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## Gender Confirmation Surgery and the Federal Prison System: Eighth Amendment Framework and Proposed Alternatives

Julie Barnett

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# GENDER CONFIRMATION SURGERY AND THE FEDERAL PRISON SYSTEM: EIGHTH AMENDMENT FRAMEWORK AND PROPOSED ALTERNATIVES

By: Julie Barnett\*

## ABSTRACT

As reform for individuals with gender dysphoria has developed, the prison system's accommodation of those individuals' needs has underperformed. There have been a number of cases in the past few years where inmates who are experiencing gender dysphoria have not received adequate care in the form of gender confirmation surgery. Four of the Federal Appellate Circuit Courts have decided that a physician's refusal to provide an inmate with gender confirmation surgery is not a violation of the 8th Amendment. One circuit ruled differently and held that denial of the surgery to an inmate experiencing gender dysphoria does violate the 8th Amendment's right against cruel and unusual punishment.

This Comment discusses the circuit split surrounding the issue of whether denying an inmate with gender dysphoria gender confirmation surgery is a violation of the 8th Amendment. This Comment argues that should SCOTUS grant review of one of these cases, it should hold as the 9th Circuit does in *Edmo v. Corizon* and rule that denial does violate the 8th Amendment. Further, this Comment discusses whether or not the 8th Amendment is the best way for inmates to seek redress on this issue and concludes that it does not. And while there is no perfect solution, this Comment recommends other ways to sue for this issue in order for inmates to receive better outcomes.

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## INTRODUCTION

Vanessa Lynn Gibson has lived as a female for 28 years.<sup>1</sup> Now incarcerated, she has attempted to castrate and harm herself, and has even attempted suicide multiple times.<sup>2</sup> Vanessa was diagnosed with gender dysphoria and has been repeatedly denied gender confirmation surgery (GCS) because it is not part of the prison's treatment protocol for gender dysphoria.<sup>3</sup> When Vanessa sued the prison for violation of the Eighth Amendment, summary judgment was granted in favor of the prison.<sup>4</sup> The Fifth Circuit upheld the district court's decision in an opinion that refused to use Vanessa's proper pronouns.<sup>5</sup>

This comment argues that it is an Eighth Amendment violation for prison officials to deny gender confirmation surgery to inmates who experience gender dysphoria. However, the unfortunate reality is that the Eighth Amendment has proved unsuccessful for inmates in multiple circuits thus far. Because of this reality, the Eighth Amendment is not the most effective way for inmates to seek redress and therefore this comment additionally proposes alternatives. Part I of this comment examines the current circuit split that exists regarding inmates who experience gender dysphoria and whether they have succeeded in their Eighth Amendment suits when denied gender confirmation surgery. It further discusses what gender dysphoria and gender confirmation surgery are, as well as the guidelines for treating them. Part II of this comment examines how the Ninth Circuit's holding that the prisoner-plaintiff made a sufficient showing for an Eighth Amendment violation in being denied GCS and further

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\* Julie Barnett, J.D., is a May 2023 Juris Doctor graduate from Marquette University Law School and a 2019 graduate from University of Wisconsin-Madison. Julie served as a Staff Editor and Comments Editor for the Marquette Benefits & Social Welfare Law Review. She will be working for the IRS in the Office of Chief Counsel upon graduation. Julie would like to thank her friends and family for their support throughout the writing process, and would like to especially thank her Comment Editor, Taylor Haefele, and the MBSWLR Faculty Advisor, Professor Elana Olson, for their help and advice.

<sup>1</sup> *Gibson v. Collier*, 920 F.3d 212, 217 (5th Cir. 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 218.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 219.

adopting a case-by-case analysis of the issue is the correct interpretation of the Eighth Amendment in this context. It also examines why the Eighth Amendment is not the best route for future inmates seeking this surgery. Part III of this comment suggests other possible routes for inmates to proceed under instead of the Eighth Amendment.

### **I. The Circuit Split, Gender Dysphoria, Gender Confirmation Surgery, and WPATH**

The First, Fifth, Seventh, and Ninth Circuits have ruled on the issue of whether prison officials denying an inmate experiencing gender dysphoria gender confirmation surgery is an Eighth Amendment violation. The Ninth Circuit is the only one that has concluded it is a violation, while the other three circuits have disagreed. The First, Fifth, and Seventh Circuits concluded it was not an Eighth Amendment violation because of sufficient enough current treatment, a lack of consensus in the medical community, and the plaintiffs' inability to live in the "real world" for twelve consecutive months. Gender dysphoria is severe distress that results from an incompatible feeling between an individual's assigned gender at birth and the individual's gender identity. The WPATH has a number of standards that are looked at to determine when an individual has gender dysphoria and when they should be able to get GCS. Lastly, the rate of transgender individuals seeking GCS has increased in recent years and transgender individuals who are incarcerated is disproportionately high.

#### **A. The Circuit Split**

Four circuits address whether it is an Eighth Amendment violation for prison officials to deny gender confirmation surgery to inmates experiencing gender dysphoria. The First, Fifth, and Seventh Circuits determined it is not a violation. One circuit, the Ninth, determined it is a violation. The First Circuit held that the inmate's current treatment was working well enough to deny her GCS. The Fifth Circuit held a blanket ban on GCS was constitutional because the state's prison policy did not authorize the treatment. The Seventh

Circuit held that the inmate's inability to live in the world for twelve months as the gender she identified with barred her from access to the surgery. Finally, the Ninth Circuit held that the plaintiff's need for the surgery was a "serious medical need" and that the prison officials did not provide her with sufficient medical treatment, despite having knowledge of these needs and her severe suffering. The Ninth Circuit's opinion is the most recent one to be published.

### 1. The First Circuit: *Kosilek v. Spencer*

The First Circuit addressed whether prison officials' denial of GCS to an inmate experiencing gender dysphoria was an Eighth Amendment violation in 2014 in *Kosilek v. Spencer*.<sup>6</sup> In this case, Michelle Kosilek, an inmate in her mid-sixties who self-identifies as a female, suffered gender dysphoria for many years.<sup>7</sup> She twice attempted suicide and self-castration while incarcerated.<sup>8</sup> After evaluating Kosilek, two doctors recommended that she receive GCS and also acknowledged Kosilek's improved wellbeing after the opportunity to access feminine attire and hormone therapy, among other things, and the ability to present herself as female.<sup>9</sup> The doctors further emphasized Kosilek's distress stemming from her male genitalia and noted that it is likely she will attempt suicide again without the surgery.<sup>10</sup>

The First Circuit detailed how an Eighth Amendment violation must be shown: (1) an objective prong that requires proof of a serious medical need, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to that need.<sup>11</sup> The first prong's disagreement stemmed from the issue of whether the GCS was medically necessary for Kosilek's care.<sup>12</sup> The DOC argued that the treatment Kosilek was receiving – psychotherapy, hormones,

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<sup>6</sup> *Kosilek v. Spencer*, 774 F.3d 63 (1st. Cir. 2014).

<sup>7</sup> *Id.* at 68-69. Michelle Kosilek has been in prison since 1990.

<sup>8</sup> *Id.* at 68-69.

<sup>9</sup> *Id.* at 71.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 82.

<sup>12</sup> *Id.* at 86.

electrolysis, and access to female clothing – increased her psychological wellbeing and was sufficient to treat her gender dysphoria.<sup>13</sup> The First Circuit ultimately held that the DOC’s treatments were “reasonably commensurate with the medical standards of prudent professionals” and provided Kosilek with significant relief, and thus did not violate the Eighth Amendment.<sup>14</sup> The First Circuit further noted that concerns over Kosilek’s safety regarding housing were reasonable.<sup>15</sup> Overall, the court found the positive effects of Kosilek’s current treatment and the safety concerns that may arise from GCS as reasons to deny the plaintiff the surgery she has been seeking for years.<sup>16</sup>

## 2. The Fifth Circuit: *Gibson v. Collier*

In 2019, the Fifth Circuit addressed whether the failure of prison officials to provide GCS to an inmate experiencing gender dysphoria was an Eighth Amendment violation in *Gibson v. Collier*. Like the First Circuit, the Fifth Circuit also held that the denial of GCS did not violate the plaintiff’s Eighth Amendment rights.<sup>17</sup> Gibson experienced similar symptoms of gender dysphoria as did the plaintiff in *Kosilek*, which included attempting to hurt and castrate herself numerous times.<sup>18</sup> Gibson repeatedly requested GCS because her regimen of counseling and hormone therapy was not adequate to treat her gender dysphoria.<sup>19</sup> Gibson cited to the Standards of Care from the World Professional Association for Transgender Health (WPATH) to argue that the surgery was a medical necessity for her.

The Fifth Circuit, while using “he” and “him” pronouns to refer to Gibson, concluded that the WPATH Standards of Care do not reflect a consensus, but rather “one side in a sharply contested medical debate over sex reassignment surgery.”<sup>20</sup> The Fifth Circuit cited the First Circuit’s examination of respected doctors disagreeing about

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<sup>13</sup> *Id.* at 86.

<sup>14</sup> *Id.* at 90.

<sup>15</sup> *Id.* at 93.

<sup>16</sup> *Id.* at 96.

<sup>17</sup> *Gibson*, 920 F.3d at 228.

<sup>18</sup> *Id.* at 217.

<sup>19</sup> *Id.* at 217.

<sup>20</sup> *Id.* at 216.

whether GCS is medically necessary to treat gender dysphoria as objective evidence that shows the medical community is deeply divided over the necessity and efficacy of the surgery.<sup>21</sup> Because of this lack of consensus, the Fifth Circuit reasoned that it was not deliberately indifferent, the second prong needed to prove an Eighth Amendment violation, for prison officials to decline to authorize the surgery.<sup>22</sup>

The Fifth Circuit further reasoned that it cannot be cruel and unusual to deny treatment to one prisoner that no other prison has ever provided to other prisoners, but instead that “it would only be unusual if a prison decided *not* to deny such treatment.”<sup>23</sup> The Fifth Circuit acknowledged that it is effectuating a blanket ban on GCS and deems the ban constitutional because Texas prison policy does not authorize the treatment the plaintiff is requesting.<sup>24</sup> It refuses to remand the case to allow Gibson the attempt to show an individualized need for the surgery because any evidence of an individualized need does not change the fact that the surgery is heavily debated within the medical community.<sup>25</sup>

### 3. The Seventh Circuit: *Campbell v. Kallas*

The Seventh Circuit ruled similarly to the First and Fifth Circuits when it addressed whether the denial of GCS to the plaintiff was an Eighth Amendment violation in 2019.<sup>26</sup> Campbell had also been experiencing gender dysphoria for many years.<sup>27</sup> The Seventh Circuit put particular emphasis on the standards set forth by WPATH which require patients to live in their preferred gender role for twelve continuous months.<sup>28</sup> WPATH explains how the one-year period prior to surgery helps patients adjust to the serious social and personal

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<sup>21</sup> *Id.* at 221.

<sup>22</sup> *Id.* at 223.

<sup>23</sup> *Id.* at 216.

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

<sup>25</sup> *Id.* at 224.

<sup>26</sup> *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019).

<sup>27</sup> *Id.* at 540.

<sup>28</sup> *Id.* at 539.



consequences of adapting one's gender expression.<sup>29</sup> These standards do not include an exception to this real-life experience period for patients living in institutions.<sup>30</sup> The court cited to how this real-life experience of living their preferred way cannot be experienced while incarcerated and that there is no evidence to predict outcomes and maintain safety if the plaintiff were to undergo this real-life experience while incarcerated.<sup>31</sup>

The same expert the Seventh Circuit used to explain these challenges, who ultimately concluded that conservative approaches for incarcerated individuals are warranted, also questioned whether the real-life experience should even be required.<sup>32</sup> In the end, the Seventh Circuit concluded that prison officials were not required to provide Campbell, who was 12 years into a 34-year sentence at the time, with treatment beyond hormone therapy.<sup>33</sup> This exemplifies that Campbell, along with other potential plaintiffs in this situation, have extensive sentences. Incarceration has unfortunately become "real-life" for these individuals and thus denying them this surgery because they cannot live in their preferred gender identity out in the "real world" should not be a consideration.

#### 4. The Ninth Circuit: *Edmo v. Corizon*

In 2020, the Ninth Circuit in *Edmo v. Corizon* held that Edmo's Eighth Amendment rights were violated when prison officials denied her GCS.<sup>34</sup> Edmo, the plaintiff, also attempted self-castration and experienced "persistent distress so severe it limit[ed] her ability to function."<sup>35</sup> Unlike the First, Fifth, and Seventh Circuits, the Ninth Circuit here held that Edmo had a serious medical need and the prison authorities did not provide her with sufficient medical treatment despite full knowledge of her extreme suffering and medical

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

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 541.

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

<sup>33</sup> *Id.* at 549.

<sup>34</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2020).

<sup>35</sup> *Id.* at 767.

needs.<sup>36</sup> The court explained that the doctor who treated Edmo acted with deliberate indifference because he knew she suffered from gender dysphoria, distress that impairs her ability to function, and of her attempts to castrate herself.<sup>37</sup> After Edmo's first self-castration attempt, the doctor noted that her gender dysphoria "had risen to another level" and yet continued to recommend the ineffective treatment plan in place.<sup>38</sup> After Edmo again attempted to castrate herself, her doctor again did not modify her treatment plan and the court noted that this level of disregard for Edmo's substantial risk of severe harm constituted deliberate indifference.<sup>39</sup> The court further explained that Edmo successfully established she suffered from a "serious medical need" and the treatment she was provided was "medically unacceptable under the circumstances."<sup>40</sup>

## **B. Gender Dysphoria, Gender Confirmation Surgery, and WPATH**

Gender dysphoria occurs in some transgender individuals who experience severe psychological distress that stems from an inconsistent feeling between their assigned gender at birth and the gender they identify with. There are a number of characteristics that can be met in order to be diagnosed with gender dysphoria. GCS is the surgical alteration of a transgender individual's body in order to change their assigned gender to the one they identify with. WPATH identifies a number of requirements that an individual must meet in order to undergo this surgery. The prevalence of known transgender individuals seeking GCS has increased in recent years. Further, transgender individuals have a high prevalence of experiencing harassment and intimidation by law enforcement and they experience higher rates of incarceration, specifically transgender individuals of color.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 793.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 797.

## 1. Gender Dysphoria

Transgender individuals' sex assigned at birth does not match their psychological sense of their gender.<sup>41</sup> Some people who are transgender will experience gender dysphoria, which is psychological stress that results from an incongruence between their assigned gender at birth and the gender they identify with.<sup>42</sup> Individuals experiencing gender dysphoria often exhibit "depression, anxiety, compulsivity, behavior disorders, personality disorders, and tendencies toward self-harm and suicide."<sup>43</sup> The *Diagnostic and Statistical Manual of Mental Disorders* explains that patients must show at least two of the following characteristics for at least six months to be diagnosed with gender dysphoria: (1) a marked inconsistency between one's experienced/expressed gender and primary and/or secondary sex characteristics; (2) a strong desire to eliminate one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender; (3) a strong desire for the primary and/or secondary sex characteristics of the other gender; (4) a strong desire to be of the other gender (or some alternative gender different from one's assigned gender); (5) a strong desire to be treated as the other gender; (6) a strong conviction that one has the typical feelings and reactions of the other gender.<sup>44</sup>

## 2. Gender Confirmation Surgery and WPATH

Gender Confirmation Surgery consists of genital and breast/chest surgical treatments for individuals experiencing gender dysphoria.<sup>45</sup> The World Professional Association for Transgender Health (WPATH) is an organization dedicated to the treatment and

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<sup>41</sup> *What is Gender Dysphoria?* AM. PSYCHIATRIC ASS'N, (Nov. 2020), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

<sup>42</sup> *Id.*

<sup>43</sup> *Transgender Inmates' Right to Gender Confirmation Surgery*, 89 *FORDHAM L. REV.* 2809, 2819 (2021).

<sup>44</sup> *Id.*

<sup>45</sup> *Standards of Care for the Health of Transsexual, Transgender, & Gender Nonconforming People*, 7 *WORLD PRO. ASS'N FOR TRANSGENDER HEALTH* 1, 55 (2011) [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf).

understanding of gender dysphoria. When it comes to GCS, WPATH explains that while some gender nonconforming individuals can find comfort without surgery, many others require surgery and find it medically necessary to alleviate their gender dysphoria.<sup>46</sup> According to a survey done in 2016, 25% of transgender and gender non-binary respondents had undergone some form of GCS, with other studies reporting slightly higher ranges up to 35%.<sup>47</sup> It is possible that these existing estimates underestimate the utilization of GCS, but it is certain that GCS is rapidly expanding.<sup>48</sup> The American Society for Plastic Surgeons (ASPS) recorded their GCS procedures increased by 155% between 2016 and 2017, which is a notable increase from ASPS's 19% increase in GCS from 2015 to 2016.<sup>49</sup> Transgender men self-report surgery rates of 42-54%, transgender women report GCS rates around 28%, and non-binary individuals report rates around 9%.<sup>50</sup>

WPATH outlines criteria for breast/chest surgery, which includes: (1) persistent, well-documented gender dysphoria; (2) capacity to make a fully informed decision and to consent for treatment; (3) age of majority in a given country; (4) if significant medical or mental health concerns are present, they must be reasonably well controlled.<sup>51</sup>

WPATH's criteria for genital surgery is similar, but contains a couple of key differences: (1) persistent, well documented gender dysphoria; (2) capacity to make a fully informed decision and to consent for treatment; (3) age of majority in a given country; (4) if significant medical or mental health concerns are present, they must be well controlled; (5) 12 continuous months of hormone therapy as appropriate to the patient's gender goals (unless the patient has a medical contraindication or is otherwise unable or unwilling to take hormones); 12 continuous months of living in a gender role that is

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<sup>46</sup> *Id.* at 54.

<sup>47</sup> I.T. Nolan, C. J. Kuhner, & G.W. Dy, *Demographic & Temporal Trends in Transgender Identities & Gender Confirming Surgery*, 8 *TRANSL. ANDROL. & UROL.* 184 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6626314/pdf/tau-08-03-184.pdf>.

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

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

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

<sup>51</sup> *Standard of Care for the Health*, *supra* note 45, at 105.

congruent with their gender identify.<sup>52</sup>

WPATH explains that the inclusion of 12 continuous months of experiencing living in an “identity congruent gender role” is based on expert clinical consensus that it provides individuals with the opportunity to socially adjust to their desired gender role before undergoing irreversible surgery.<sup>53</sup>

The 2015 U.S. Transgender Survey showed a frequent amount of abuse and harassment by law enforcement officers as well as high rates of incarceration.<sup>54</sup> Two percent of respondents had been incarcerated in the prior year, which was more than the general population percentage of .87%.<sup>55</sup> Further, the incarceration rate was even higher among transgender people of color and low-income respondents, such as the nine percent rate for black transgender women.<sup>56</sup>

## **II. The Ninth Circuit’s Appropriate Conclusion and Why the Eighth Amendment is an Insufficient Cause of Action for Inmates**

The Ninth Circuit appropriately interpreted and applied the Eighth Amendment to the plaintiff in the case before it. The Ninth Circuit looked to the plaintiff’s expert’s evidence as to why the WPATH Standards of Care are used and how they should be applied to Edmo. To satisfy an Eighth Amendment violation, a plaintiff must show that she had a serious medical need and that prison officials acted with deliberate indifference to those needs. The current Eighth Amendment jurisprudence indicates that the route to GCS using the Eighth Amendment may prove to be unsuccessful. Three out of the four circuits that have addressed the issue of whether an inmate experiencing gender dysphoria should receive GCS have denied the plaintiff’s request.

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<sup>52</sup> *Id.* at 60.

<sup>53</sup> *Id.* at 61.

<sup>54</sup> *LGBTQ People Behind Bars*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Oct. 2018) <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>.

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

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

### A. Why the Ninth Circuit Came to the Correct Conclusion

The Ninth Circuit, the only circuit to conclude a denial of GCS violated the Eighth Amendment, correctly interprets and applies the Eighth Amendment to the common issue here. The Ninth Circuit held that the prisoner established the treatment provided to her (treatment that did not include GCS) was medically unacceptable under her circumstances.<sup>57</sup> The Ninth Circuit cited the plaintiff's experts as well-qualified and as explaining the necessity of GCS in a logical and persuasive manner.<sup>58</sup> The plaintiff's experts applied the WPATH Standards of Care, which is the "undisputed starting point in determining the appropriate treatment for gender dysphoric individuals," while the State's experts were underqualified and did not apply the WPATH Standards of Care.<sup>59</sup> The plaintiff's experts outlined how the current treatment the plaintiff was receiving was clearly insufficient because of her continued self-castration attempts.<sup>60</sup> Additionally, the experts explained that if the plaintiff did not receive the surgery, there is little chance her gender dysphoria would improve, thus placing her at serious risk of harming herself again, physically and emotionally.<sup>61</sup> Allowing the plaintiff to receive surgery would align her genitalia with her gender identity and alleviate the severe distress she experiences from her male genitalia.<sup>62</sup>

The Ninth Circuit accurately exemplifies the medical consensus surrounding the necessity and effectiveness of GCS.<sup>63</sup> The decision further explains that there should not be a blanket rule where all inmates who request a surgery should receive one.<sup>64</sup> Rather, it dictates that whether an inmate experiencing gender dysphoria should

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<sup>57</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 792 (9th Cir. 2020).

<sup>58</sup> *Id.* at 787.

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

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

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

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

<sup>63</sup> *Devolving Standards Of Decency: How Eighth Amendment Jurisprudence Fails Transgender Inmates Seeking Necessary Medical Care*, 36 WIS. J.L. GENDER & SOC'Y 59, 77 (2021).

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

receive GCS should be on a case-by-case and fact-specific basis, looking to the specific needs of the individual bringing the claim.<sup>65</sup> Establishing a blanket ban on these sorts of claims rather than looking at it based on the particular individual is what the other circuits have mistakenly done.<sup>66</sup>

The other circuits that have addressed this issue have come to the opposite conclusion for flawed reasons. The First Circuit found the current treatment the plaintiff was seeking was sufficient to treat her gender dysphoria, despite her suicide and self-castration attempts.<sup>67</sup> As the plaintiff's expert stated in *Edmo*, if an individual is receiving treatment but still attempting to harm themselves, then perhaps the treatment is insufficient.<sup>68</sup> Even if the individual is not continuing to harm themselves, the repeated and continued requests for the surgery should also be an indication that their current treatment plan is not working for them.

The Fifth Circuit denied the plaintiff GCS because of apparent disputes in the medical community over the necessity of GCS and WPATH, despite many experts confirming it is the correct course of treatment.<sup>69</sup> The Fifth Circuit used this lack of consensus in the medical community as a way to deny the plaintiff even the chance to make an individualized argument as to why she specifically needed the surgery.<sup>70</sup> The Fifth Circuit went so far as to say it was not "cruel and unusual punishment" to withhold a medical treatment no other prison had given to inmates, and would be unusual if it did allow it.<sup>71</sup> In 2019, the year the Fifth Circuit wrote this opinion, only one other circuit had ruled on this specific issue. It is unreasonable to call something unusual when only one other circuit had come to this conclusion.

The Seventh Circuit cited to concerns about the twelve-month real-life criteria standard that could supposedly not be fully

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

<sup>66</sup> *Id.*

<sup>67</sup> *Kosilek v. Spencer*, 774 F.3d 63, 89-90 (1st. Cir. 2014).

<sup>68</sup> *Edmo v. Corizon, Inc.*, 935 F.3d 792, 787 (9th Cir. 2020).

<sup>69</sup> *Gibson v. Collier*, 920 F.3d 212, 216, 218 (5th Cir. 2019).

<sup>70</sup> *Id.* at 224.

<sup>71</sup> *Id.* at 216.

experienced in prison.<sup>72</sup> Some of these prisoners will be incarcerated for the rest of their life, or at least a large percentage of their remaining years. The four walls of the prison they are in have become their new normal and therefore is the only “real life” they have left. Just because an individual is in prison does not mean their life and problems cease. They are still humans experiencing life every day and this is not a reason to disallow a surgery that will let them feel as though they belong in their own bodies.

## B. How to Satisfy an Eighth Amendment Violation

To determine whether an Eighth Amendment violation has occurred in a prison setting, a court will generally look to whether the prison condition “deprives a basic human need, and is thus cruel and unusual,” and whether the prison official had a sufficiently culpable state of mind.<sup>73</sup> To satisfy the first part of this inquiry, a prisoner must show that she has a serious medical need.<sup>74</sup> This first prong of this test, proving the prisoner has a “serious medical need,” is objective.<sup>75</sup> The First Circuit defined this objective prong as requiring that the “serious medical need” be diagnosed by a physician as mandating treatment, or a need that is “so obvious even a lay person would easily recognize the necessity for a doctor’s attention”.<sup>76</sup> This prong is not a requirement that the prison execute a perfect plan for every inmate, but rather the services provided “need only be on a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards.”<sup>77</sup>

To satisfy the second part of this test, a prisoner must show that a prison official was “deliberately indifferent” to the serious medical need of the prisoner.<sup>78</sup> This second prong is a subjective one and is satisfied when a prison official is deliberately indifferent so as he

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<sup>72</sup> *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019).

<sup>73</sup> Nina Garcia, *Starting With The Man In The Mirror: Transsexual Prisoners And Transitional Surgeries Following Kosilek v. Spencer*, 40 AM. J.L. & MED. 443, 450 (2014).

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

<sup>75</sup> *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st. Cir. 2014).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Garcia, *supra* note 73, at 450.



disregards a substantial risk of serious harm to an inmate's health or safety.<sup>79</sup> This means the official had to have known of facts that he could infer the risk and then that he did actually draw the inference.<sup>80</sup>

### C. Why the Eighth Amendment is an Insufficient Cause of Action for Inmates

Moving forward, the current Eighth Amendment jurisprudence is a problem because it has set precedent that makes it difficult for inmates to succeed in these situations. The Fifth Circuit went so far as to implement a broad, blanket rule stating "a state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate."<sup>81</sup> The Fifth Circuit reasoned that because the surgery was of apparent debate among the medical community, a blanket rule was appropriate, even though it is widely accepted that medical decisions should be made on a patient-by-patient basis.<sup>82</sup> The First Circuit came to a more specific, but still limiting, conclusion. It decided that when hormone therapy and lifestyle accommodations, but no surgery, were provided to a transgender inmate, the officials did not violate the Eighth Amendment.<sup>83</sup>

The Eighth Amendment has proved to be an insufficient way for transgender individuals suffering from gender dysphoria to receive the medical care they require. While the Ninth Circuit ruled in favor of the plaintiff and is the most recent circuit to address the issue, the majority of circuits that have addressed the issue have ruled against the plaintiffs seeking the surgery. Therefore this makes it difficult for inmates moving forward under the current case law to access these surgeries when they need it.

One criticism that comes with the Eighth Amendment structure is the need for a medical definition. Many activists in the transgender community argue that self-identification is what is important rather

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<sup>79</sup> *Id.* at 451.

<sup>80</sup> *Id.*

<sup>81</sup> *Devolving Standards Of Decency: How Eighth Amendment Jurisprudence Fails Transgender Inmates Seeking Necessary Medical Care*, 36 WIS. J.L. GENDER & SOC'Y 59, 74 (2021).

<sup>82</sup> *Id.* at 75.

<sup>83</sup> *Id.* at 74.

than an official medical diagnosis.<sup>84</sup> Another argument against the medical definition is that it can be underinclusive for people who do not clearly fit into the specific category necessary for a diagnosis.<sup>85</sup>

Further, the medical model of gender contributes to why the Eighth Amendment is not a sufficient way for inmates to bring their claims. The medical model of gender “assumes that two genders exist and . . . is based upon the belief that some people suffer from a psychological condition (Gender Identity Disorder) that causes them to experience great discomfort regarding their assigned gender.”<sup>86</sup> This model can certainly be helpful for the individuals that have a clear medical diagnosis and thus “serious medical needs” under the Eighth Amendment and entitles them to some form of medical treatment.<sup>87</sup> However, the model can also be detrimental to other transgender individuals. The individuals that are not able to narrate and articulate their gender experiences and whose lives do not fit into the “hyper-normative manner consistent with GID diagnostic criteria” may not as easily be able to get what they need.<sup>88</sup>

This is further exemplified when a court chooses to base its determination on standards set forward by organizations such as WPATH. While WPATH is only attempting to help transgender individuals in a safe and healthy manner, the guidelines it sets forward may be limiting to individuals who do not fall into the specific criteria required. However, on the other hand, courts need to look somewhere to determine the best cause of action moving forward, and WPATH is an organization whose only job is to advocate for these individuals.

### III. Proposed Alternatives

The Eighth Amendment is the current way these claims to

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<sup>84</sup> See *id.* at 479.

<sup>85</sup> See *id.*

<sup>86</sup> *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 188 (2006).

<sup>87</sup> *Id.* at 189.

<sup>88</sup> *Id.*

receive GCS are brought, but there are alternative options for inmates seeking this surgery. While there may not be a perfect solution for them yet, there are a few options that may prove more successful. The unfortunate truth is that some of these inmates do not have any other choice because of the current state of the case law. The Federal Tort Claims Act is an act that would allow federal inmates to sue the U.S. Government, should they be able to get past the broad exceptions that may stand in their way. State tort law claims may be the best option for state prisoners because there are fewer exceptions and hurdles to jump through. The Prison Litigation Reform Act has limitations but the common circumstances of an inmate's case who suffers from gender dysphoria will likely meet the criteria.

### A. The Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) grants federal courts jurisdiction over actions against the Government when its employees act in a negligent manner.<sup>89</sup> This Act works as an exception to sovereign immunity because it provides a way for individuals with just claims against the Government to move forward with their actions.<sup>90</sup> The statute grants "exclusive original jurisdiction over all money claims, in whatever amount, for property damage or personal injury caused by the negligent or wrongful act of a Government employee within the scope of his employment."<sup>91</sup> The FTCA provides a way for individuals to receive compensation who have suffered personal injury or death caused by the negligent or wrongful act or omission of an employee of the federal government.<sup>92</sup> While this statute allows for tort lawsuits against the Government and the United States itself, it expressly disallows actions against the federal employees themselves.<sup>93</sup> Further, the federal employee that is accused of being

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<sup>89</sup> *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947)

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

<sup>91</sup> *Id.* at 536.

<sup>92</sup> *Federal Tort Claims Act (FTCA)*, U.S. ENV'T. PROT. AGENCY, (last updated Jan. 26, 2023), <https://www.epa.gov/ogc/federal-tort-claims-act-ftca>.

<sup>93</sup> Kevin M. Lewis, *Federal Tort Claims Act (FTCA): A Legal Overview*, CONGR. RSCH. SERV. 1, 7 (Nov. 20, 2019) <https://www.everycrsreport.com/reports/R45732.html>.

negligent, must have been acting within the scope of his employment.<sup>94</sup> This means that if an individual, who just so happens to be a federal employee at the local federal prison, gets into a fistfight at a bar and the victim wishes to sue them, they could not do so under the FTCA because the employee was not acting within the scope of his employment. The victim would potentially have a state-law tort action against the employee personally, but could not sue the United States just because the individual worked for the federal government.<sup>95</sup>

To state a valid claim under the FTCA, a claimant must show that (1) she was injured by a federal government employee; (2) the employee was acting within the official scope of his duties; (3) the employee acted negligently or wrongfully; and (4) the negligent or wrong actions proximately caused the injury or damage sustained by the complainant.<sup>96</sup> An inmate could attempt to prove a violation of the FTCA in the context of the denial of GCS. For example, the inmate would have to show that a prison official, such as a doctor, denied her GCS when she was experiencing well-documented gender dysphoria. Next, she would show that the prison official was acting within the scope of his duties, such as a doctor assessing and diagnosing patients in the facilities they work in. Next, the employee would have to show the doctor acted negligently or wrongfully, such as that the inmate had well-documented gender dysphoria and her current treatment was insufficient to treat it. Finally, the inmate would need to show that the denial of the surgery was the proximate cause of any further injury or damage sustained, such as continued self-harm or suffering due to her gender dysphoria.

However, the FTCA does have limitations that could make an action more difficult for inmates to prove. There are a number of exceptions that this Act lists, including certain claims arising from an intentional tort committed by a federal employee, certain admiralty claims for which federal law provides alternative remedies, and any claim caused by the establishment of a quarantine by the United

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

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

<sup>96</sup> *Federal Tort Claims Act*, U.S. HOUSE OF REPRESENTATIVES (last visited May 8, 2023), <https://www.house.gov/doing-business-with-the-house/leases/federal-tort-claims-act>.

States.<sup>97</sup> But the most difficult exception for inmates to overcome would be the discretionary function exception. The discretionary function exception disallows “any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.”<sup>98</sup> In other words, the federal government’s immunity is preserved when an employee is acting upon an exercise of judgment or choice.<sup>99</sup> It has been described as “the broadest and most consequential” exception to the FTCA.<sup>100</sup> Tort liability cases including exposures to asbestos, radiation, and HIV have been avoided by the United States by invoking this exception.<sup>101</sup> This exception has been justified by its protection of the Government from liability that would affect and hinder efficient government operations.<sup>102</sup> It would supposedly lead to government officials spending too much of their “tax-payer compensated time responding to lawsuits” rather than serving their community.<sup>103</sup>

To determine whether this exception applies, courts examine whether the employee was engaged in conduct that was (1) discretionary and (2) policy-driven.<sup>104</sup> The court must determine whether the conduct involved an element of choice or judgment by the federal employee.<sup>105</sup> Typically, if there is not a federal statute, regulation, or policy that specifically describes a course of action for an employee to follow, then the conduct will be deemed discretionary.<sup>106</sup>

This discretionary function exception could be detrimental to an inmate’s claim of action because there is no federal statute or regulation that specifically lays out when an inmate experiencing gender dysphoria should be able to obtain GCS. However, there is a federal

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<sup>97</sup> Federal Tort Claims Act, *supra* note 93, at 17.

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

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

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

<sup>101</sup> *Id.*

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

<sup>103</sup> *Id.*

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

<sup>105</sup> *Id.*

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

statute titled “Medical care and treatment of Federal prisoners.<sup>107</sup> This statute reads that the public health services shall “supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services . . . in penal and correctional institutions of the United States.<sup>108</sup> While this is a broad statute, it goes toward the medical needs of federal prisoners. In a federal prisoner could should that their necessary medical or psychiatric needs were not being met, they could attempt to cite this statute to refute the discretionary function exception of the FTCA.

## B. State Tort Law Claims

Another alternative solution is suing under the state tort laws of whichever state an inmate is housed in. In order to state a claim for the tort of negligence, which would likely be the most appropriate tort to sue under in these cases, a plaintiff must show: (1) duty; (2) breach; (3) causation; and (4) damages.<sup>109</sup> A plaintiff must show that the defendant owed a duty to a class of persons, including the plaintiff, to take care not to cause an injury of the kind suffered by the plaintiff; that the defendant breached that duty of care; that the defendant’s breach was an actual and proximate cause of the plaintiff’s injury; and that the plaintiff suffered an injury.<sup>110</sup>

Each state will be different and have varying statutes that an inmate must satisfy in order to bring these claims. Additionally, each state will have different sovereign immunity laws as well. For example, Illinois excludes government liability “for injury proximately caused by the failure of the employee to furnish or obtain medical care.”<sup>111</sup> However, Illinois does impose liability on an employee who,

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<sup>107</sup> 42 U.S. Code § 250 (2010).

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

<sup>109</sup> Robert Rafii, *What Are the Elements of Negligence?* FINDLAW.COM, (last reviewed Dec. 19, 2022), <https://www.findlaw.com/injury/accident-injury-law/proving-fault-what-is-negligence.html>.

<sup>110</sup> *Id.*

<sup>111</sup> Sasha Volokh, *Prisoner litigation against public prisons: how many ways can you lose?* WASH. POST. (Feb 18, 2014) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/18/prisoner-litigation-against-public-prisons-how-many-ways-can-you-lose/>.

“acting within the scope of his employment, knows from his observation of conditions that the prisoner is in need of immediate medical care and, through willful and wanton conduct, fails to take reasonable action to summon medical care.”<sup>112</sup> Although states will have varying laws on governmental immunity, some states do not have such immunity.<sup>113</sup> For cases where plaintiffs want to bring suit for denial of GCS, the sovereign immunity law will matter because it could prevent the plaintiff from filing a suit against a government actor.

It is possible that state laws will have a discretionary exception as well, but it is likely it will not be as limiting as the federal exception. For instance, the Washington Supreme Court explained that in order for the state government to benefit from the discretionary exemption, it had to show that “an actual, conscious balancing of risks actually took place.”<sup>114</sup> This is a much higher standard to prove than what is required for the federal discretionary exception. It is possible this will be more difficult for state governments to prove and thus less of a chance for these governments to get out of liability. Therefore, plaintiffs experiencing gender dysphoria who seek action for denial of GCS will have a smaller chance of their claims being disregarded because state tort claims do not necessarily have the strict discretionary exception.

### C. Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) allows for prisoners to sue state or local officials for the “deprivation of any rights, privileges, or immunities secured by the Constitution and federal laws.”<sup>115</sup> A constitutional or statutory right has to be violated to sue under the PLRA. Under § 1997e, there are a number of requirements and limitations an inmate must satisfy.<sup>116</sup> For example, a prisoner must exhaust all administrative remedies before bringing a suit

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> 42 U.S.C. § 1983 (1996).

<sup>116</sup> 42 U.S.C. § 1997e (2013).

under this Act.<sup>117</sup> Further, in order for an inmate to collect compensatory damages for a mental or emotional injury, he or she must also suffer a physical injury.<sup>118</sup> There is a circuit split regarding whether a constitutional violation is separate from a mental or emotional injury, but either way it is likely this distinction would not be a problem for prisoners suing under this act.

Many of the inmates who bring these claims have suffered from mental, emotional, and physical injury. Because of how unhappy they are in their bodies, they will attempt to self-harm or self-castrate. In some circumstances, such as *Edmo*, when these individuals do not receive the surgery to correct their gender identity, they will continue to harm themselves as a direct result. This should satisfy the physical injury requirement of the PLRA because it is a result of the prison officials denying the individuals access to the surgery and then physical harm ensuing.

## CONCLUSION

Inmates whose gender dysphoria is left untreated deserve a way to obtain the medical treatments they need to feel safe and comfortable about themselves. The Eighth Amendment is one avenue these inmates can go down in order to gain these medical needs. The Ninth Circuit has made an important development in this right and ruled in favor of an inmate who, despite experiencing well-documented gender dysphoria, was repeatedly denied gender confirmation surgery. Other circuits have created blanket bans on these surgeries without feeling the need for a case-by-case analysis as the Ninth Circuit held. The Eighth Amendment has proved to only narrowly work thus far and so an alternative route is required. Although there is not a perfect road for these individuals to go down yet, the unfortunate reality is that a lot of these inmates do not have any other options because their jurisdiction has disallowed the Eighth Amendment route. The Federal Tort Claims Act, state tort laws, and the Prison Litigation Reform Act are alternative options they may seek

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

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



to attempt to alleviate their gender dysphoria and receive the surgery they require to feel comfortable in their own bodies.