutional violations and has failed to consistently ensure access to safe housing and proper medical care for transgender inmates. While they have had sporadic success, it is far too difficult for transgender prisoners to assert their Eighth Amendment rights in court.¹⁴⁴

1. The Qualified Immunity Doctrine

When inmates allege constitutional violations, prison officials are often protected by the qualified immunity doctrine.¹⁴⁵ Even if government officials contravene the Constitution, they may “be shielded from liability for civil damages if their actions did not violate ‘clearly established [at the time of the alleged violation] statutory or constitutional rights of which a reasonable person would have known.’”¹⁴⁶ Prisoners’ claims must overcome the qualified immunity defense to be tested against the Farmer-Estelle Framework’s two-prong standard. Unfortunately, transgender inmates often struggle to prove entitlement to a “clearly established right[,]” since the Supreme Court has not directly endorsed the right to gender-confirming therapies or to identity-corresponding housing.¹⁴⁷ As such, when transgender inmates sue prison officials, the qualified immunity defense wins out more often than not.¹⁴⁸

Transgender prisoners have been able to defeat the qualified immunity defense in certain cases, which demonstrates the importance of clear judicial prescriptions regarding transgender inmates’ rights. In *Kothmann v. Rosario*, for example, the defendant-official claimed qualified immunity, arguing that transgender inmates did not have a clearly established right to receive hormone

144. *Id.* at 1746 (stating that Eighth Amendment litigation has only proven reliable for transgender inmates that have suffered particularly egregious abuse).

145. See *infra* notes 147–148.

146. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (“For a constitutional right to be clearly established, its contours must be ‘sufficiently clear that a reasonable official would understand what he is doing violates that right.’”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

147. It is possible for a federal right to be clearly established even without a Supreme Court decision so holding, but that determination might be precluded by disparate lower court decisions. *United States v. Lanier*, 520 U.S. 259 (1997). For example, in *Safford Unified School District #1 v. Redding*, the Court upheld a qualified immunity defense in large part because of disagreement among lower courts. 557 U.S. 364 (2009).

148. See *Dunnivant*, *supra* note 22, at 31–32.

replacement therapy.¹⁴⁹ The court rejected this argument and found it clearly established in the Eleventh Circuit that a prison official may not refuse to provide an inmate's required medical treatment, which naturally includes prescribed hormone treatments.¹⁵⁰

However, more common are cases like *Mitchell v. Kallas*, in which the court rejected a transgender inmate's Eighth Amendment claim and granted summary judgment for the defendant.¹⁵¹ The court held that the defendant-official was entitled to qualified immunity because the prisoner did not have a clearly established right to receive gender-confirming hormone therapy, calling law on the matter "unsettled."¹⁵²

2. Deference to Prison Officials and Proving Deliberate Indifference

Even if a plaintiff defeats a qualified immunity defense, the Farmer-Estelle Framework is excessively difficult for transgender inmates to satisfy. The subjective elements required to sustain a claim are "especially difficult for prisoners to prove."¹⁵³ To have any chance of success, the prisoner must "identify the prison official who is the decision maker and whose state of mind is to be analyzed," then be able to point to incidents in which he or she was endangered by that official's decisions.¹⁵⁴ The prisoner must also establish that the official knew of such incidents (or conditions that created risk) and actually concluded that there was a substantial risk to the inmate's health or safety, but then declined to take reasonable measures to abate that risk.¹⁵⁵

If this burden is met, courts still often defer to prison officials' claims that housing or medical decisions were based on "reasonable, good faith judgments balancing the inmate's . . . needs against other legitimate, penological considerations," such as security for the inmate or the facility as a whole.¹⁵⁶ This deference has allowed many

149. *See* Kothmann v. Rosario, 558 Fed. Appx. 907, 909–11 (11th Cir. 2014).

150. *Id.*

151. *Mitchell v. Kallas*, 15-cv-108-wmc, 2016 WL 4507392 (W.D. Wis. Aug. 26, 2016).

152. *Id.*

153. Etheridge, *supra* note 1, at 593. The objective prong has been easier for inmates to prove. *See, e.g., Doe*, 2016 WL 6088262, at *9 (finding that rape is clearly a deprivation of rights serious enough to violate the Eighth Amendment, as sexual assault is always "objectively sufficiently serious").

154. Etheridge, *supra* note 1, at 593. This means that the inmate must have been accurately cataloging instances of abuse as they occurred.

155. *Id.*

156. *Kosilek v. Spencer (II)*, 889 F.Supp. 2d 190, 206 (D. Mass. 2012); *see Farmer*, 511 U.S. at 832–33; Etheridge, *supra* note 1, at 593–94. *See also* Etheridge, *supra* note 1, at 588,

defendants to escape liability for withholding proper medical care from transgender inmates and making housing decisions that jeopardize their safety.¹⁵⁷ Unsurprisingly, many transgender plaintiffs are denied recourse, even after suffering serious trauma while incarcerated.¹⁵⁸

Concerning healthcare for transgender inmates, prison officials have been able to successfully argue that providing a medical evaluation precludes finding deliberate indifference.¹⁵⁹ In *Maggert v. Hanks*, for example, an inmate alleged that her prison facility violated the Eighth Amendment by refusing to provide hormone therapy for her gender dysphoria.¹⁶⁰ The court found that the plaintiff had not shown deliberate indifference since the prison's doctor—who was not a gender specialist—had determined that she was not actually transgender.¹⁶¹ Similarly, in *Cuoco v. Moritsu*, the facility's physician—again, not a gender specialist—decided that the inmate did not have gender dysphoria, despite her preincarceration diagnosis to the contrary.¹⁶² The prison then terminated her hormone therapy, causing her to suffer physical and psychological withdrawal.¹⁶³ The court found that the plaintiff had not shown deliberate indifference, as the termination was based on a physician's recommendation.¹⁶⁴

Prison officials have also been able to justify long delays in providing gender dysphoria treatments, or even medical evaluations, for transgender inmates.¹⁶⁵ For instance, in *Mitchell v. Kallas*, an inmate sued her correctional facility's mental health physicians for failing to treat her gender dysphoria.¹⁶⁶ After her initial request for hormone therapy, the defendants waited ten months before completing a psychological evaluation.¹⁶⁷ The court accepted the officials' determination that the delay was reasonable, finding that

595–96. A jurisprudential framework that allows “a prison official to perceive an irreconcilable difference between an inmate's serious medical need and his safety is inherently problematic.” *Id.* at 594.

157. This continued deference is particularly odd considering that the “penal system has thus far proven unable to uniformly identify safe and constitutional housing” methods “for its non-operative transgender inmates.” Ethridge, *supra* note 1, at 588.

158. See Dunnivant, *supra* note 22, at 30–31 (a major problem is that it is very difficult to meet the deliberate indifference standard for transgender prisoners and many are unsuccessful).

159. Even when those evaluations do not result in providing actual treatment.

160. 131 F.3d 670 (7th Cir. 1997).

161. *Id.* at 671–72.

162. 222 F.3d 99 (2d Cir. 2000).

163. *Id.* at 104.

164. *Id.* at 113.

165. See Ethridge, *supra* note 1, at 595.

166. No. 15-cv-108-wmc, 2016 WL 4507392 (W.D. Wis. Aug. 26, 2016).

167. *Id.*

they had not been deliberately indifferent to the plaintiff's medical needs.¹⁶⁸

Under the Farmer-Estelle Framework, lower courts have been similarly unreliable in affirming transgender prisoners' right to safe living conditions.¹⁶⁹ In *Greene v. Bowles*, a transgender woman brought an Eighth Amendment claim after being housed in a protective custody unit (PCU) alongside a cisgender male with a known history of assault and a maximum-security classification.¹⁷⁰ The court reversed summary judgment for the defendant, finding that the plaintiff produced enough evidence to show that housing her in a PCU with a dangerous inmate constituted deliberate indifference.¹⁷¹ The court further reasoned that the plaintiff's physical characteristics made her particularly vulnerable to sexual assault, such that placing her among cisgender inmates without additional protection created a substantial safety risk of which the warden was aware.¹⁷²

Yet, for every case like *Greene*, there are numerous examples of courts ruling that plaintiffs had not shown their housing assignments to constitute deliberate indifference.¹⁷³ In *Lopez v. City of New York*, a transgender woman brought an Eighth Amendment claim over the decision to house her with male inmates for three days at Rikers Island.¹⁷⁴ Despite alleging harassment at the hands of both inmates and prison guards,¹⁷⁵ the court granted summary judgment for the defendants.¹⁷⁶ The court found that the plaintiff had not adduced sufficient evidence to show that officials deliberately ignored an excessive risk of violence when making her housing decision.¹⁷⁷ Likewise, in *D.B. v. Orange County*, a transgender woman sued after

168. *Id.* The district court granted summary judgment for the defendant-officials. *Id.* at *1. It is hard to fathom that the court found this ten-month delay “reasonable” considering medical evidence on the devastating effects of leaving gender dysphoria untreated. *See supra* text accompanying notes 17–20, 84–87.

169. *See* Dunnivant, *supra* note 22, at 30–31.

170. 361 F.3d 290, 292 (6th Cir. 2004).

171. *Id.* at 293–94.

172. *Id.*

173. *See, e.g.*, Dunnivant, *supra* note 22, at 30–31; *Chapter Three, supra* note 10, at 1754; *Lucrecia v. Samples*, No. C-93-3651-VRW, 1995 WL 630016 (N.D. Cal. Oct. 16, 1995) (rejecting transgender inmate's Eighth Amendment claim regarding her housing assignment because she failed to establish that the defendant had a culpable mental state).

174. No. 05 Civ. 10321(NRB), 2009 WL 229956 (S.D.N.Y. Jan. 30, 2009).

175. Specifically, the plaintiff alleged that prison officials housed her with male inmates, refused to provide her female clothing, withheld her preexisting hormone treatment, verbally harassed and physically assaulted her, and failed to intervene while watching other prisoners verbally harassed and physically assaulted her. *Id.* at *1.

176. *Id.* at *14.

177. *Id.*

being housed with a male inmate who sexually assaulted her.¹⁷⁸ The court held for the defendants, finding that the plaintiff had not shown that prison officials were actually aware of her increased risk of sexual attack.¹⁷⁹

In applying the Farmer-Estelle Framework, courts frequently defer to officials' security-based justifications in ruling against transgender inmates' Eighth Amendment claims.¹⁸⁰ One facility successfully argued against providing a prescribed treatment by claiming that it could not safely house transgender inmates who underwent gender-confirming procedures.¹⁸¹ And courts often allow prisons to isolate or segregate transgender inmates indefinitely to abate their risk of assault.¹⁸² Courts have displayed an "either/or mentality" on transgender housing, i.e., if one method might be unconstitutional (placement with the general population), the other must be acceptable.¹⁸³ Thus, courts frequently accept arguments that administrative segregation is a reasonable alternative designed to promote security, despite evidence that such housing practices are socially and psychologically damaging.¹⁸⁴

As presently constituted, the Farmer-Estelle Framework for Eighth Amendment claims fails to ensure access to adequate medical care or safe housing for transgender prisoners. The stringent deliberate indifference standard and overdeference to prison officials leaves many transgender inmates without legal recourse for their abuse.

178. No. 6:13-cv-434-Orl-31DAB, 2014 WL 4674136 (M.D. Fla. Sept. 18, 2014).

179. *Id.* at *6-7. This finding is made even more absurd by the fact that before her incarceration the plaintiff had undergone surgeries that gave her a particularly feminine appearance. *Id.* at *1.

180. See Etheridge, *supra* note 1, at 595; *supra* text accompanying note 156.

181. Etheridge, *supra* note 1, at 595; see *infra* note 200. The frequency of assaults on transgender prisoners allow prisons to argue that feminizing treatments or SRS would make it impossible to secure the inmate's safety, but this could just as easily be evidence as to why post-operative transgender inmates must be transferred to a facility that corresponds to their gender-identity and new anatomical sex.

182. See, e.g., Farmer v. Carlson, 685 F.Supp. 1335, 1346 (M.D. Pa. 1988) (finding no liability where a prison facility placed a transgender inmate in administrative segregation for nearly five straight months).

183. Etheridge, *supra* note 1, at 603.

184. Etheridge, *supra* note 1, at 603; see *supra* text accompanying notes 59-63.

3. Circuit Inconsistency on Gender Dysphoria as a Serious Medical Need Per Se and the *Kosilek* Series

While medical consensus on gender dysphoria has grown, the Supreme Court has never directly found it to be a serious medical need for Eighth Amendment purposes.¹⁸⁵ This has hindered constitutional claims by transgender inmates and led to varied treatment of such cases among lower courts.¹⁸⁶

Several circuit courts have found that gender dysphoria can be a serious medical need for Eighth Amendment purposes.¹⁸⁷ The Fifth Circuit has no explicit precedent, while the Fourth, Eighth, and Tenth Circuits have suggested that gender dysphoria can be a serious need, without recognizing it as one per se.¹⁸⁸ In *De'Lonta*, for example, the Fourth Circuit ruled in favor of a transgender plaintiff, but did not explicitly declare gender dysphoria a serious medical need, focusing instead on the specific inmate's drive to self-mutilate.¹⁸⁹ Similarly, in *Ricketts* the Tenth Circuit found that the plaintiff was entitled to therapy, but stopped short of finding gender dysphoria to be a serious medical need under the Eighth Amendment.¹⁹⁰ The Eighth Circuit treated gender dysphoria as a serious medical need in *White v. Farrier*,¹⁹¹ but later upheld a district court finding that gender dysphoria did not constitute a serious need given the inmate's other psychological issues.¹⁹²

The Seventh Circuit has taken the most progressive approach by recognizing gender dysphoria as a serious medical need categorically.¹⁹³ In *Fields v. Smith*, the court held that a Wisconsin statute banning prison facilities from providing gender-confirmation

185. See Givens, *supra* note 6, at 587. While the plaintiff in *Farmer* was a transgender inmate, the court did not actually directly declare gender dysphoria to be a serious medical need. *Id.* at 586–87.

186. See Givens, *supra* note 6, at 587–93.

187. Etheridge, *supra* note 1, at 592. These courts have been inclined to mandate some of gender dysphoria's "most commonly prescribed treatment methods . . ." *Id.*

188. Givens, *supra* note 6, at 588.

189. 330 F.3d 630 (4th Cir. 2003); Givens, *supra* note 6, at 589.

190. 792 F.2d 958 (10th Cir. 1986); Givens, *supra* note 6, at 589–590.

191. 849 F.2d 322 (8th Cir. 1988).

192. *Long v. Nix*, 877 F.Supp. 1358 (S.D. Iowa 1995). Overall, gender dysphoria is probably still a serious medical need in the Eighth Circuit, but it is treated as a question of fact. Givens, *supra* note 6, at 599. See, e.g., *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *10 (E.D. Mo. Feb. 9, 2018) ("A diagnosis of gender dysphoria disorder alone may constitute a serious medical need.") (emphasis added).

193. See Givens, *supra* note 6, at 592. See also *Cole v. Coe*, No. 3:14-cv-01314-SMY-RJD, 2016 WL 6804486, at *3 (S.D. Ill. Nov. 17, 2016) ("Gender dysphoria is undoubtedly a serious medical condition.").

treatments violated the Eighth Amendment.¹⁹⁴ In doing so, the Seventh Circuit affirmed the lower court's unchallenged finding that diagnosed gender dysphoria constitutes a serious medical condition *per se*.¹⁹⁵

A series of recent holdings in the First Circuit illustrates appellate court variation in gender dysphoria cases and the need for clear Supreme Court precedent that would allow transgender inmates to defeat qualified immunity defenses more consistently.¹⁹⁶ In *Kosilek v. Spencer*, a transgender inmate (Kosilek) alleged that the Massachusetts Department of Correction (DOC) violated the Eighth Amendment by refusing to provide her sexual reassignment surgery.¹⁹⁷ A gender identity specialist evaluated Kosilek and concluded that gender-confirmation surgery was necessary, consistent with WPATH standards that recommend the procedure for gender dysphoria patients whose distress cannot be alleviated through other methods alone.¹⁹⁸ In fact, multiple specialists concurred and prescribed gender-confirmation surgery for Kosilek, but the DOC continued to order evaluations until one physician finally recommended against SRS.¹⁹⁹ The DOC then prepared a report that focused primarily on security concerns, arguing that SRS would make Kosilek a target for assault, but cause inmates "mental distress" if she were transferred to a female facility.²⁰⁰

The district court held that sexual reassignment surgery was the only adequate medical treatment for Kosilek's severe gender dysphoria.²⁰¹ The court found that, even when balanced against security concerns, the physician's recommendation on which the DOC relied was an "outlier" that departed greatly from professional standards and was not made in good faith.²⁰² The court mandated that

194. 653 F.3d 550 (7th Cir. 2011).

195. *Id.* at 555–56; Givens, *supra* note 6, at 593, 601.

196. In the following text, *Kosilek II* refers to a district court case in 2012, while *Kosilek III* is the initial review by the First Circuit Court of Appeals, and *Kosilek IV* is the First Circuit's revised en banc opinion.

197. *Kosilek v. Spencer (II)*, 889 F.Supp. 2d 190 (D.Mass. 2012).

198. *Id.* at 218 (the specialist recommended that Kosilek complete the triadic sequence, which calls for receiving hormone therapy, living as the opposite sex for a period of time, then undergoing SRS if necessary); Coleman, *supra* note 16, at 60.

199. *Kosilek v. Spencer (IV)*, 774 F.3d 63, 76 (1st Cir. 2014) (en banc); *Kosilek II*, 889 F.Supp. 2d at 235–36, 238; Church, *supra* note 16, at 24–25.

200. *Kosilek IV*, 774 F.3d at 74; Church, *supra* note 16, at 24.

201. *Kosilek II*, 889 F.Supp. 2d at 251; Church, *supra* note 16, at 18.

202. *Kosilek II*, 889 F.Supp. 2d at 235–36, 238 (finding that an "outlier" medical opinion was merely pretext for denying Kosilek the procedure); Church, *supra* note 16, at 24–25.

the DOC provide Kosilek gender-confirmation surgery, as refusing her the procedure would violate the Eighth Amendment.²⁰³

Kosilek was initially affirmed on appeal,²⁰⁴ but the First Circuit later reversed its decision *en banc*.²⁰⁵ While the court acknowledged gender dysphoria as a serious medical need,²⁰⁶ it found that Kosilek failed to show that denying her SRS amounted to deliberate indifference.²⁰⁷ The court found the plaintiff's preexisting treatments medically adequate, despite a WPATH amicus brief explaining why gender-confirmation surgery was necessary.²⁰⁸ Essentially, the court agreed that Kosilek was suffering from a serious condition, but allowed the DOC to provide treatment considered insufficient by the medical community.²⁰⁹

In *Kosilek IV*, the First Circuit denied an inmate access to necessary medical care and evidenced the shortcomings of our current Eighth Amendment framework. The First Circuit erred by ignoring expert consensus on gender dysphoria and relying on an outlier medical opinion as the basis for its holding.²¹⁰ The WPATH calls for “flexibility” in the sense that each patient needs varied and specific care—the majority treated the term as if practitioners could be flexible in *adhering* to the WPATH's guidelines.²¹¹ The court also found against deliberate indifference because the DOC had procured conflicting diagnoses, even though the district court considered the recommendation against gender-confirmation surgery to be a medical outlier.²¹² It was inappropriate to give credence to the evaluation in question since sexual reassignment surgery is supported by the vast majority of medical experts for cases such as Kosilek's.²¹³ And treatment can still be constitutionally inadequate if a facility relies on

203. *Kosilek II*, 889 F.Supp. 2d at 251

204. *Kosilek v. Spencer (III)*, 740 F.3d 733 (1st Cir. 2014).

205. *Kosilek IV*, 774 F.3d 63 (1st Cir. 2014).

206. *Id.* at 86.

207. *Id.* at 96.

208. Church, *supra* note 16, at 18. The court treated the WPATH's standards as flexible guidelines, rather than as scientific and medical consensus. *Kosilek IV*, 774 F.3d at 87.

209. Church, *supra* note 16, at 30–31.

210. *Kosilek IV*, 774 F.3d at 103–04 (Thompson, J., dissenting) (stating that there was ample evidence that the district court weighed in deciding to disregard Schmidt's outlier medical opinion); Church, *supra* note 16, at 17.

211. *Kosilek IV*, 774 F.3d at 102–04 (Thompson, J., dissenting).

212. *Id.* at 106–08.

213. See *supra* text accompanying notes 21–24.

an opinion that departs significantly from medical consensus, which was certainly the case in *Kosilek*.²¹⁴

III. RECOMMENDATIONS AND EFFECTS

A. *Necessary Jurisprudential Changes to Remedy the Farmer-Estelle Framework's Shortcomings*

The Supreme Court has read the Eighth Amendment as requiring prison facilities to provide inmates adequate medical care and to protect them from violence.²¹⁵ Yet, the current framework for adjudicating transgender prisoners' Eighth Amendment claims leaves many unable to realize those constitutional protections.²¹⁶ Without consistent legal recourse, transgender inmates continue to struggle with inadequate healthcare and unsafe housing conditions.²¹⁷ In order to ensure constitutionally adequate housing and access to all medically necessary treatments, courts must adjust their current approach to Eighth Amendment claims by transgender prisoners.

1. Excessive Deference and the Farmer-Estelle Framework's Subjective Prong

As for overdeference to correctional facilities,²¹⁸ it is incumbent upon judges to treat more skeptically the spurious arguments that prison officials commonly advance. Departments of Corrections have many incentives to underserve their transgender inmates, none of which justify violating the Constitution.²¹⁹ *Estelle* and *Farmer* established core Eighth Amendment protections, pertinent to both housing and healthcare for transgender prisoners.²²⁰ Decisions with such profound constitutional implications are too important to be left to the discretion of prison officials, who are “known to be biased

214. Church, *supra* note 16, at 23. See, e.g., Arnett v. Webster, 658 F.3d 742 (7th Cir. 2011); Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996).

215. See *supra* Part II.A.

216. See *supra* Part II.B.

217. See *supra* Part I.B.

218. See *supra* Part II.B.2.

219. For example, denying gender-confirming therapies prevents political backlash for Department of Corrections officials. See *supra* notes 115–117 and accompanying text. And employing segregation, rather than identify-based housing, does not challenge prison systems' reliance on gender binary and does not upset society's traditional concepts of sexuality. Dunnavant, *supra* note 22, at 20 (“It is widely accepted in the dominant culture that there are two sexes and two genders and no room for anything in between.”).

220. See *supra* Part II.A.

against transgender inmates and disinclined to protect” their rights.²²¹ Thus, courts should not hesitate to strike down prison policies that threaten these protections.

Courts must be realistic about what motivates prison officials in decisions concerning transgender inmates—they should maintain a healthy circumspection when evaluating what defendants hold out as reasonable measures taken to abate risk.²²² For example, a medical evaluation by a prison physician should not preclude finding deliberate indifference. Courts routinely refer to and rely on expert consensus when weighing scientific and medical evidence, including in Eighth Amendment cases.²²³ Expert consensus on gender dysphoria calls for patients to be diagnosed by specialists and to receive individualized treatment plans.²²⁴ Thus, perfunctory psychological evaluations by nonspecialists can still constitute inadequate medical care. As such, courts should readily find deliberate indifference when prison officials refuse treatments for gender dysphoric inmates based on recommendations from physicians who are not gender specialists.²²⁵

Expert consensus should establish the parameters for deliberate indifference to a serious medical need. If nine orthopedic specialists recommended surgery for an inmate’s back injury, but one suggested a stretching regimen, it would surely be deliberate indifference to send that prisoner to a yoga class. The same principle should apply when a court is reviewing a prison official’s decision on a gender dysphoric inmate’s course of treatment.

Regarding safety as a rationale for isolating a transgender prisoner, there are at least two remedies that would be more effective than indefinite segregation: transferring the inmate to an identity-corresponding facility or enacting a holistic transgender housing policy.²²⁶ It is important for courts to move beyond the either/or

221. Etheridge, *supra* note 1, at 589.

222. *See supra* text accompanying notes 156, 180–182.

223. Church, *supra* note 16, at 21. *See also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993) (discussing the importance of courts leaning on peer-reviewed scientific evidence when faced with dense technical issues).

224. *See supra* text accompanying notes 21–24.

225. This note argues that *Maggert v. Hanks* and *Cuoco v. Moritsugu* should have both been decided differently—at least, the courts should not have granted defendants summary judgment based merely on the fact that the prisons had provided some form of medical evaluation. *See supra* notes 159–164.

226. *See supra* text accompanying notes 57–63 for an explanation of why relying on segregated or isolated housing can be damaging, *See supra* notes 73–78 for a discussion of jurisdictions that have instead enacted alternative, identity-based placement policies. Obviously, whether transfer to an identity-corresponding facility would better serve the

mentality on transgender housing.²²⁷ If neither general placement nor segregation is tenable for an inmate, then neither should be condoned.²²⁸

Some have called for continued deference to prison officials' housing determinations by arguing that if a transgender inmate were "to receive surgery and become, for all intents and purposes, a genetically-female individual, how would prison officials protect her from attacks by fellow male prisoners?"²²⁹ Such arguments are inherently contradictory—admitting that SRS would make an inmate biologically female highlights the obvious solution to security concerns in that circumstance: transfer the inmate to a sex-corresponding facility.²³⁰ When transgender prisoners assert Eighth Amendment claims, courts should thoroughly consider medical consensus and the plaintiff's constitutional rights before deferring to prison officials' penological concerns, even if the solution (such as transferring facilities) appears dramatic at first blush.

As for the Farmer-Estelle Framework,²³¹ one could advocate repudiating its subjective prong altogether and moving toward a purely objective test for transgender inmates' Eighth Amendment claims. By requiring subjective awareness of, and deliberate indifference toward, a serious health or safety risk, the Farmer-Estelle Framework often allows defendants to justify housing transgender prisoners in harsher, more restrictive conditions than the general population.²³² And the Court has specifically addressed the housing concerns of other vulnerable groups in prison without relying on defendants' subjective intent.²³³ In *Youngberg v. Romeo*, for example, an inmate challenged his extended periods of solitary confinement, and the Court held that intellectually disabled prisoners had a right to

inmate, as well as the occupants of the potential transferee facility, would depend on that inmate's specific needs, desires, and characteristics. *See, e.g., supra* text accompanying notes 74–78 for a discussion of the factors that the D.C. Department of Corrections considers when making housing decisions for transgender inmates.

227. *See supra* text accompanying note 183.

228. Inconveniencing a prison facility should be preferable to forcing an inmate to endure unconstitutional punishment.

229. Ethan Z. Tieger, *Transsexual Prisoners and the Eighth Amendment: A Reconsideration of Kosilek v. Spencer and Why Prison Officials May Not be Constitutionally Required to Provide Sex-Reassignment Surgery*, 47 SUFFOLK U. L. REV. 627, 651 (2014).

230. *See infra* Part III.C and text accompanying note 271.

231. *See supra* Part II.B.2.

232. Etheridge, *supra* note 1, at 603–04. *See supra* text accompanying notes 169–184 for a discussion of how defendant-officials successfully justify restrictive housing conditions under the deliberate indifference standard.

233. *Id.*

reasonably safe confinement conditions.²³⁴ The Court found that prisons could not use “unreasonable bodily restraints” against such individuals and had to provide any habilitation that they reasonably required.²³⁵

Transgender inmates are the prison system’s most vulnerable population;²³⁶ perhaps it would be more logical to use an objective reasonability test when evaluating their housing conditions. However, while such a standard would be more protective of transgender inmates’ rights, it is probably unrealistic to expect the Court to abruptly overturn longstanding precedent, especially considering that *Farmer* expressly declined to adopt a purely objective test.²³⁷ Addressing how lower courts apply the Farmer-Estelle Framework is a more practical solution.²³⁸

Even if the Supreme Court never repudiates its subjective prong, lower courts should apply the Farmer-Estelle Framework with as much objectivity as it allows. In *Rummel v. Estelle*, the Court found that Eighth Amendment judgments should be “informed by objective factors to the maximum possible extent.”²³⁹ As such, even in evaluating *Farmer*’s subjective prong, courts should read deliberate indifference more liberally by focusing on transgender plaintiffs’ objective characteristics and vulnerabilities.²⁴⁰ When the Court reversed summary judgment for the defendants in *Farmer*, it weighed the plaintiff’s youth and “feminine appearance,” finding that she could establish exposure to a serious risk of harm “by showing that she belongs to an identifiable group of prisoners who are frequently singled out for attack by other inmates.”²⁴¹ Thus, trial courts should use such factors to infer subjective awareness of risks to transgender inmates’ health or safety “from the very fact that” these risks are “obvious.”²⁴² Based on *Rummel*’s call for objectivity and *Farmer*’s

234. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

235. *Id.* at 308. Obviously, those with gender dysphoria are not intellectually disabled; the comparison is only meant to illustrate that the Court has used an objective standard in the past to protect vulnerable prison populations from Eighth Amendment violations.

236. *See supra* Part I.B.1 (particularly the text accompanying notes 53–55).

237. *Farmer*, 511 U.S. at 837 (reasoning that a *purely* objective test would depart from Eighth Amendment text and jurisprudence).

238. *See infra* text accompanying notes 240–243.

239. *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980).

240. *See infra* text accompanying notes 243–244 for an example of a court focusing on an inmate’s objective traits during a *Farmer* analysis.

241. *Farmer*, 511 U.S. at 843, 848.

242. *Id.* The Court also cited *Farmer v. Carlson* in recognizing that courts may infer subjective awareness of risk when a plaintiff’s characteristics make his or her vulnerability to sexual assault particularly obvious. 685 F.Supp. 1335, 1342 (M.D. Pa. 1988) (“Clearly,

language regarding at-risk inmates, a heightened focus on transgender inmates' objective traits and vulnerabilities when applying the deliberate indifference standard would neatly adhere to Supreme Court precedent.

Greene v. Bowles is a great example of a court focusing on a transgender inmate's objective vulnerabilities to find deliberate indifference when applying the Farmer-Estelle Framework.²⁴³ The court found that the plaintiff's physical characteristics and transgender status made her highly susceptible to sexual assault, such that placing her among cisgender inmates created a substantial safety risk of which the defendant should have been aware.²⁴⁴ Courts hearing Eighth Amendment cases should be similarly willing to hold prison officials responsible for awareness of transgender inmates' particular needs and vulnerabilities.

Case law is replete with examples of transgender inmates' physical traits rendering them particularly vulnerable to sexual assault, and statistics confirm that they are assaulted with unique and staggering frequency.²⁴⁵ In cases brought by transgender prisoners, courts should highlight their objective characteristics to infer that defendants were aware of heightened health and safety risks.²⁴⁶ If lower courts more readily impute subjective awareness, transgender inmates could more successfully litigate Eighth Amendment violations without requiring the Supreme Court to overturn the Farmer-Estelle Framework's subjective prong.

2. Circuit Inconsistencies and *Kosilek*

The Eighth Amendment requires that a prison provide adequate care for an inmate's serious medical needs; it does not have to be the most advanced care, nor the prisoner's preferred method, but it must meet prudent professional standards.²⁴⁷ Courts rely on expert

placing . . . a twenty-one year old transsexual, into the general population at . . . a high-security institution, could pose a significant threat . . . to plaintiff in particular.”).

243. 361 F.3d 290 (6th Cir. 2004).

244. *Id.* See text accompanying notes 170–172.

245. See *supra* text accompanying notes 53–55 for statistics on the rampant sexual assault of transgender prisoners.

246. Many prison officials are, in fact, aware of heightened risks for transgender inmates. See *supra* text accompanying note 44 (an example of prison officials acknowledging that the prevalence of assault on transgender inmates is well known within their industry).

247. *U.S. v. DeCologero*, 821 F.2d 39, 42–43 (1st Cir. 1987) (“[T]his obligation is met in full measure by the provision of adequate services: services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”); Church, *supra* note 16, at 20–21.

consensus when weighing medical evidence in Eighth Amendment cases to avoid condoning cruel and unusual punishments.²⁴⁸ For instance, in *Atkins v. Virginia*, the Court held that executing intellectually disabled persons violated the Eighth Amendment based on consensus among mental health experts regarding such individuals' mental culpability.²⁴⁹ Similarly, to ensure that transgender inmates receive adequate medical treatment, courts must look to expert consensus and hold prison facilities responsible for following the standards of care enacted by the WPATH and embraced by the APA.²⁵⁰ Deferring to outlier medical opinions, as seen in *Kosilek IV*,²⁵¹ would allow prison facilities to escape liability simply by finding a single physician to advise against the treatment in question.²⁵²

As for circuit inconsistency on whether gender dysphoria is a serious medical need per se,²⁵³ the Supreme Court (and other appellate courts) should adopt the Seventh Circuit's approach when given the opportunity. Treating gender dysphoria as a serious medical need per se conforms to the Court's Eighth Amendment jurisprudence.²⁵⁴ The existence of a serious medical need is typically a factual inquiry, but courts normally focus on the specific plaintiff, not on the medical condition's classification or whether its attendant treatments are necessary.²⁵⁵ For Eighth Amendment purposes, a medical condition need not be strictly physical, and courts recognize a variety of psychological conditions as serious medical needs per se.²⁵⁶ One of *Estelle's* rationales was that withholding medical care causes suffering with no legitimate penological purpose, and the suffering

248. See, e.g., *Kosilek IV*, 774 F.3d at 90 (stating that in an Eighth Amendment claim for adequate medical care, it is critical for judges to give weight to peer-supported medical evidence because a misstep could mean condoning cruel and unusual punishment).

249. *Atkins v. Virginia*, 536 U.S. 304 (2002). See also *Roper v. Simmons*, 543 U.S. 551 (2005) (providing a similar analysis for holding that executing juveniles also violated the Eighth Amendment). That is not to suggest that those with gender dysphoria are in any way intellectually disabled or comparable to juveniles; *Atkins* and *Roper* merely highlight the Court's reliance on expert consensus in past Eighth Amendment cases.

250. Church, *supra* note 16, at 31.

251. See *supra* text accompanying notes 211–215.

252. Church, *supra* note 16, at 32–33. Such deference benefits prison officials to the detriment of transgender inmates. *Id.*

253. See *supra* Part II.B.3.

254. Givens, *supra* note 6, at 601.

255. *Id.* at 602. See, e.g., *Leavitt v. Corr. Med. Servs. Inc.*, 645 F.3d 484, 500 (1st Cir. 2011).

256. See, e.g., *Hudson v. McMillan*, 503 U.S. 1 (1992) (unnecessary pain prohibited by the Eighth Amendment also includes psychological pain); Givens, *supra* note 6, at 602 (courts have recognized psychological conditions such as acute depression and schizophrenia as medically serious per se).

caused by untreated gender dysphoria has been widely documented.²⁵⁷ Uniformly establishing gender dysphoria as a serious medical need per se would be the easiest standard to administer²⁵⁸ and would make it easier for transgender inmates to sue for access to medical treatments. At the least, courts fielding Eighth Amendment claims should respect expert consensus on gender dysphoria by forcing prison facilities to honor treatments prescribed by gender identity specialists.

Blanket policies against entire classes of treatment have already become constitutionally suspect.²⁵⁹ However, it is still critical that the Supreme Court and other circuits reject *Kosilek IV* and establish precedent that recognizes gender-confirmation therapies, including SRS, as prudent professional treatments for a per se serious medical need.

B. Effects of Jurisprudential Recommendations on Healthcare for Transgender Inmates

Treating gender dysphoria as a serious medical issue per se would make it easier for plaintiff-inmates to show that prison officials did not provide adequate medical care. If gender dysphoria were established as per se serious, especially by a Supreme Court decision, courts would be less likely to second-guess professionally prescribed treatments for inmates diagnosed with the condition—even if treatment involved gender-confirmation surgery.²⁶⁰ If an inmate shattered his kneecap, a court would not question the prison facility's responsibility to provide knee-replacement surgery.²⁶¹ The same would become true of requiring facilities to supply prescribed treatments for inmates with gender dysphoria.

A clear statement from the Court identifying gender dysphoria as a per se serious medical condition, and affirming transgender prisoners' entitlement to necessary gender-confirming therapies, would also allow plaintiffs to overcome the qualified immunity defense

257. *Estelle*, 429 U.S. at 104; *supra* text accompanying notes 84–87.

258. Givens, *supra* note 6, at 603.

259. *Supra* notes 99–100. Even the *Kosilek* court admitted that if the prison had a blanket policy against providing transgender inmates SRS it would have violated the Eighth Amendment. *Kosilek IV*, 774 F.3d at 91.

260. For transgender inmates that only require hormone therapy, such cases would become slam dunks given that courts have already become more inclined to mandate such treatments. *See supra* text accompanying notes 101–105.

261. *See supra* text accompanying notes 116–117 (discussing how prison facilities do not face backlash for providing inmates conventional surgeries using taxpayer money).

discussed in Part II.B.1.²⁶² Armed with such precedent, transgender inmates would be able to assert their right to adequate healthcare more effectively and defeat motions for summary judgment more consistently.²⁶³ This, in turn, would likely improve medical care for gender dysphoric inmates, as prisons would rather provide them prescribed therapies than continue to spend time and money on litigation.²⁶⁴ Even without a clear statement from the Court, plaintiff-inmates could bring Eighth Amendment claims more successfully if judges became more skeptical of what prison officials held out as reasonable treatments.

Furthermore, if courts follow Eighth Amendment jurisprudence by relying on medical consensus, there will be cases in which judges require correctional facilities to provide transgender plaintiffs gender-confirmation surgeries.²⁶⁵ In fact, a transgender woman named Shiloh Quine recently became the first inmate in U.S. history to receive a government-funded SRS.²⁶⁶ After an extended legal battle, California correctional officials chose to provide the operation, rather than continue to spend resources on litigation.²⁶⁷ This may strike some as radical, but when an inmate is diagnosed with profound gender dysphoria and prescribed SRS, the procedure constitutes adequate medical care. If courts follow Eighth Amendment precedent by adhering to medical consensus, there will be many more cases of state-funded gender-confirmation surgeries for transgender inmates in the years ahead.

262. See *supra* notes 149–150 (where the Eleventh Circuit held a prison official responsible for knowledge of its past holdings on prisoners’ Eighth Amendment rights in rejecting defendant’s motion for summary judgment).

263. With this “clearly established right,” defendant-officials would face longer court battles since they would no longer be able to easily claim qualified immunity in summary judgment motions.

264. Givens, *supra* note 6, at 604.

265. *E.g.* Norsworthy v. Beard, 87 F.Supp. 3d 1164, 1188 (N.D. Cal. 2015) (granting a prisoner with gender dysphoria a preliminary injunction for SRS, relying on the WPATH’s standards of care to reject an outlier medical opinion proffered by the defendants). But Norsworthy never received the operation because she was immediately released from prison after the ruling. Guerra, *supra* note 117.

266. Guerra, *supra* note 117.

267. *Id.*

C. Effects of Jurisprudential Recommendations on Housing for Transgender Inmates

Curtailing deference toward prison officials and focusing on plaintiffs' objective traits when applying the Farmer-Estelle Framework would allow transgender inmates to bring Eighth Amendment housing claims more successfully. In relying on medical consensus and acknowledging gender dysphoria as a per se serious condition, courts would also have to consider that its prescribed treatments typically involve more than hormone therapy or surgeries. Many treatment plans call for counseling and/or living one's life as one's gender identity, which involves wearing gender-appropriate clothing and assuming a gender-corresponding name.²⁶⁸ Such behavioral adaptations might be impossible when living in isolation or under constant threat of sexual assault from cisgender inmates. If a physician prescribes that a transgender woman live as a woman, being housed as if she were a man might prevent her from realizing the benefits of that treatment. Thus, isolation or general placement could prevent the transgender inmate from expressing her identity as prescribed and fail to qualify as adequate medical care.

Taken together—courts focusing on plaintiffs' objective traits and respecting medical prescriptions attendant with gender dysphoria—prison facilities would have more difficulty justifying housing decisions that isolate or endanger transgender inmates. Thus, facilities would face increasingly expensive litigation, which would naturally drive more Departments of Corrections to embrace holistic housing policies like those in place in Washington, D.C. and Denver.²⁶⁹ A definitive Supreme Court ruling on transgender prisoners' housing and medical needs would also mean that state facilities could no longer spurn PREA requirements without running afoul of the Constitution, driving many state prisons to embrace its recommendations on transgender housing.²⁷⁰

Lastly, for an inmate who does receive gender-confirmation surgery, the Eighth Amendment demands that he or she then be transferred to a facility that corresponds to his or her new anatomical

268. See *supra* note 21 and accompanying text.

269. See *supra* notes 73–78 and accompanying text. See also Givens, *supra* note 6, at 604 (positing that increased successful litigation involving medical treatment would motivate prison facilities to improve their transgender policies as a whole in order to save time and money).

270. See *supra* notes 65–72 and accompanying text. See *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment's cruel and unusual punishment clause to states).

sex. Continuing to house a post-operative transgender female in an all-male prison, for example, would almost certainly constitute cruel and unusual punishment due to the extreme risk of sexual assault. In fact, after California provided Shiloh Quine SRS, she was immediately transferred to an all-female correctional facility.²⁷¹

Obviously, correctional facilities should not wait for a Supreme Court mandate or jurisprudential shifts that cause them expensive litigation before changing their policies for placing transgender inmates. Departments of Corrections should be proactive and begin taking steps to bring their facilities in line with policies from jurisdictions like Washington, D.C. and Denver.²⁷² Facilities willing to break the gender binary will better protect transgender prisoners' constitutional rights by providing housing more suited to inmates' medical plans and tailored for their personal safety needs.

CONCLUSION

Transgender prisoners are the most at-risk subsection of America's already underserved prison population. The Eighth Amendment does not ask much: prisons must provide inmates adequate healthcare and reasonably safe housing accommodations. Yet, correctional facilities have proven unable to protect their transgender prisoners from rampant abuse on both fronts. Our courts must do more to safeguard the constitutional rights of gender-nonconforming inmates. The current system is undoubtedly cruel and unusual.

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271. Guerra, *supra* note 117.

272. See *supra* notes 73–78 and accompanying text.

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