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## Life is What You Make It . . . Unless You Are Transgender and Incarcerated: Revising The Test for Judging an Incarcerated Transgender Individual's Readiness for Gender Confirmation Surgery

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**LIFE IS WHAT YOU MAKE IT . . . UNLESS YOU  
ARE TRANSGENDER AND INCARCERATED:  
REVISING THE TEST FOR JUDGING AN  
INCARCERATED TRANSGENDER INDIVIDUAL’S  
READINESS FOR GENDER CONFIRMATION  
SURGERY.<sup>1</sup>**

*“The rights of transgender persons and sex reassignment surgery remain politically controversial, even outside the prison context. And some members of the public are outraged at any effort to improve the health and well being of inmates. But the true public interest lies in alleviating needless suffering by those who are dependent on the government for their care.”*  
—District Judge James D. Peterson of the Western District of Wisconsin<sup>2</sup>

I. INTRODUCTION

Incarcerated transgender individuals have been fighting for the right to medically necessary treatment for decades.<sup>3</sup> This fight has continued despite the Eighth Amendment requiring prison officials not be deliberately

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<sup>1</sup> “Gender affirming surgery” is the most modern and appropriate description of the type of medical procedure this Note analyzes. *Terms and Phrases to Avoid*, ALBERTA HEALTH SERVS., <https://perma.cc/6V8J-2CMT> (last visited Jan. 5, 2023, 6:18 PM). This Note utilizes the term “gender confirmation surgery” for purposes of consistency and clarity in alignment with cited case law and medical text for the benefit of the courts. However, the author recognizes that gender cannot be “confirmed” through surgery, only affirmed, and a person’s gender is respected and valid regardless of surgical history or physical features. Moreover, any terms such as “sexual reassignment surgery,” “transsexualism, or “transgenderism” have been redacted, except where used in direct quotes. The author disclaims these terms and urges that any citation of this Note use the most modern, inclusive language, which is “gender affirming surgery.”

<sup>2</sup> See *Campbell v. Kallas*, No. 16-cv-261-jdp, 2020 U.S. Dist. LEXIS 230117, at \*25 (W.D. Wis. Dec. 8, 2020) (speaking to public interest associated with provision of medical care to transgender prisoners).

<sup>3</sup> See *Lamb v. Maschner*, 633 F. Supp. 351, 354 (D. Kan. 1986) (holding prison officials are not required to provide hormone therapy to transgender prisoners); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (holding denial of hormone therapy to transgender prisoner is not considered deliberate indifference); *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir. 1987) (affirming denial of hormone therapy to prisoner by deferring to prison officials’ medical judgment); *Allard v. Gomez*, 9 F. App’x 793 (9th Cir. 2001) (establishing hormone therapy may be appropriate for incarcerated transgender individual’s medical needs); *Kosilek v. Spencer*, U.S. Dist. LEXIS 13355 (D. Mass. Sept. 12, 2000), *aff’d*, 29 F. App’x 621, 622 (1st Cir. 2002), *aff’d*, 889 F. Supp. 2d 190, 218 (D. Mass. 2012) (replacing freeze frame policy with alterable hormone treatment if hospital determines medical necessity).

indifferent to the serious medical needs of incarcerated individuals.<sup>4</sup> Gender identity disorder is currently recognized as a serious medical need under the Eighth Amendment, and medically necessary treatment particularized to the needs of a transgender individual can include anything from access to feminizing and masculinizing clothes, to therapy and hormone treatments, and even gender confirmation surgery.<sup>5</sup> The World Professional Association for Transgender Health (“WPATH”) sets forth recommended criteria for doctors and courts to consider in providing transgender patient care, and offers guidelines to assist medical professionals in determining a transgender individual’s readiness for gender confirmation surgery, should that individual request it.<sup>6</sup> The sixth and final WPATH gender confirmation surgery criteria is that the individual spend “12 continuous months of living in a gender role that is congruent with their gender identity.”<sup>7</sup> This recommendation has become a significant barrier to transgender individuals seeking gender confirmation surgery while incarcerated due to lack of circuit consensus regarding whether incarcerated individuals are able to have real-life experience while in prison.<sup>8</sup>

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<sup>4</sup> See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (creating deliberate indifference doctrine to determine whether prisoners’ treatment is cruel and unusual).

<sup>5</sup> See Ethan Tieger, Note, *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, 628 (2014) (discussing gender identity disorder’s classification as serious medical need under Eighth Amendment); see also Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Vol. 7 WORLD PRO. ASS’N FOR TRANSGENDER HEALTH 1, 9-10 (2012) (listing several forms of necessary treatment for transgender individuals). “Some patients may need hormones, a possible change in gender role, but not surgery; others may need a change in gender role along with surgery, but not hormones. In other words, treatment for gender dysphoria has become more individualized.” *Id.* at 9; see also *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (holding prisons may be required to provide gender confirmation surgery under Eighth Amendment).

<sup>6</sup> See Coleman et al., *supra* note 5, at 60 (publishing general steps followed in progression of transgender individuals’ care).

<sup>7</sup> See *id.* at 60-61 (listing recommended pre-treatment steps transgender people should fulfil before undergoing gender confirmation surgery). WPATH recommends that candidates meet the following six criteria before undergoing sexual reassignment surgery:

- 1) persistent, well documented gender dysphoria; 2) capacity to make a fully informed decision and to consent for treatment; 3) age of majority in 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 hormones are not clinically indicated for the individual); and 6) 12 continuous months of living in a gender role that is congruent with their gender identity.

See *id.* at 61.

<sup>8</sup> See *Campbell v. Kallas*, 936 F.3d 536, 540 (7th Cir. 2019) (denying prisoner gender confirmation surgery on basis of lack of real-life experience while incarcerated), *rev’d* *Campbell v.*

The twelve-month real-life experience recommendation is a vague and undefined test that is difficult to apply in prison settings.<sup>9</sup> This issue is exacerbated by the fact that the Federal Bureau of Prison's ("BOP") policies leave a significant amount of room for judicial interpretation regarding the WPATH recommendations in determining the necessary level of care to incarcerated transgender individuals.<sup>10</sup> Because courts often defer to the Department of Corrections ("DOC") employees' medical judgments—who lack a rigid test to apply—an incarcerated person's request for transitional gender-related medical treatment can be prolonged and denied for many years, having a significant negative impact on the individual's mental health.<sup>11</sup> In fact, transgender individuals are often not granted permission to receive gender confirmation surgery until it becomes apparent to officials that the individual's mental health is so poor that the individual will likely suffer irreparable negative consequences, such as suicide or self-mutilation, should the individual further be denied surgery.<sup>12</sup> Denying gender confirmation surgery

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Kallas, No. 16-cv-261-jdp, 2020 WL 7230235 (W.D. Wis. Dec. 8, 2020). The 2019 *Campbell* court determined that real-life experience was impossible in a prison setting due to prisoner's inability to have a "meaningful opportunity" to integrate their gender identity into a "successful life." *Campbell*, 936 F.3d at 539-40 (justifying court's decision based on lack of social adjustment one can experience while incarcerated). *But see* *Edmo v. Corizon, Inc.*, 935 F.3d 757, 788 (9th Cir. 2019) (granting gender confirmation surgery to prisoner regardless of twelve-month real-life experience recommendation). The 2019 *Edmo* court considered a strict adherence to the twelve-month experience recommendation to be in direct contradiction to the instructions set forth in the WPATH standards of care. *Edmo*, 935 F.3d at 789 (stressing importance of flexibility in applying WPATH recommendations).

<sup>9</sup> See Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 ARCHIVES OF SEXUAL BEHAVIOR 1649, 1656 (2016) (discussing historical approach to evaluating the twelve-month test in prison); see also Travis Cox, Comment, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 345-46 (2009) (noting definition of real-life experience recommendation is completely determined by medical provider's discretion).

<sup>10</sup> See *Medical Management of Transgender Inmates: Federal Bureau of Prisons Clinical Guidance*, FEDERAL BUREAU OF PRISONS, at 19, <https://perma.cc/R5QW-UAHQ> (December 2016) (requiring twelve months of full-time real-life experience in individual's preferred gender).

<sup>11</sup> See *Meriwether v. Faulkner*, 821 F.2d 408, 414 (7th Cir. 1987) ("[A] federal court should defer to the informed judgement of prison officials as to the appropriate form of medical treatment."); see also *Campbell*, 2020 WL 7230235, at \*3 (describing *Campbell*'s efforts to undergo gender confirmation surgery lasting over seven years); Anna Glezer et al., *Transgendered and Incarcerated: A Review of the Literature, Current Policies and Laws, and Ethics*, 41 J. AM. ACAD. PSYCHIATRY & L. 551, 554 (2013) (revealing how official's bias can negatively impact medical care decision-making). The general lack of guidance on how to apply the standards of care to transgender prisoners has allowed for "a tacit discrimination against the population" to arise in the form of strict adherence to standards the prison deems unattainable, often leading to an increased sense of depression and suicidal ideation. See *id.* at 553-54 (describing how bias can worsen mental health problems by improperly denying necessary medical care).

<sup>12</sup> See *Edmo*, 935 F.3d at 769, 772 (granting gender confirmation surgery only after plaintiff's multiple suicide and self-castration attempts); see also *Campbell*, 2020 WL 7230235, at \*9 (giving significant weight to severity of plaintiff's mental anguish when granting gender confirmation

on the basis that one cannot have real-life experience while in prison, often done so with an admitted understanding of the mental health risks to the plaintiff, pushes the bounds of what is acceptable under the Eighth Amendment's deliberate indifference standard.<sup>13</sup>

Maintaining a view that an individual cannot obtain real-life experience while incarcerated poses a serious threat to a transgender individual's access to a medically necessary procedure and their overall mental health.<sup>14</sup> The dangers presented by denying gender confirmation surgery on the basis that a WPATH recommendation is unachievable in a prison setting not only conflicts with the intent of the WPATH standards of care, but also directly contravenes what is permitted under the Eighth Amendment's deliberate indifference test.<sup>15</sup> This Note seeks to critique certain circuits' application of WPATH's twelve-month real-life experience recommendation and advocate for reform or abolition of this test in determining an incarcerated transgender individual's readiness for gender confirmation surgery.<sup>16</sup>

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surgery); *see also* *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (deciding against gender confirmation surgery requests when plaintiff is determined mentally stable).

<sup>13</sup> *See Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (holding denial of care to prisoner's serious medical needs constitutes wanton infliction of pain); *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (finding plausible Eighth Amendment violation when prison officials ignored plaintiff's requests for gender confirmation surgery). The court in *De'lonta* held that dismissal of the plaintiff's Eighth Amendment claim was improper when prison guards repeatedly failed to act despite plaintiff's self-harm and suicide attempts. *See id.* at 526 (clarifying Eighth Amendment requires adequate provision of care, not just some level of care).

<sup>14</sup> *See Campbell v. Kallas*, 936 F.3d 536, 541 (7th Cir. 2019) (describing consequence of adhering to DOC's view on achievability of real-life experience). The DOC acknowledged an "... inherent difficulty for any inmate to meet eligibility requirements for gender reassignment surgery while in prison—specifically, the need for a valid real-life experience in the desired gender role." *Id.* at 541 (asserting DOC does not have de facto ban on gender confirmation surgery); *see also Edmo*, 935 F.3d at 769 ("Gender dysphoria is a serious but treatable medical condition. Left untreated, however, it can lead to debilitating distress, depression, impairment of function, substance use, self-surgery to alter one's genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.").

<sup>15</sup> *See Coleman et al.*, *supra* note 5, at 67 (stressing applicability of WPATH standards of care to all transgender individuals); *Osborne & Lawrence*, *supra* note 9, at 1654 (discussing possibility of abolition of real-life experience requirement for incarcerated individuals); *see also Estelle*, 429 U.S. at 104 (finding deliberate indifference test can be met if prison doctors fail to treat prisoner's needs).

<sup>16</sup> *See* discussion *infra* Part II, III (contextualizing issues surrounding twelve-month real-life experience recommendation); *see analysis infra* Part IV (stressing how real-life experience requirement violates the Eighth Amendment).

## II. HISTORY

### A. *The Eighth Amendment and Deliberate Indifference*

The founders of the United States Constitution enshrined the right to be free from “[e]xcessive bail,” “excessive fines,” and “cruel and unusual punishment.”<sup>17</sup> These constitutional principles have evolved in application, with the Supreme Court of the United States’ goal being to preserve human decency for all, regardless of a person’s status as incarcerated or institutionalized.<sup>18</sup> Moreover, the Court has emphasized that cruel and unusual punishment standards are meant to evolve with the maturing of society.<sup>19</sup> Punishments considered cruel and unusual are those that are either so excessive that they inflict an unnecessary and wanton infliction of pain, so cruel that they no longer serve as a deterrent method for crime, or so harsh that they deny an incarcerated individual of basic necessities, such as medical care.<sup>20</sup>

In the seminal case *Estelle v. Gamble*,<sup>21</sup> which established the constitutional right for incarcerated individuals to have access to necessary medical care, the Supreme Court set forth a two pronged test to adjudicate claims based on the deliberate indifference of prison officials: 1) the claimant must have a serious medical need, and 2) the failure to treat that serious medical

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<sup>17</sup> See U.S. CONST. amend. VIII (codifying protections for incarcerated individuals).

<sup>18</sup> See *Brown v. Plata*, 563 U.S. 493, 510 (2011) (establishing rationale for prohibiting cruel punishment is to maintain human dignity); Thomas E. Robins, Article, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PENN ST. L. REV. 885, 900-02 (2015) (providing historical overview of Eighth Amendment jurisprudence).

<sup>19</sup> See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (mandating punishment must be exercised within bounds of civilized standards). The Court explained that civilized standards are those that reflect the maturing of society. See *id.* at 101-02 (claiming punishment is not civilized when it inflicts extreme anguish on incarcerated); *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (recognizing establishing lack of “static” precedent for what is considered cruel and unusual).

<sup>20</sup> See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (defining excessiveness under Eighth Amendment), rejected in part, *Graham v. Connor*, 490 U.S. 386, 387 (1989) (stating excessive force test under Fourth Amendment differs from Eighth Amendment); *Trop*, 356 U.S. at 111 (prescribing punishment as purposeful to deterrence). The punishment cannot be so cruel and unusual that it excommunicates the prisoner to the point they are driven back to unlawful behavior as a result of deprivation of their basic rights. See *Trop*, 356 U.S. at 111 (holding provision of basic rights is essential in effective punishment and crime reduction); *Brown*, 563 U.S. at 511 (establishing deprivation of prisoner’s medical care, among other basic necessities, is incompatible with human dignity); see also Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1217-18 (2004) (noting Eighth Amendment protects against most egregious violations regarding living conditions and medical treatment).

<sup>21</sup> 429 U.S. 97 (1976).

need was purposeful.<sup>22</sup> In order to have an actionable claim, the alleged violation must exceed negligence or an inadvertent failure on behalf of the prison to provide adequate medical care.<sup>23</sup> Notably, the Court indicated that a “doctor’s choosing the ‘easier and less efficacious treatment’” may run afoul of the Eighth Amendment should it be in contravention with professional medical judgment.<sup>24</sup>

Since *Estelle*, courts have interpreted the deliberate indifference doctrine in a variety of ways, expanding upon the original ideas set forth in *Estelle* and attempting to maintain the spirit of the Eighth Amendment: that all persons are to be treated with dignity.<sup>25</sup> Some of these developments include that prisoners’ medical care must be specifically tailored to the cause of the ailment, rather than the symptoms resulting from the ailment.<sup>26</sup> Additionally, medical treatment must be delivered promptly and delivered in consideration of future health risks to the patient.<sup>27</sup> In developing a future-oriented model of the deliberate indifference standard, courts have held that prison guards must have disregarded an obvious risk of imminent harm to the patient or failed to protect them from future medical issues correlated to the current injury.<sup>28</sup> Deliberate indifference demonstrated by the failure to

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<sup>22</sup> See *id.* at 106 (establishing objective and subjective elements to deliberate indifference test). The Court noted that the deliberate indifference standard is applicable to both prison doctors who respond to a prisoner’s needs, as well as prison guards who may intentionally delay or deny adequate access to medical care. See *id.* at 104-05.

<sup>23</sup> See *id.* at 105 (requiring prison conduct to be more than negligent to qualify as wanton infliction of pain). “It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.” *Id.* at 106; see also *Farmer v. Brennan*, 511 U.S. 825, 826 (1994) (holding actions may qualify as deliberately indifferent if less than purposeful).

<sup>24</sup> See *Estelle*, 429 U.S. at 104 n.10 (clarifying care must be adequate rather than most simple or available) (citing *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)).

<sup>25</sup> See sources cited *infra* notes 26, 27 (providing additional examples of prohibited conduct under Eighth Amendment).

<sup>26</sup> See *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001) (distinguishing treatment of poor mental health from treatment of causes of depression). “While [trans[gender] plaintiff prescribed Prozac for depression] may have received some medical attention in prison, there is a fact question as to whether [plaintiff] received any treatment for transsexualism.” See *id.*; see also *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) (requiring fact specific and particularized treatment to inmate claiming Eighth Amendment violation).

<sup>27</sup> See *Ancata v. Prison Health Serv.*, 769 F.2d 700, 704 (11th Cir. 1985) (“[I]f necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out.”); *Baze v. Rees*, 553 U.S. 35, 49 (2008) (“Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”); *Roe v. Elyea*, 631 F.3d 843, 858 (7th Cir. 2011) (“[T]he Eighth Amendment ‘protects [an inmate] not only from deliberate indifference to his or her *current* serious health problems, but also from deliberate indifference to conditions posing an unreasonable risk of serious damage to *future* health.’”) (emphasis in original) ) (quoting *Board v. Farnham*, 394 F.3d 469, 479 (7th Cir. 2005)).

<sup>28</sup> See *Petties*, 836 F.3d at 729 (discussing correlation between risk and deliberate indifference). If a risk from a lack of a medical treatment is obvious enough, prison officials can be held

protect is also evident when prison officials pursue courses of treatment known to be ineffective at treating the relevant medical need or inexplicably delay effective treatment.<sup>29</sup>

*B. The Twelve-Month Real-Life Experience Requirement through the WPATH Standards of Care, the Harry Benjamin Standards of Care, and the Bureau of Prison's Medical Management of Transgender Prisoners*

The WPATH standards of care are recommendations and treatment plans designed to provide clinical guidance to medical providers who treat transgender and gender nonconforming individuals.<sup>30</sup> The standards of care have evolved from the Harry Benjamin standards of care to stress that gender confirmation surgery is a necessary treatment for some individuals, and that being transgender, by itself, is not a medical disorder.<sup>31</sup> The WPATH standards of care focus on gender affirming treatments that seek to alleviate negative feelings resulting from an individual's gender dysphoria.<sup>32</sup> The WPATH and Harry Benjamin standards of care differ in that WPATH recommendations are intended to be flexible and individualized for each patient, whereas the Harry Benjamin standards of care emphasize a strict adherence to the proffered eligibility requirements.<sup>33</sup> This difference is most evident

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liable as having both knowledge of the risk and disregarding it. *See id.* (implying prison officials need only constructive knowledge of inmate's medical needs); *see also* *Wade v. Haynes*, 663 F.2d 778, 782 (8th Cir. 1981) (holding ignorance of obvious medical need must be more than negligent to constitute Eighth Amendment violation).

<sup>29</sup> *See Petties*, 836 F.2d at 729-30 (warning courts to give deference to imminence of further harm in evaluation of treatment's efficacy).

<sup>30</sup> *See* *Coleman et al.*, *supra* note 5, at 1 (describing composition and purpose of WPATH Standards of Care).

<sup>31</sup> *See* *Walter Meyer III M.D. et al., Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders*, 5 INT'L J. OF TRANSGENDERISM 1 (2001) (postulating mental and behavioral characteristics of being transgender as "mental disorder"); *cf.* *Coleman et al.*, *supra* note 5, at 6 (stressing transgender people are not disordered, but rather experience distress from gender dysphoria).

<sup>32</sup> *See* *Coleman et al.*, *supra* note 5, at 1 (describing standards' purpose as maximizing individuals' "overall health, psychological well-being, and self-fulfillment"). Gender dysphoria is the discomfort or stress caused by a discrepancy between one's gender identity and their sex assigned at birth. *See id.* at 2 (differentiating between gender dysphoria and being transgender).

<sup>33</sup> *See* *Coleman et al.*, *supra* note 5, at 2 (noting standards of care are designed to be flexible). The WPATH standards of care permit individual health care professionals to modify the recommendations programs so that they can be adapted to suit a patient's environment or other medical needs. *See id.* (claiming lack of one-size-fits-all solution to transgender patient care); *cf.* *Meyer III M.D. et al.*, *supra* note 31, at 20 (promoting completion of all eligibility requirements before undergoing gender confirmation surgery). While the Harry Benjamin standards of care state its recommendations are a flexible consensus for the psychiatric, psychological, and surgical management of the transgender community, the procedures required in order to fulfill the eligibility



regarding the twelve-month real-life experience requirement for eligibility for gender confirmation surgery: WPATH requires twelve months of presenting in the desired gender role to allow for a range of different life experiences, whereas Harry Benjamin requires documented proof by a physician that the patient has fully adopted their new gender role by taking several steps, including maintaining full or part-time employment and providing documentation that someone other than the therapist is aware of the individual's transition.<sup>34</sup> Most importantly, the WPATH standards of care specify that its recommendations can be fulfilled by any individual, including those living in an institutionalized setting, such as prison.<sup>35</sup>

The Bureau of Prisons (“BOP”) sets its own clinical guidelines on transgender inmates’ medical management and prioritizes individualized treatment plans that work towards the consolidation of the prisoner’s gender identity.<sup>36</sup> The 2016 guidelines adopt the WPATH standards of care recommendations when determining a transgender prisoner’s readiness for gender confirmation surgery.<sup>37</sup> However, the BOP guidelines fail to specify what actually qualifies as real-life experience while incarcerated, and the 2018 prison housing policy instituted under President Donald Trump—disallowing prison placement based on gender identity—created significant new challenges to an incarcerated transgender person’s ability to gain real-life

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requirements are far more stringent than those required by WPATH. *See id.* (specifying steps required before undergoing gender confirmation surgery).

<sup>34</sup> *See* Coleman et al., *supra* note 5, at 61 (explaining what qualifies as real-life experience). The WPATH standards of care prioritize an individual live for twelve months in their desired gender role so that they may have ample opportunity to socially adjust to their desired gender role before undergoing irreversible surgery. *See id.* (providing rationale for requiring twelve-month real-life experience recommendation); *cf.* Meyer III M.D. et al., *supra* note 31, at 17-18 (establishing how twelve months of real-life experience should be evaluated by health care providers). Emphasizing the clinical importance of this requirement, the Harry Benjamin standards of care require that the individual fully adopt the new gender role by accomplishing the following within a twelve-month period: 1) to maintain full or part time employment, 2) to function as a student or volunteer, 3) the acquisition of a new, gender appropriate legal name, and 4) provide documentation that persons other than the therapist are aware the individual functions in a gender role other than the one congruent with their sex assigned at birth. *See id.* (articulating what qualifies as real-life experiences).

<sup>35</sup> *See* Coleman et al., *supra* note 5, at 67 (“These standards of care apply to transgender individuals irrespective of their housing situation, including their institutional environments, such as prisons or long-/intermediate-term health care facilities.”).

<sup>36</sup> *See* Bureau of Prisons, *supra* note 10, at 6 (discussing how transgender individuals require individualized medical treatment based on patient’s desired goals).

<sup>37</sup> *See id.* at 19 (noting need for twelve months of real-life experience for gender confirming surgery); *see also* Julie Moreau, *Bureau of Prisons rolls back Obama-era transgender inmate protections*, NBC (May 14, 2018, 2:19 PM), <https://perma.cc/J2XL-6X8R> (stressing 2016 BOP guidelines are merely recommendations not legally binding on prisons).

experience that consolidates their gender identity.<sup>38</sup> This is because correctional facilities often design its job programs, clothing, and educational programs around the biological sex assigned its designated to house.<sup>39</sup> Additionally, because prisons are organized around the traditional gender binary, male and female, transgender people become hyper-aware of their bodies, as they are housed in an institution incongruent with their gender identity.<sup>40</sup> This housing policy has a significant impact on a transgender prisoner's urgency and ability to obtain gender confirmation surgery due to the fact that as soon as their genitalia matches their gender identity, they will be transferred to an institution where not only they are more comfortable, but will

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<sup>38</sup> See Bureau of Prisons, *supra* note 10, at 3 (focusing on vague multidisciplinary approach to providing healthcare to transgender prisoners); see also Change Notice from Mark S. Inch from the U.S. Dep't of Just. to the Fed. Bureau of Prisons Transgender Offender Manual (May 11, 2018) (striking language allowing for housing based off gender identity). The Department of Justice added language to their manual that requires transgender individuals to be housed firstly according to their biological sex, with a focus on overall prison safety. See *id.* at 2; see also Kaid Ray-Tipton, *Transgender and Incarcerated: Revised Bureau of Prisons Guidance Could Compromise Safety of Transgender Inmates* (Jan. 9, 2019), <https://perma.cc/GX7A-N7YC> (discussing FBI's housing policy effect). Transgender advocates view this policy as a direct attack on the safety and well-being of transgender prisoners due to the high rates of sexual, physical, and mental violence transgender prisoners experience from both by fellow prisoners and prison guards. See *id.* (describing dangers of housing transgender individuals based of biological sex). This policy's goal was to articulate a ". . . balance of safety needs of transgender inmates as well as other inmates, including those with histories of trauma, privacy concerns, etc., on a case-by-case basis . . .". Moreau, *supra* note 36 (justifying housing practice by focusing on safety and privacy concerns of cis-gendered prisoners). The 2018 housing policy is currently under review by the Department of Justice under President Biden. See Michael Balsamo & Mohamed Ibrahim, *Justice Department reviewing policies on transgender inmates*, THE BOSTON GLOBE, <https://perma.cc/C58U-MSSA> (last updated Sept. 17, 2021, 6:29 AM) (suggesting possible return to Obama-era housing polices based off gender identity).

<sup>39</sup> See Darren Rosenblum, Article, "*Trapped*" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 526-28 (2000) (outlining gendered divisions in prisons). The extreme gender binarism of prison organization acts as an "iron curtain" between the resources and opportunities available in an institution a transgender prisoner may be housed in based off biological sex, and the one in which they can more accurately obtain real-life experience in based off gender identity. See *id.* at 528 (discussing psychological effects of living in prison structured by biological sex); see also Jerry Metcalf, *A Day in the Life of a Prisoner*, THE MARSHALL PROJECT (July 12, 2018, 10:00 PM), <https://perma.cc/F9R8-PVTL> (describing day of work, classes, and interpersonal interactions for prisoners).

<sup>40</sup> See Victoria Patrickson, *A 'Double Punishment': Placement and protection of transgender people in prison* (Sept. 30, 2020), <https://perma.cc/8NEJ-72F6> (describing prisons' values, norms, and practices as congruent with either male or female); see also Peek, *supra* note 20, at 1217-18 (discussing mental perception of transgender person's view of their own medical condition). For transgender individuals seeking gender confirmation surgery, incarceration can feel like a "double imprisonment," as they are both held in prison and trapped in a body that does not align with their gender identity. See Rosenblum, *supra* note 39, at 506 (analyzing cruel nature of housing transgender individuals according to biological sex).

also likely be subjected to less physical and sexual abuse from prison guards and other prisoners.<sup>41</sup>

C. *The Twelve-Month Real-Life Experience Requirement from a Clinical Perspective*

The twelve-month real-life experience recommendation is the final evaluative method in determining an individual's readiness to undergo gender confirmation surgery, which is traditionally the last surgically invasive medical procedure to treat someone's gender dysphoria.<sup>42</sup> The purpose of

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<sup>41</sup> See Moreau, *supra* note 37 (reporting on reactions to new prison housing policy). Mara Keisling, executive director of the National Center for Transgender Equality, called the Trump administration housing policy inhumane, noting ". . . extreme rates of physical and sexual violence faced by transgender people in our nation's prisons is a stain on the entire criminal justice system." *Id.* (condemning likelihood of increased violence against transgender prisoners from new policy). The Prison Rape Enforcement Act, passed in 2003, mandated a study on gender-based violence in prisons and discovered that transgender prisoners were the most high-risk group out of all demographics studied to experience sexual violence while incarcerated. See *id.* (supporting proposition 2018 housing policy is dangerous to transgender individuals); see also Osborne & Lawrence, *supra* note 9, at 1654 (illustrating unfeasibility of obtaining real-life experience in prison setting incongruent with gender identity). Some medical experts argue obtaining real-life experience in a prison housing a gender different than the gender identity of the prisoner would not effectively prepare them for what life in that gender role would be like should they undergo gender confirmation surgery. See Osborne & Lawrence, *supra* note 9, at 1656 (highlighting challenges of housing policy on ability to obtain accurate real-life experience).

If [a transgender woman] were to undergo [gender confirmation surgery], they would almost certainly be assigned thereafter to women's prisons, where their lives would immediately become dramatically different. Living in a female-typical role in a men's prison could not effectively prepare them for this. There is no way for inmates to know, first hand and in advance, what life in a woman's prison would be like.

*Id.*

<sup>42</sup> See Colman et al., *supra* note 5, at 58 (outlining prerequisite medical treatments to gender confirmation surgery); see also Stephanie Rudolph, Comment, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 EMORY INT'L L. REV. 95, 114-18 (2021) (recommending alternative treatment plans based on other countries' approach to transgender medical treatment).

In 2013, the American Psychiatric Association (APA) adopted the term 'gender dysphoria' as a diagnosis characterized by a 'marked incongruence between' an individual's gender identity and sex assigned at birth. However, not every transgender person has gender dysphoria and '[t]ranssexual, transgender, and gender-nonconforming individuals are not inherently disordered.' The APA has set forth two conditions that must be met to diagnose a person with gender dysphoria. First, there must be a 'marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration.' This marked incongruence can be manifested in a variety of ways, including 'a strong desire to be rid of one's primary and/or secondary sex characteristics,' which include a person's breasts or chest, external and/or internal genitalia, facial features, body hair, and voice. Second, the condition must be 'associated with clinically

the twelve-month real-life experience recommendation is to provide transitioning individuals an opportunity to live fully and openly in their desired gender role for a year so that they feel affirmed in their decision before undergoing an irreversible surgery.<sup>43</sup> There is no conclusive legal, medical, or scientific evidence that the twelve-month real-life experience recommendation actually produces greater satisfaction in patients who complete it before undergoing gender confirmation surgery.<sup>44</sup>

### III. FACTS

Transgender prisoners have long relied on the Eighth Amendment as a basis to advocate for their right to gender affirming care.<sup>45</sup> Unlike other medical claims, however, courts often give significant deference to prison officials' treatment plans for transgender inmates and have been reluctant to adopt treatment plans that often progress a transgender prisoner's gender consolidation.<sup>46</sup> Additionally, competing medical testimonies regarding the

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significant distress or impairment in social, occupational, or other important areas of functioning.'

See Rudolph, *supra*, at 98-99; see also Osborne & Lawrence, *supra* note 9, at 1653 (“[Sexual reassignment surgery] is demonstratively effective in treating [gender dysphoria], especially genital anatomic [gender dysphoria] in community populations . . . and plausibly also in prison populations.”).

<sup>43</sup> See Coleman et al., *supra* note 5, at 60-61 (contextualizing intent behind recommendation); Meyer III M.D. et al., *supra* note 31 (considering requirement for fully adopting new gender role for everyday life); Glezer, et al., *supra* note 11, at 553 (reviewing triadic sequence as “public” transition to new gender role). The triadic sequence of an individual’s transition requires 1) changes in gender expression, 2) hormone therapy, and 3) gender confirmation surgery. See Glezer, et al., *supra* note 11, at 553.

<sup>44</sup> See Osborne & Lawrence, *supra* note 9, at 1656 (highlighting debate about whether “requirement has much practical or prognostic relevance for inmates.”); Stephen Levine, *Real-Life Test Experience: Recommendations for Revisions to the Standards of Care of the World Professional Association for Transgender Health*, 11 INT’L J. OF TRANSGENDERISM 186, 191 (2009) (“It is important for all to realize that there is no scientific evidence to support or refute the [real-life experience test] and that the scientific limitations of research on the outcomes of [gender confirmation surgery] are quite formidable.”).

<sup>45</sup> See Sarah Halbach, Comment, *Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care*, 105 J. CRIM. L. & CRIMINOLOGY 463, 474 (2015) (“[T]ransgender prisoner plaintiffs have turned to the Eighth Amendment to argue that a deprivation of hormone therapy and [gender confirmation surgery] constitutes cruel and unusual punishment.”); see also Jordan Rogers, Note, *Being Transgender Behind Bars in the Era of Chelsea Manning: How Transgender Prisoners’ Rights Are Changing*, 6 ALA. C.R. & C.L. L. REV. 189, 195 (2015) (noting courts found prisoners have constitutional right to gender affirming care in some circumstances).

<sup>46</sup> See Yvette Bourcicot & Daniel Woofert, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 283, 294 (2016) (comparing treatment of medical needs unrelated to transitioning with transgender related medical care). Courts have been more willing to adopt a treatment plan for transgender prison care that is easier or less effective

definition of real-life experience is often sufficient to refute a plaintiff's claim that their medical care is inadequate under the Eighth Amendment.<sup>47</sup> The combination of these two factors can lead circuit courts to convolute the application of the WPATH real-life experience requirement and use it as a tool to prevent gender confirmation surgery for incarcerated transgender individuals.<sup>48</sup>

#### A. *The First Circuit*

In *Kosilek v. Maloney* and *Kosilek v. Spencer*, Kosilek was and still remains a incarcerated transgender woman who has been fighting for access to gender-affirming care while incarcerated since 2002.<sup>49</sup> *Kosilek v. Maloney* highlights Kosilek's first attempts at receiving gender-affirming care in prison, where despite the prison's denial of her request for hormone therapy, the court found Kosilek's medical care adequate under the Eighth Amendment.<sup>50</sup> In 2012, Kosilek brought suit requiring the Massachusetts DOC to provide her with gender confirmation surgery, which was granted after the court determined that the DOC's proffered "prison safety" reasons were a pretextual basis to deny her gender confirmation surgery and that her care was inadequate under the Eighth Amendment.<sup>51</sup> In considering Kosilek's

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so long as it is within the bounds of mainstream practice, even if the plan conflicts with a doctor's recommendation. *See id.* at 297 (articulating lack of application of deliberate indifference standard to specifically transgender medical needs).

<sup>47</sup> *See Kosilek v. Spencer*, 774 F.3d 63, 88 (1st Cir. 2014) (rejecting Eighth Amendment violation due to "reasonable" differences in medical approach to real life experience); *Campbell v. Kallas*, 936 F.3d 536, 545 (7th Cir. 2019) (allowing minimum level of care under Eighth Amendment due to lack of medical consensus).

<sup>48</sup> *See* sources and discussion *infra* Part IV (magnifying different approaches to real-life experience and effect on access to necessary medical care).

<sup>49</sup> *See Kosilek v. Maloney*, 221 F. Supp. 2d 156, 159 (D. Mass. 2002) (showing genesis of Kosilek's legal battle in receiving gender-affirming care). In the 2002 case, Kosilek sought hormone therapy to treat her gender dysphoria. *See id.* at 159 (providing reason for cause of action); *see Kosilek v. Spencer*, 889 F. Supp. 2d 190, 196 (D. Mass. 2012) (initiating legal proceedings to obtain gender confirmation surgery).

<sup>50</sup> *See Kosilek*, 221 F. Supp. 2d at 158-59 (demonstrating Harry Benjamin Standards of Care in action as applied to incarcerated individuals). When Kosilek was admitted to prison, the facility only provided "supportive therapy" to cope with the mental distress resulting from her gender dysphoria, rather than medical care that aided her in her transition, due to the rigid freeze frame policy instituted at the time. *See id.* at 159, 161, 166 (defining policy as maintaining care at same level as when individual was incarcerated).

<sup>51</sup> *See Kosilek*, 889 F. Supp. 2d at 198 (summarizing reasons for reversing denial of gender confirmation surgery).

The district court found that the DOC's proffered security concerns were 'pretextual' because they were 'not reasonable and made in good faith.' Instead, it found, the DOC denied the surgery to avoid 'public and political criticism.' To support these findings,

twelve months of real-life experience, the court looked to the WPATH standards of care and determined that she had completed the recommendation while in prison because she had lived a full year while taking female hormones.<sup>52</sup> This determination hinged on Kosilek's life sentence; because Kosilek will never be released from prison, experts formulated their own real-life experience recommendation, and found that Kosilek was provided with ". . . an awareness of what to expect in a different gender role" by undergoing hormone therapy and other feminizing treatments while incarcerated.<sup>53</sup> Additionally, the district court found the prison's denial of gender confirmation surgery was a violation of Kosilek's Eighth Amendment rights, based both on the severity of her gender dysphoria, which, if left untreated, could result in serious harm to her, and the DOC's failure to provide adequate care to treat that medical need in the form of gender confirmation surgery.<sup>54</sup>

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the district court relied on evidence of [the DOC's] long history of conduct aimed at avoiding the provision of care to transgender inmates. Among other things, it found that . . . [the DOC] took the 'unprecedented' step of directly hiring a social worker who was known to oppose the provision of [gender confirmation surgery] to inmates to peer review the report prepared by the DOC's own physicians.

*See* Petition for Writ of Certiorari at \*11-12, *Kosilek v. O'Brien*, 2015 WL 1201365 (No. 14-1120) (arguing how district court determined Kosilek's initial denial of gender confirmation surgery was pretextual).

<sup>52</sup> *See Kosilek*, 889 F. Supp. 2d 201, 219, 232 (postulating real-life experience could be achieved in prison despite contrary medical testimony); *see also* Petition for Writ of Certiorari, *supra* note 51, at \*10-11 (discussing court's adoption of WPATH standards of care).

The district court found that [gender confirmation surgery] offered the only adequate treatment for Ms. Kosilek's GID. The court concluded that 'the Standards of Care continue to describe the quality of care acceptable to prudent professionals who treat individuals suffering from gender identity disorders,' and that the treatment plan recommended by the DOC's expert witness, Dr. Schmidt - continued access to estrogen therapy and female clothing, plus psychotherapy - failed to comply with those standards.

*See* Petition for Writ of Certiorari, *supra* note 51, at \*10-11.

<sup>53</sup> *See Kosilek*, 889 F. Supp. 2d at 235 (loosening twelve-month real-life experience requirement to suit Kosilek's institutionalization). The doctors argued that Kosilek had life experience that was even more stringent than a non-prisoner because ". . . inmates are constantly under observation and any failure to live as a woman would be readily noted." *Id.* at 235. The court contextualized Kosilek's real-life experience by saying, "For someone like Kosilek who is serving a life sentence without the possibility of parole, prison is, and always will be, his [her] real life." *Id.* at 232; *see also* *Kosilek v. Spencer*, 774 F.3d 63, 73 (1st Cir. 2014) (reviewing lower court's determination Kosilek completed twelve-month experience recommendation).

<sup>54</sup> *See Kosilek*, 889 F. Supp. 2d at 229-31 (articulating how denying Kosilek's gender confirmation surgery constitutes deliberate indifference to serious medical need). The court noted that medical experts warned the DOC several times that there was a risk of suicide and self-harm if they did not provide gender confirmation surgery to treat Kosilek's gender dysphoria, and therefore, knew she was at a substantial risk of harm. *See id.* at 238 (establishing DOC's knowledge of serious medical need).

The court issued injunctive relief and ordered that Kosilek be provided gender confirmation surgery “as promptly as possible.”<sup>55</sup>

Sitting en banc, the United States Court of Appeals for the First Circuit reversed the district court’s 2012 decision and stated it erred in holding Kosilek’s care inadequate under the Eighth Amendment because although Kosilek did not receive the desired gender confirmation surgery, she was not deprived of the standard of care constitutionally required for prisoners.<sup>56</sup> The court extensively investigated the appropriateness of gender confirmation surgery for Kosilek, taking testimony from several medical experts which generally conflicted around one topic: Kosilek’s ability to have real-life experience while in prison.<sup>57</sup> The court provided testimony from Dr. Levine, one author of the fifth version of the WPATH standards of care, who critiqued the district court’s finding that real-life experience could be had in prison due to the fact that the provision was “. . . designed to test the patients’ capacity to function as a female in the community by mastering the demands of . . . family, social relationships, educational accomplishment, and vocational experience.”<sup>58</sup> The doctors considered other factors in Kosilek’s inability to have real-life experience while incarcerated, such as her living in a single-sex environment thus limiting her ability to gain social interactions integral to a real-life experience, as well as her lack of exposure to stressors and choices she would normally be exposed to living in the outside world.<sup>59</sup> Ultimately, the First Circuit reasoned the district court inappropriately made an inferential leap when determining Kosilek could obtain real-life experience while incarcerated and decided to not require the provision of gender

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<sup>55</sup> See *id.* at 251 (issuing order for relief for plaintiff, Kosilek).

<sup>56</sup> See *Kosilek*, 774 F.3d at 68 (providing overview of issue on appeal).

<sup>57</sup> See *id.* at 73-77 (evaluating conflicting medical testimony regarding Kosilek’s mental health and readiness for surgery). The doctors presented on behalf of Kosilek opined that incarceration should not be used as a barrier to the full and adequate treatment of someone’s gender dysphoria, especially if the treatment is deemed to be medically necessary. See *id.* at 73. Alternatively, doctors offered by the DOC testified that real-life experience could not be achieved in prison as it is designed to include “. . . a range of social and vocational experiences unavailable in a penological setting,” despite their acknowledgement that Kosilek’s mental anguish would likely increase should she be further denied gender confirmation surgery. See *id.* at 77.

<sup>58</sup> See *id.* at 78 (taking testimony recommending Kosilek’s gender-affirming treatment be stopped just short of gender confirmation surgery). Notably, when Dr. Levine was asked if the court should provide gender confirmation surgery should it be conclusively determined Kosilek did obtain real-life experience while incarcerated, Dr. Levine acknowledged that a medical professional would not deny a necessary surgery to an eligible individual. See *id.* at 79 (implying twelve-month real-life experience test as integral factor reversing district court’s order).

<sup>59</sup> See *id.* at 88 (illustrating lack of medical, judicial, and penological consensus regarding meaning of “real-life experience”).

confirmation surgery because the court felt her mental state was stabilized with hormone therapy and other feminizing gender affirming care.<sup>60</sup>

*B. The Seventh Circuit*

In the Seventh Circuit, Nicole Campbell, formally known as Mark Campbell, is a woman incarcerated in a men's prison for a sentence of thirty-four years who suffers from severe gender dysphoria.<sup>61</sup> In 2019, Campbell filed a claim of deliberate indifference to her serious medical needs based on her denial of gender confirmation surgery.<sup>62</sup> The suit, *Campbell v. Kallas*, was initiated after the DOC wholly denied Campbell's request for gender confirmation surgery despite an outside medical expert determining that Campbell was a potential surgical candidate, so long as the prison developed a workable solution to the twelve-month real-life experience requirement.<sup>63</sup>

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<sup>60</sup> See *id.* at 88-90 (reasoning why Kosilek's medical treatment did not amount to Eighth Amendment violation). The court stated, "Prudent medical professionals, however, do reasonably differ in their opinions regarding the requirements of a real-life experience- and this reasonable difference in medical opinions is sufficient to defeat Kosilek's argument." *Id.* at 88. In determining the DOC's lack of deliberate indifference, the Court interpreted the first prong of the standard formulated in *Estelle*, that the prisoner have a serious medical need, to apply only when the harm faced by the prisoner due to the challenged deprivation of care is worsened by the lack of treatment. See *id.* at 89 (rationalizing deprivation of medically necessary procedure by considering future risk of harm to Kosilek). Because the First Circuit determined Kosilek was less depressed due to the provision of hair removal, hormone therapy, women's clothing, and anti-depressants by the DOC, the court did not find an Eighth Amendment violation. See *id.* at 96 (creating standard requiring showing severe risk of harm rather than mere medical necessity). The First Circuit did note that if a clear risk of future harm developed in the future, evidenced by suicide attempts or self-mutilation, that harm may sustain an Eighth Amendment violation, however, the court found that that was not the case. See *id.* at 90; see also Kane Levings, Note, *Cruel and Unusual Punishment: The Invisible Ban on Sex-Reassignment Surgery for Transgender Inmates*, 17 J. HEALTH & BIOMED. L. 67, 88 (2020) (arguing court confuses "clearly established right" with what was medically necessary for transgender prisoners).

<sup>61</sup> See *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019) (explaining cause of action). Campbell began her request for gender confirmation surgery in 2013, after being imprisoned in 2008 in a men's prison. See *id.* at 540-42 (stating timeline regarding plaintiff's request for surgery).

<sup>62</sup> See *id.* at 542. In 2019, Campbell filed suit alleging an Eighth Amendment violation regarding her denial of gender confirmation surgery in 2019. See *id.* (alleging DOC officials were indifferent to her serious medical needs); see also Corrinne Hess, *Wisconsin Inmate Wins Federal Sexual Reassignment Surgery Case*, WISCONSIN PUBLIC RADIO (Dec. 17, 2020, 6:05 AM), <https://perma.cc/Y4VC-ZQDX>. (providing timeline regarding Campbell's gender-affirming medical treatment requests).

<sup>63</sup> See *Campbell*, 936 F.3d at 538 (citing DOC reasons for denial of care); see also *Campbell v. Kallas*, No. 16-cv-261-jp, 2020 WL 7230235, at \*5 (W.D. Wis. Dec. 8, 2020) (referencing original findings by DOC to illustrate factual history of case).

The DOC declined to provide the surgery because, under DOC policy, she was unable to satisfy WPATH criteria number six, which is sometimes referred to as the 'real-life experience.' The DOC decision was not based on an individualized assessment



Because the twelve-month real-life experience recommendation was the prohibiting factor in granting Campbell's request, the court of appeals focused its analysis on determining her ability to complete this recommendation by looking to the WPATH standards of care.<sup>64</sup> After hearing medical testimony from gender dysphoria experts, the court was persuaded by arguments that safety played a large role in the prison's inability to formulate a real-life experience that provided Campbell with an opportunity to socially adjust to her desired gender role.<sup>65</sup> This decision was despite competent medical testimony articulating that Campbell had already completed twelve months of real-life experience, finding that the purpose of the real-life requirement is to test the patient's consistency and resolve in their gender consolidation over time.<sup>66</sup> Stating that no reasonable, qualified medical provider could conclude otherwise, one medical expert determined Campbell completed the recommendation by relying on her wearing feminine clothing, hairstyles, and makeup, as well as her utilization of "typically female speech patterns, speech intonation, posture and mannerisms."<sup>67</sup> The medical experts

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Campbell; it was a matter of formal DOC policy. 'Due to the limitations inherent in being incarcerated, a real-life experience for the purpose of gender-reassignment therapy is not possible for inmates who reside within a correctional facility. However, treatment and accommodations may be provided to lessen gender dysphoria.'

*See Campbell*, 2020 WL 7230235, at \*5.

<sup>64</sup> *See Campbell*, 936 F.3d at 539 (acknowledging application of WPATH standards of care to incarcerated peoples). The court also noted the standards of care do not provide an alternative to, exception to, or concrete approach to achieving the twelve-month real-life experience requirement while incarcerated. *See id.* at 539. Alternatively, the DOC looked to the policies set forth by its Gender Dysphoria Committee, noting that transgender prisoners are entitled to certain lifestyle accommodations, such as hormone therapy, psychotherapy, and other "treatment that may be deemed medically necessary" by the Committee. *See id.* at 540 (providing methods of care offered by DOC to treat gender dysphoria).

<sup>65</sup> *See id.* at 541 ("[Dr. Cynthia Osborne] noted that 'there is no empirical evidence on which the DOC can rely in its efforts to predict outcomes, prevent harm[,] and maintain safety' in developing a real-life experience for Campbell."). The court noted it was understandable that the DOC refused Campbell's surgery out of a "[r]eluctance to embark on a social experiment." *Id.*

<sup>66</sup> *See Expert Opinion Regarding Nicole Campbell Kathy Oriel MD, MS, Campbell v. Kallas*, 2017 WL 9674022, at \* 9 (W.D. Wis. Oct. 2017) (No. 16-cv-261) (arguing WPATH purpose is simplicity and flexibility). Dr. Oriel relayed to the Court that while prior versions of the standards of care explicitly required twelve months of real-life experience, the operative version of the WPATH standards of care recommend a more flexible standard of ". . . living continuously for at least 12 months in a gender role that is congruent with their gender identity." *See id.* at 9; *see also* Coleman et al., *supra* note 5, at 60 (publishing reduced standard for real-life experience in seventh version of WPATH standards of care).

<sup>67</sup> *See Expert Opinion Regarding Nicole Campbell Kathy Oriel MD, MS, supra* note 65, at \*10 (observing Campbell's consolidation of gender identity).

considered Campbell's thirty-four-year sentence when they approved her completion of the twelve-month requirement.<sup>68</sup>

Despite the court's acknowledgement that successfully completing the twelve-month real-life experience recommendation presents a formidable obstacle to gender confirmation surgery while in prison, the court found Campbell was not clinically ready for gender confirmation surgery, and as such, there was no Eighth Amendment violation on the prison's behalf.<sup>69</sup> In its Eighth Amendment analysis, the court rejected Campbell's argument that the prison was deliberately indifferent to her medical needs by pursuing a course of treatment known to be ineffective to treat gender dysphoria.<sup>70</sup> The court countered Campbell's argument by stating that prison officials face liability only when their course of treatment is a substantial departure from professional judgment.<sup>71</sup>

In 2020, seven years after Campbell's initial request for gender confirmation surgery, the district court granted her request.<sup>72</sup> When the district court reevaluated the appellate court's finding that real-life experience could not be had in prison, it focused on whether this recommendation was truly a valuable tool in predicting success post gender confirmation surgery rather

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<sup>68</sup> See Expert Report of Felicia Levine, LCSW, *Campbell v. Kallas*, 2017 WL 9674021, at \*7 (W.D. Wisc. Oct. 16, 2017) (No. 16-cv-261) (noting institution life will be Campbell's real-life for a significant period).

<sup>69</sup> See *Campbell*, 936 F.3d at 541 (“[There is an] inherent difficulty for any inmate to meet eligibility requirements for gender reassignment surgery while in prison—specifically, the need for a valid real-life experience in the desired gender role.”).

<sup>70</sup> See *id.* at 547-48 (referencing Campbell's claims of deliberately indifferent treatment). The course of ineffective treatment referenced by Campbell was the repeated denial of her request for gender confirmation surgery, as well as other feminizing treatments such as hair removal electrolysis and makeup based upon the prison's conclusion that such treatments were not medically necessary. See *id.* at 542-43 (demonstrating prison's lack of regard for Campbell's medically necessary needs).

<sup>71</sup> See *id.* at 545 (“A prison medical professional faces liability only if his course of treatment is ‘such a substantial departure from accepted professional judgment, practice, or standards[ ] as to demonstrate that the person responsible actually did not base the decision on such a judgment.’”) (quoting *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 988 (7th Cir. 1998)). This standard is low, requiring merely that no minimally competent medical professional would have responded similarly under the same facts. See *id.* at 545 (relying on lack of medical consensus to justify providing less gender affirming care as adequate). The court overlooked the deliberate indifference test established in *Estelle* by stating the proper prospective inquiry into deliberate indifference claims is if there is a constitutional right to gender affirming care beyond hormone therapy. See *id.* at 549 (rejecting inadequate medical care claim because gender confirmation surgery is not a constitutional right).

<sup>72</sup> See *Campbell v. Kallas*, No. 16-cv-261-jdp, 2020 WL 7230235, at \*9 (W.D. Wis. Dec. 8, 2020) (ordering relief due to violation of Campbell's Eighth Amendment right by denying gender confirmation surgery); see also Hess, *supra* note 62 (reporting on reactions to district court's approval of Campbell's surgery).

than how this recommendation could be achieved while incarcerated.<sup>73</sup> This analysis was crucial in the district court's finding that gender confirmation surgery was medically necessary for Campbell, because in determining that the requirement was merely a test of resolve to a transitioning person's commitment to a new gender role, it effectively removed an evaluative barrier to Campbell's surgery.<sup>74</sup> This also influenced the court's determination that the DOC was deliberately indifferent to Campbell's medical needs, citing that the DOC knew her symptoms of gender dysphoria would not remit without surgery and, in light of that knowledge, erroneously relied on the real-life experience test as a way to institute a blanket ban on gender confirmation surgery for transgender prisoners.<sup>75</sup> The court found that prison officials consciously disregarded an effective form of treatment to Campbell's serious medical need and that no reasonable professional who specialized in gender dysphoric care would have concluded similarly with the prison.<sup>76</sup> In granting Campbell the requested relief, she will not only be provided with gender

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<sup>73</sup> See *Campbell*, No. 16-cv-261-jdp, 2020 WL 7230235, at \*4-6 (reviewing medical expert opinion regarding value of real-life experience test to an incarcerated person's transition).

The third important explanation concerned the purpose of the real-life experience and the need for that requirement among incarcerated persons. Osborne testified that the real-life experience was a common-sense practice based more on tradition than any science. She was aware of no systematic evidence that completion of a real-life experience led to better outcomes . . . [and] she acknowledged that departures from the requirement of the real-life experience might be appropriate in an individual case, particularly among incarcerated persons.

*Id.* at \*6.

<sup>74</sup> See *id.* (holding surgery necessary for Campbell due to WPATH's fulfillment of purpose requirement).

Osborne testified that the purpose of the real-life experience was to ensure the patient's commitment to the gender transition and to confirm that the patient could adjust to life in the new gender role without aggravating psychological problems such as depression or creating new ones . . . Campbell's . . . gender dysphoria had an early onset, well before incarceration. And she has demonstrated resolute commitment to gender transition, having lived, to the fullest extent possible, as a woman in male prisons for years. I find that Campbell suffers from severe unremitting anatomical gender dysphoria. Her gender dysphoria is a serious medical need, for which sex reassignment surgery is the only effective treatment.

*Id.*

<sup>75</sup> See *id.* at \*8 (holding prison officials committed Eighth Amendment violation). "The reason defendants denied Campbell's request is clear: DOC policy flatly prohibited [gender confirmation surgery] for inmates. The policy cited the inability to achieve a real-life experience in prison as the basis for the rule. But this determination was not based on any assessment of Campbell's needs." *Id.* at \*7 (stressing de facto bans on medically necessary treatment are unconstitutional on state and federal levels).

<sup>76</sup> See *id.* at \*7 (using professional standards as way to evaluate medial judgment of prison official's denial of care).

confirmation surgery, but will also be moved from a men's prison to a women's prison where she will be able to consolidate her gender identity even more effectively and reduce her mental anguish resulting from her gender dysphoria.<sup>77</sup>

### C. *The Ninth Circuit*

In 2019, the Ninth Circuit held in *Edmo v. Corizon, Inc.*,<sup>78</sup> that a prison violated the Eighth Amendment when it failed to provide gender confirmation surgery to Edmo, a prisoner with severe gender dysphoria.<sup>79</sup> In determining Edmo's readiness for gender confirmation surgery, the DOC postulated that Edmo had not fulfilled the real-life experience recommendation because she did not experience "living as a woman" around "her real social network" of family and friends, which was partly attributed to her being housed in a men's prison.<sup>80</sup> In her defense, Edmo's medical experts argued that the DOC's medical testimony should be discredited because it blatantly misinterpreted the WPATH standards of care to be inapplicable to institutionalized individuals.<sup>81</sup> While the *Edmo* court did not focus as heavily on the twelve-month real-life experience requirement as the First and Seventh circuits did due to the blatant medical necessity of the procedure, as evidenced by Edmo's self-castration attempts, it did conclude that Edmo satisfied the requirement anyway because she lived for years in her "target gender role . . . despite an environment that's very hostile to that."<sup>82</sup> The court found the DOC could be held deliberately indifferent to Edmo's medical

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<sup>77</sup> See *id.* at \*9 (issuing order for relief and discussing effect of surgery on Campbell's housing placement).

<sup>78</sup> 935 F.3d 757 (9th Cir. 2019).

<sup>79</sup> See *Edmo*, 935 F.3d at 772-73 (describing severity of condition that lead to Edmo's cause of action). The need for gender confirmation surgery was evidenced by the fact that Edmo's poor mental health was attributed predominantly to the lack of congruence between her gender identity and physical body. See *id.* at 772 (clarifying gender affirming care short of gender confirmation surgery inadequately treated Edmo's medical needs).

<sup>80</sup> See *id.* at 774, 779 (providing DOC's interpretation of WPATH real-life experience requirement).

<sup>81</sup> See *id.* at 789 (determining strict adherence to twelve-month requirement in direct contradiction to WPATH's standards of care).

<sup>82</sup> See *id.* at 790 (adopting view assigning transgender prisoners based off biological sex exposes plaintiff to heightened negative consequences). The court established that Edmo lived as a woman to the best of her ability because she wore her hair in a feminine way, was undergoing hormone therapy, and wore female undergarments. See *id.* (citing medical testimony which determined requirement was fulfilled due to physical and social transition).

needs because it pursued a course of treatment that was ineffective and it disregarded a substantial risk of harm to her well-being.<sup>83</sup>

Although a petition for an en banc rehearing of the 2019 decision was denied, “Judge Diarmuid F. O’Scannlain and several other judges who favored full-court review said the [three judge] panel erred in relying on the standards of care of the [WPATH] in determining that surgery was necessary” for Edmo.<sup>84</sup> By delegitimizing the WPATH standards of care by suggesting its writers were merely advocates, the dissenting judges concluded that Edmo’s care was not in violation of the Eighth Amendment.<sup>85</sup> The

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<sup>83</sup> See *id.* at 793 (exercising two-pronged deliberate indifference analysis). The court established that prison officials knew of Edmo’s clinically significant gender dysphoria because of her blatant distress and attempts at self-castration. See *id.* at 793 (listing factors that contributed to officials’ knowledge). Edmo testified that she felt “depressed, embarrassed, [and] disgusted” by her male genitalia on a daily basis. *Id.* at 772. Despite this knowledge, the prison continued with an ineffective treatment plan of providing only hormone therapy and feminizing treatments. See *id.* at 793 (re-emphasizing provision of some medical treatment alone does not mean treatment was adequate).

<sup>84</sup> See Peter Hayes, *Ruling Recognizing Inmate’s Right to Gender Confirmation Stands*, BLOOMBERG L. (Feb. 10, 2020, 3:01 PM), <https://perma.cc/R4XV-47SM> (establishing main contentions against 2019 *Edmo* decision); see also *Edmo v. Corizon, Inc.*, 949 F.3d 489, 495 (9th Cir. 2020) (delegitimizing WPATH standards of care by declaring they have no constitutional basis or support).

One would be forgiven for inferring from the panel’s opinion that its bold assertions about the WPATH Standards are uncontroverted truths. But, as the Fifth Circuit has recognized, ‘the WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery.’ *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019). For its part, the First Circuit, sitting en banc, has likewise held that ‘[p]rudent medical professionals . . . do reasonably differ in their opinions regarding [WPATH’s] requirements.’ *Kosilek*, 774 F.3d at 88. Our court should have done the same. The WPATH standards are merely criteria promulgated by a controversial private organization with a declared point of view. According to Dr. Stephen Levine, author of the WPATH Standards’ fifth version, former Chairman of WPATH’s Standards of Care Committee, and the court-appointed expert in *Kosilek*, WPATH attempts to be ‘both a scientific organization and an advocacy group for the transgendered. These aspirations sometimes conflict.’ *Id.* at 78. Sometimes the pressure to be advocates wins the day. . . Only about half of the Revision Committee possesses a medical degree. The rest are sexologists, psychotherapists, or career activists, with a sociologist and a law professor rounding out the group.

*Edmo*, 949 F.3d at 497.

<sup>85</sup> See *Edmo*, 949 F.3d at 500 (“So long as the ultimate treatment *choice* was medically acceptable, our precedents tell us, we cannot infer ‘the unnecessary and wanton infliction of pain’ that violates the Eighth Amendment.”). The dissenting judges disregarded the persistence of Edmo’s severe gender dysphoria and instead rested their argument on the belief that deliberate indifference cannot be established simply by a doctor taking a course of action that differs slightly from one that a doctor in similar circumstances would take. See *id.* at 504 (“The Eighth Amendment forbids the ‘unnecessary and wanton infliction of pain,’ not the ‘difference of opinion between a physician and the prisoner—or between medical professionals.’”) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

judges expressed their concern that the ruling in the 2019 Edmo case set up a new, significantly lower standard to establish a deliberate indifference claim, saying that “[I]nstead of reserving the Eighth Amendment for the grossly, unjustifiably reckless, the panel infers a culpable state of mind from the supposed inadequacy of the treatment.”<sup>86</sup> Despite the views published in the 2020 opinion, Edmo was able to move forward with her gender confirmation surgery and the Ninth Circuit became the first circuit to provide gender confirmation surgery under the Eighth Amendment.<sup>87</sup>

#### IV. ANALYSIS

The haphazard evolution of policies coming from the DOC, as well as the lack of medical consensus surrounding the twelve-month real-life experience requirement, will continue to be a significant barrier to the access of necessary medical procedures for transgender prisoners unless addressed by the Supreme Court.<sup>88</sup> It is evident that political and prejudicial attitudes are prevalent throughout the DOC and court systems that prolong, challenge, and bar transgender prisoners from accessing the care they need.<sup>89</sup> Moreover, because state legislatures are often explicitly excluded from making policy decisions regarding medical care in penological institutions, private prisons have significant discretion in designing and implementing medical

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<sup>86</sup> *Id.* at 504 (contesting notion inadequate treatment could also be grossly or unjustifiably reckless).

<sup>87</sup> See Hayes, *supra* note 84 (announcing outcome of denial to rehear Edmo’s case en banc).

<sup>88</sup> See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 171 (D. Mass. 2002) (citing to blanket ban on hormone therapy due to DOC freeze frame policy); *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019) (acknowledging lack of existing framework to establishing real-life experience); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 790 (9th Cir. 2019) (relaxing real-life experience requirement in light of mental health concerns); see also *Inch*, *supra* note 38 (changing DOC housing policies to one based solely off biological sex).

<sup>89</sup> See *Petition for Writ of Certiorari, Kosilek v. O’Brien*, No. 14-1120, 2015 WL 1201365, at \*11-12 (stating DOC’s reasons for denial of care were pretextual). The district court critiqued the DOC’s security concerns, finding that they were merely a way of covering up the fact that the prison sought to avoid public and political criticism. See *id.* at 11-12 (demonstrating extent and effect of prejudice in provision of medical care in prisons); see also *Campbell*, 936 F.3d at 541 (referencing prison’s reluctance to embark on “social experiment”). One of the doctors noted that *Campbell*’s steps taken to transition to a woman would likely be sufficient should she live outside of a correctional facility. See *Expert Opinion Regarding Nicole Campbell*, Kathy Oriel M.D., M.S., *supra* note 65, at \*10 (postulating higher standard exists for prisoners in demonstrating completion of final WPATH standard, prolonging care); see also *Edmo*, 949 F.3d 498 at 495 (analyzing previous en banc review). The *Edmo* en banc review postulated that the WPATH standards of care were written by transgender advocates, alluding that the ruling was nothing more than a bending to a liberal political position rather than court precedent. See *Edmo*, 949 F.3d at 495 (revealing judicial division of legality regarding gender confirmation surgery in prison); see also *Glezer et al.*, *supra* note 11, at 553 (suggesting lack of clear application of real-life test breeds prejudice in medical decisions).

treatment plans that diverge from leading medical opinions regarding gender confirmation surgery.<sup>90</sup> These issues contributing to the real-life experience problem are exacerbated by the 2018 federal policy that houses transgender prisoners according to their biological sex, as it has notably impacted the ability of transgender prisoners to qualify for gender confirmation surgery by inhibiting their ability to actualize their gender.<sup>91</sup> This is significant, as courts often look to gender presentation and consolidation as a factor in determining whether someone has completed twelve months of real-life experience while incarcerated.<sup>92</sup>

Because the provision of gender confirmation surgery in prison is a contentious issue, there is currently no safeguard preventing either the formation of more stringent real-life experience tests from being employed by the DOC, or from courts disregarding and discrediting sound medical testimony due to lack of consensus or political connotations.<sup>93</sup> This lack of judicial safeguard will create larger variations between the circuits in terms of how courts evaluate real-life experience for transgender prisoners, and will

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<sup>90</sup> See Cox, *supra* note 9, at 347 (discussing need for state protection of transgender prisoners' health); see also Kosilek, 774 F.3d at 88-90 (relying on lack of medical consensus to justify inadequate treatment provided by DOC).

<sup>91</sup> See Change Notice, *supra* note 38 (revoking language that allowed DOC to consider gender identity when taking in transgender prisoners); see also Rosenblum, *supra* note 39, at 506 (evaluating problems that arise when transgender people are put into spaces divided by gender binary). By placing someone who identifies as a woman in a men's prison because of their biological sex, the DOC has the power to deny the prisoner's request for proper undergarments, makeup, and hairstyles under the pretext of security concerns, effectively preventing them from "live[ing] their authentic life and actualizing their gender role in prison." See Rosenblum, *supra* note 39, at 550 (correlating housing policy with ability of transgender prisoners to advance gender affirming care); see also Patrickson, *supra* note 40 (espousing designations based on gender binary contribute to urgency and necessity of gender confirmation surgery). Much of this urgency and necessity comes from the sexual, mental, and physical violence experienced by transgender prisoners at the hands of other prisoners and correctional officers due to their gender identity. See Patrickson, *supra* note 40 (indicating gender confirmation surgery as necessary for both personal health and physical safety).

<sup>92</sup> See Expert Opinion Regarding Nicole Campbell, Kathy Oriol M.D., M.S., *supra* note 65, at \*10 (listing steps taken by Campbell to demonstrate consolidation of feminine identity); see also Edmo, 935 F.3d at 790 (testifying Edmo lived as woman as best as possible due to her feminine presentation).

<sup>93</sup> See Kosilek, 774 F.3d at 77 (hearing arguments from DOC). The DOC maintained Kosilek was not ready for surgery because the twelve-month real-life experience requirement demanded a variety of social and vocational experiences that could not be achieved while institutionalized. See *id.* at 77 (relying on DOC's own medical expert's interpretation of WPATH standards); see also Campbell, 936 F.3d at 540 (stipulating blanket policy that real-life experience is not possible by prison's Gender Dysphoria Committee); see also Edmo, 935 F.3d at 757 (interpreting real-life experience to mean having "real social network" of family and friends). The en banc court reviewing the decision in Edmo said "[t]he pressure to be advocates appears to have won the day." See Edmo, 949 F.3d at 497 (suggesting political opinions sway court decisions); see also Cox, *supra* note 9, at 347 (pinpointing origins of disparate interpretations of real-life experience test).

continue to fundamentally fragment and convolute the purpose behind the WPATH requirement.<sup>94</sup> While the Eighth Amendment serves as a protection against the denial of necessary medical care for incarcerated individuals, the deliberate indifference standard as applied to those in need of gender confirmation surgery has essentially substituted the first prong of the test—or the need to show a serious medical need—with a need to show a serious risk of irreversible harm, effectively reducing the Amendment’s protectionary impact.<sup>95</sup> Without action, courts have the ability to strictly enforce policy decisions centered around the twelve-month real-life experience requirement that result in per-se bans on the provision of medically necessary gender confirmation surgeries for incarcerated individuals.<sup>96</sup>

A. *Addressing Flaws in the Current Real-Life Experience Test*

Beyond the acknowledgment that overt bans against gender confirmation surgery are unconstitutional, the BOP and circuit courts have failed to implement a concrete way to ensure that institutionalization is not a bar to

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<sup>94</sup> See Coleman, et al., *supra* note 5, at 60-61 (describing purpose of real-life experience test to allow prisoners to socially adjust to new gender). Doctors have two main alternative views for how this test is meant to function for a transgender person seeking to undergo confirmation surgery: 1) that the twelve-month real-life experience period is a “test” of someone’s true identity as a transgender individual, determining that if they succeed in this twelve-month period, their trans identity is more valid than those who do not fare well living in their desired gender role, and 2) that the real-life experience recommendation provides an opportunity for the individual to see if they can successfully operate in their new gender role, with a focus on an assimilation to gender norms and happiness in relationships and sense of self. See Cox, *supra* note 9, at 346 (articulating two main perspectives influencing doctors’ evaluation of real-life experience recommendation). If courts or prisons lean towards the first purpose of the test, then transgender prisoners will be subjected to more particularized and rigorous standards for achieving the sixth recommendation of the WPATH standards of care. See *Campbell*, 936 F.3d at 541 (determining readiness for surgery hinged on having a “valid” real-life experience); see also Osborne & Lawrence, *supra* note 9, at 1656 (suggesting current version of WPATH requirement is “entirely up to an individual’s interpretation”).

<sup>95</sup> See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); see also *Estelle v. Gamble*, 429 U.S. 97 (1976) (introducing two-pronged test to evaluate medical claims under Eighth Amendment); *Edmo*, 949 F.3d at 772 (overlooking need for concrete determination of real-life experience due to Edmo’s suicidal actions).

<sup>96</sup> See Levings, *supra* note 60, at 87 (“The DOC has maintained an invisible ban on [gender confirmation surgery] by not amending their policies to allow for transgender inmates to successfully fulfill the year requirement under the WPATH standards.”). Knowing that statutory bans are blatantly unconstitutional, “. . . allowing the practice of denying [gender confirmation surgery] when it has been diagnosed and proven to be the only effective treatment for a specific individual is an invisible ban, and therefore unconstitutional.” *Id.* (concluding setting unachievable requirements for surgery equivalent to unconstitutional per-se ban on necessary medical treatment).



undergoing gender confirmation surgery.<sup>97</sup> In doing so, both courts and prison officials have crafted real-life experience tests that either harken back to the Harry Benjamin Standards of Care by employing stringent requirements unattainable in a penological setting, or tests that utilize vague, ambiguous markers that allow for medical disagreement.<sup>98</sup> This is seen in the First Circuit's en banc decision to reverse Kosilek's granting of gender confirming surgery on the grounds she would never be able to achieve the "range of social and vocational experiences" required by the real-life experience test because those experiences were not available in an institutionalized, binary gendered environment.<sup>99</sup> It can also be seen in the Seventh Circuit, where the court determined, in cohesion with proffered security concerns, a valid real-life experience was not possible because transgender prisoners will not be able to consolidate their gender into a "successful life."<sup>100</sup> It can even be seen in the Ninth Circuit's interpretation of the real-life experience test as applied in *Edmo*, which evaluated the achievement primarily on a full range of "different life experiences and events that may occur throughout the year."<sup>101</sup>

The rationale for requiring a range of vocational, social, and familial experiences as a prerequisite for gender confirmation surgery is to see how the individual reacts to stressors and difficult choices they would need to make in a noninstitutionalized setting.<sup>102</sup> However, requiring evidence of employment and functionality in family dynamics completely overlooks the fact that incarcerated individuals do engage in social and vocational

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<sup>97</sup> See Coleman et al., *supra* note 5, at 9 (stressing applicability of standards to all individuals regardless of institutionalization); see also Campbell v. Kallas, No. 16-cv-261-jp, 2020 WL 7230235, at \*5 (condemning DOC's policy against provision of gender confirmation surgery).

<sup>98</sup> See Meyer III M.D. et al., *supra* note 31 (itemizing pre-requisites to accessing gender confirmation surgery). Some pre-requisites mandated by the Harry Benjamin Standards of Care include documented proof of functionality in a professional or volunteer position and success in sexual relationships. See *id.* (providing examples of conditions unachievable while incarcerated); see also Campbell v. Kallas, 936 F.3d at 540 (postulating real-life experience cannot be achieved while incarcerated because it is not "successful life").

<sup>99</sup> See Kosilek v. Spencer, 774 F.3d 63, 71 (1st Cir. 2014) (rationalizing denial of care by pointing to housing as unworkable barrier to achieving real-life experience). Medical testimony offered at the 2014 hearing bolstered the argument that real-life experience could not be had in a single-sex environment by stating that Kosilek did not have, and could not have, the ability to master vocational or social demands as a female in her community. See *id.* at 78 (articulating idea all real-life experience consists of vocational, social, and familial experiences).

<sup>100</sup> See Campbell, 936 F.3d at 540 (agreeing with DOC'S medical testimony suggesting real-life experience is not had unless successful or meaningful).

<sup>101</sup> See *Edmo*, 935 F.3d at 771 (boiling down requirement to essentially living one year on hormone therapy).

<sup>102</sup> See Kosilek, 774 F.3d at 88 (suggesting lack of stressors in prison falls short of those experienced by outside world).

experiences on a daily basis.<sup>103</sup> Moreover, mandating this specific type of experience not only ignores the fact that prisoners with long sentences may only experience prison life, but also undermines prisoners' legitimate attempts to consolidate their gender through means within their control, such as physical appearance.<sup>104</sup> By adopting such a stringent real-life experience test that is insurmountable, the court is essentially reverting back to the freeze frame policies established under the Harry Benjamin Standards of Care and the 2002 Guidelines for the Mental Health Treatment of Inmates with Gender Identity Disorder by enacting a per-se ban on gender confirmation surgery.<sup>105</sup> A correct approach to these arbitrary tests can be seen in *Edmo*, where the court explicitly rejected the DOC's argument that real-life experience could not be achieved while incarcerated due to Edmo's lack of living in her consolidated gender identity around her social network of family and friends.<sup>106</sup> Cohesively, the vague determination that a valid real-life experience is only one that is "successful" is in clear contravention to the WPATH standards of care, which establishes the real-life experience requirement is merely meant to be a period of gender consolidation.<sup>107</sup>

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<sup>103</sup> See Metcalf, *supra* note 39 (describing day in prison as "incredibly full"). In addressing claims that prison is nothing but boredom, Metcalf describes a day that includes his job of counseling another inmate, taking care of his service dog, writing emails, exercising, teaching writing classes, speaking with family on the phone, and watching television. *See id.*

<sup>104</sup> See *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 165 (D. Mass. 2002) (noting Kosilek's attempts to live as a woman in a men's prison). By feminizing her voice, styling her clothes in a more feminine way, and growing her hair long, Kosilek did all she could without medical intervention to actualize her gender. *See id.*

<sup>105</sup> See *Kosilek*, 221 F. Supp. 2d at 171 (looking to guidelines written by DOC). The 2002 guidelines determined that there were no opportunities for real-life experience while in prison because security concerns did not permit inmates to function as members of the opposite sex in vocational and social settings. *See id.* (indicating explicitly that gender confirmation surgery was not possible in prison); *see also* Meyer III et al., *supra* note 31 (publishing standards of care that did not advocate for advancement of gender affirming care); *cf.* Coleman et al., *supra* note 5, at 67 (advocating for accommodations so transgender care in prisons mirrors outside world).

<sup>106</sup> See *Edmo*, 935 F.3d at 788 (rejecting argument that gender actualization only valid if performed for those within one's social group); *cf.* Coleman et al., *supra* note 5, at 30 ("Changing gender roles can have profound personal and social consequences, and the decision to do so should include an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be, so that people can function successfully in their gender role.").

<sup>107</sup> See Coleman et al., *supra* note 5, at 68 ("Reasonable accommodations to the institutional environment can be made in the delivery of care consistent with the [standards of care], if such accommodations do not jeopardize the delivery of medically necessary care to people with gender dysphoria."); *see also* Cox, *supra* note 9, at 354 (evaluating different purposes of real-life experience test). By enacting a test that is predicated on testing the validity of someone's trans identity, the court reverts back to initial, controversial purposes of the requirement. *See* Cox, *supra* note 9, at 354 (using test as way to determine who was legitimately transgender); *see also* Osborne & Lawrence, *supra* note 9, at 1651 (analyzing history of real-life experience requirement as vetting technique). When the real-life experience test was first employed in the 1970s, it was used as a tool to address the controversial nature of gender confirmation surgery by deemphasizing the

Moreover, such a marker of real-life experience offers no real metrics of measurement, leading to a prolonged denial of care and a worsening of the prisoner's mental conditions.<sup>108</sup>

The 2012 *Kosilek* court, aligning more closely to the WPATH standards of care, determined *Kosilek* had completed the triadic sequence and should be granted gender confirmation surgery because she had lived for twelve months while taking feminizing hormones, determining that *Kosilek*'s thirty-four-year long prison sentence experience as a transgender person was effectively her real life.<sup>109</sup> While this decision was unfortunately overturned due to *Kosilek*'s mental stability, it was similar to the evaluations employed at the appellate level in *Campbell* and *Edmo*: the court in *Campbell* stated it made an erroneous error in denying her surgery by invalidating the seriousness of her mental health needs and the length of her prison sentence, and the *Edmo* court acknowledged the necessity of gender confirmation surgery due to her multiple self-castration attempts.<sup>110</sup> The court, in evaluating *Edmo*'s severely deteriorating mental well-being, gave weight to the housing policies based on biological sex, factoring in that the requirement was satisfied due to her living in her target gender role “. . . despite an environment that's very hostile to that and some negative consequences that she has experienced because of that.”<sup>111</sup> While the court relaxed the standard for achieving the real-life experience test in *Campbell*'s and *Edmo*'s cases, the Ninth Circuit set a dangerous precedent in evaluating an individual's readiness for surgery based on overcoming adversity.<sup>112</sup> By evaluating real-life

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diagnosis of “transgenderism.” See Osborne & Lawrence, *supra* note 9, at 1655 (relating requirement to time when being transgender was considered a medical disorder by itself). The rationale was that by forcing transgender individuals to demonstrate and document economic, social, psychological, and even sexual success during the one year period, those who qualified for surgery were those who were considered having the best chances of success post-operation. See *id.* at 1655-56.

<sup>108</sup> See *Campbell v. Kallas*, No. 16-cv-261-jp, 2020 WL 7230235, at \*9 (granting relief from severity of mental anguish due to genital-based dysphoria); see also *Edmo*, 935 F.3d at 790 (documenting many months of self-harm).

<sup>109</sup> See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 201, 219, 232, 235 (D. Mass. 2012) (establishing basic approach to determining completion of triadic sequence).

<sup>110</sup> See Levings, *supra* note 60, at 92 (critiquing court for denying care clearly medically necessary to *Campbell*). *Campbell*'s persistent and severe gender dysphoria was overlooked in favor of adhering to a strict interpretation of the WPATH standards of care. See *id.* (subjecting *Campbell* to lifelong mental distress due to lack of enumerated exception); *Edmo*, 935 F.3d at 790 (reducing requirement due to blatant pressing need for gender confirmation surgery).

<sup>111</sup> See *Edmo*, 935 F.3d at 790 (insinuating real-life experience is especially considered when gained in a hostile environment).

<sup>112</sup> See Patrickson, *supra* note 40 (discussing risks of housing transgender individuals according to biological sex). Denying *Edmo*'s surgery kept her hyperaware of her incongruent body parts, not only playing a significant factor in her repeated attempts at self-castration, but placed her in a situation where she is more susceptible to violence at the hands of other prisoners and correctional

experience in light of successfully consolidating gender in a hostile environment, the *Edmo* court interpreted the standards of care to be applied in a way that induces “. . . a sense of desperation that may lead to depression and suicidality.”<sup>113</sup> Moreover, this type of policy intentionally subjects prisoners to a known risk of future harm, and could constitute an Eighth Amendment violation.<sup>114</sup>

*B. Risk of Lowering Eighth Amendment Standards to Permit Cruel and Unusual Punishment*

In repeatedly denying gender confirmation surgery requests and finding no Eighth Amendment violations, courts often ground their decisions by stating that there is no clearly established legal right to gender confirmation surgery.<sup>115</sup> Courts have used both the lack of enumerated constitutional provisions regarding gender affirming care and the lack of medical consensus regarding the application of the sixth WPATH recommendation as a rationale to push the boundaries of what constitutes ineffective treatment under the deliberate indifference test, regressing the standards of what is deemed cruel and unusual.<sup>116</sup> This problem is worsened when actors within the DOC

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officers. *See id.* (theorizing proof of real-life experience completion should not be determined on successful navigation of adversity).

<sup>113</sup> *See* Glezer et al., *supra* note 11, at 553 (warning courts to not hinder access to medically necessary treatments).

<sup>114</sup> *See* Petties v. Carter, 836 F.3d 722, 729-30 (7th Cir. 2016) (including future risks of harm and inexplicable delays in treatment as Eighth Amendment violations).

<sup>115</sup> *See* Campbell v. Kallas, 936 F.3d 536, 548 (7th Cir. 2019) (considering Campbell’s claims of deliberate indifference). Before overturning the decision in 2020, the district court held prisons had qualified immunity against Campbell’s claims of deliberate indifference because the right to gender confirmation surgery is not clearly established. *See id.* at 547 (adopting narrow application of Eighth Amendment deliberate indifference standards); *see also* Peek, *supra* note 20 (noting courts do not require gender confirmation surgery despite being necessary step in care).

<sup>116</sup> *See* Campbell, 936 F.3d at 548 (“Deciding whether a particular treatment plan was a ‘substantial departure from accepted professional judgment, practice, or standards’—a necessary predicate to establish an Eighth Amendment violation—requires a close examination of professional standards and the specific choices made by care providers.”) (quoting Sain v. Wood, 512 F.3d 886, 895 (7th Cir. 2008)). Campbell attempted to use this argument to advance her deliberate indifference claim, but the court found it to be unconvincing because the right to the requested type of gender affirming care was not well established. *See id.* at 547-48 (declining Eighth Amendment violation based on lack of professional and legal consensus); *see also* Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014) (reversing finding of deliberate indifference because Kosilek’s dysphoria was found unaffected by denial of care). The *Kosilek* court reasoned that “[p]rudent medical professionals . . . do reasonably differ in their opinions regarding the requirements of a real-life experience—and this reasonable difference in medical opinions is sufficient to defeat Kosilek’s argument.” *Id.* at 88. The court justified its rationale by stating it was not bound to choose the most compassionate treatment option when multiple viable medical treatments exist. *See id.* at 90-91 (emphasizing need for one clear test regarding real-life experience); *cf.* *Edmo v. Corizon, Inc.*, 935 F.3d 757, 793 (9th Cir. 2019) (holding deliberate indifference claim viable due to prison official’s

purposefully ignore obvious signs of prisoners' mental distress, as this directly causes delays in treatment for struggling individuals.<sup>117</sup> While previous caselaw establishes that prisoners are entitled to care that does not amount to a wanton infliction of pain, it is clear that transgender prisoners must demonstrate severe mental distress, and even self-mutilation, in order to be taken seriously in court.<sup>118</sup> Without exhibiting signs of depression, self-harm, or suicidal ideation, courts will unfortunately consider a prisoner "stabilized" and not truly in need of gender confirmation surgery, even if significant distress results from having body parts incongruent with the individual's gender identity.<sup>119</sup>

Denying requests for gender confirmation surgery until there is a demonstrated attempt to physically injure oneself is in direct contravention to the preservation of the decency of all individuals under the Eighth Amendment because it subjects prisoners to a clear risk of future harm.<sup>120</sup> The

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ignorance of plaintiff's "clinically significant" distress); *see also* Levings, *supra* note 60, at 87-88 (critiquing court's decision in *Campbell* for ignoring what was medically necessary for Campbell).

<sup>117</sup> *See Edmo*, 935 F.3d at 773 (conflating positive mood with good mental health). A year after her self-castration attempt, the medical providers evaluating Edmo reported that prison staff noted Edmo's behavior as "notable for animated effect and no observed distress." *See id.* at 773 (establishing incongruence between Edmo's mental health and DOC's perception of her well-being). Months later, Edmo attempted to castrate herself for a second time, reporting that she no longer wanted her testicles and was disappointed with the medical treatment she was receiving for her gender dysphoria. *See id.* at 774 (inferring ignorance or bias of medical needs of prisoners prolongs access to effective treatment); *see also* *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir. 1985) (holding delay of necessary medical care for non-medical reasons creates case for deliberate indifference).

<sup>118</sup> *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (affirming institutionalized individuals are protected from unnecessary and wanton infliction of pain); *see also Edmo*, 935 F.3d at 772-73 (noting need for advanced gender affirming care only after multiple attempts at self-castration); *Kosilek*, 774 F.3d at 90 (acknowledging although gender dysphoria was severe, suicidal ideation could be treated with alternatives to GCS); *see also* Bourcicot & Woofter, *supra* note 46, at 297 (suggesting courts permit inadequate transgender prisoner care based on prison physician recommendations). While many courts refuse to second guess doctors' treatment plans and professional medical opinions related to non-gender affirming care, in the case of transgender prisoners' medical care, a court is likely to uphold the prison's course of treatment over one suggested by a doctor outside of the DOC. *See* Bourcicot & Woofter, *supra* note 46, at 297 (highlighting historical double standard employed against transgender medical needs).

<sup>119</sup> *See Kosilek*, 774 F.3d at 90 (indicating mental stabilization diminishes urgency of gender affirming care). The *Kosilek* court stated that an Eighth Amendment claim may arise if it appears there is a clear risk of future harm through suicide attempts. *See id.* at 90; *cf.* *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (finding deliberate indifference when transgender individual was repeatedly denied surgery despite suicide attempts). The *De'lonta* court determined there was an Eighth Amendment violation because De'lonta's care inadequately treated the root causes of her suicidal ideation. *See De'lonta*, 708 F.3d at 526 (indicating "some treatment" is not necessarily "constitutionally adequate treatment") (emphasis in original).

<sup>120</sup> *See Brown v. Plata*, 563 U.S. 493, 510 (2011) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); *Baze v. Rees*, 553 U.S. 35, 49 (2008) (noting cruel and unusual punishment may exist when future risks of harm are not mitigated); *Petties v.*

courts should redefine the scope of adequate care which addresses the root issue—severe, genitalia-based gender dysphoria—rather than merely treating the depressive symptoms associated with it.<sup>121</sup> Without doing so, transgender individuals with a medically necessary need for gender confirmation surgery will be subjected to cruel punishments that do not reflect the “progress of a maturing of society” or its “evolving standards of decency.”<sup>122</sup> This problem could be addressed with a new approach and articulable standard with which to evaluate real-life experience while incarcerated.<sup>123</sup>

### C. Recommendations

Some scholars find the twelve-month real-life experience requirement an integral part of the transition process that should be applied to all transgender individuals seeking gender confirmation surgery.<sup>124</sup> However, many recognize that prison presents unique obstacles to obtaining traditional real-life experience and advocate for relaxing the requirement significantly or formulating new procedures that allow for the real-life experience opined for in the *Campbell* and *Kosilek* cases.<sup>125</sup> One significant way to address the

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Carter, 836 F.3d 722, 729 (7th Cir. 2016) (arguing deliberate indifference should include negligence to obvious risks). If a risk resulting from a lack of medical treatment is obvious enough and prison officials were aware of that risk, then it could be found that the second prong of the deliberate indifference test is fulfilled. See *Petties*, 836 F.3d at 729 (interpreting deference to imminent harm must be considered in judging deliberate indifference); see also *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981) (equating deliberate indifference to egregious, grossly negligent failures to protect against obvious risks of harm).

<sup>121</sup> See *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001) (distinguishing between depression symptoms treatment and cause of gender dysphoric depression for Eighth Amendment violation); see also *Rosenblum*, *supra* note 39, at 543-44 (“The vital importance of gender transformation for some transgendered people, faced with the refusal of authorities to attend to their gender identity issues, will likely continue to lead them to attempt to further their transformations themselves.”).

<sup>122</sup> See *Trop v. Dulles*, 356 U.S. 86, 101 (reflecting on punitive purpose of incarceration). The primacy of punishment as a deterrent for future crimes and retribution for past crimes no longer becomes effective when the individual is subjected to punishments that do not reflect the maturing of society or what is deemed civilized in the modern day. See *id.* (indicating punishment should consider modern day notions of civility in order to be effective); see also *Gregg v. Georgia*, 428 U.S. 153, 172-173 (1976) (stressing flexibility of what is deemed cruel and unusual as society matures).

<sup>123</sup> See *Levings*, *supra* note 60, at 90-91 (arguing for flexible approach to twelve-month real-life experience requirement).

<sup>124</sup> See *Bourcicot & Woofter*, *supra* note 46, at 307-12, 320-23 (stressing importance of experience and justifying safety concerns as reason to abridge gender expression).

<sup>125</sup> See *Rudolph*, *supra* note 42, at 95 (advocating for more equitable treatments for gender dysphoria while incarcerated); see also *Osborne & Lawrence*, *supra* note 9, at 1654 (suggesting requirement be offset by more stringent execution of other WPATH prerequisites); *Levings*, *supra* note 60, at 90 (arguing for flexible approaches to real-life recommendation); *Levine*, *supra* note 44, at 189 (acknowledging some medical professionals find one year of real-life experience too

lack of social and vocational opportunities—or real-life experience as designated by some circuit courts—could be to remove the “iron curtain” between men’s and women’s prisons.<sup>126</sup> In acknowledging transgender individuals have a difficult task in fighting for their gender identity while in prisons based around biological sex, some legal advocates suggest separate sex facilities should be partially consolidated to allow for greater life experiences.<sup>127</sup> Cohesively, while many vocational and social experiences already exist in prison, loosening the standard to an appellate level *Kosilek* evaluation would significantly reduce the mental suffering inflicted upon prisoners and preempt issues of deliberate indifference.<sup>128</sup>

While the test could be modified, completely waiving the real-life experience test for incarcerated individuals would create the greatest impact.<sup>129</sup> Fulfillment of this requirement produces no conclusive evidence that suggests it leads to greater satisfaction in prisoners post-gender confirmation surgery, especially in light of long sentences, and is therefore unnecessary.<sup>130</sup> Instead of a real-life experience that calls for demonstrated success in a range of social and vocational opportunities, medical experts suggest that longer periods of presenting as the opposite gender, hormone therapy, or

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long); *see also* Patrickson, *supra* note 40 (pointing to division of sexes as inhibiting factor in achieving real-life experience while incarcerated).

<sup>126</sup> *See* Rosenblum, *supra* note 39, at 528 (advocating for co-ed correctional activities). By allowing, at minimum, an intermingling of the genders in correctional institutions, resources and opportunities provided to all individuals would be shared, providing individuals with greater opportunities to actualize their gender. *See id.* (urging consolidation of resources from men’s and women’s prisons).

<sup>127</sup> *See id.* at 527 (suggesting categorical problem could be addressed by dividing cell blocks by ward rather than sex). Some of the major advantages to this plan would be options for closer proximity to prisoners’ families, similar vocational, recreational, educational, and social opportunities provided to both groups, and more efficient coordination of resources. *See id.*

<sup>128</sup> *See* Metcalf, *supra* note 39 (listing educational, social, and vocational experiences of day in prison); Peek, *supra* note 20, at 1219-20 (noting gender divided housing increases mental distress in transgender prisoners); Osborne & Lawrence, *supra* note 9, at 1656 (postulating living in men’s prison deprives trans women of knowledge of life in women’s prison); *see also* Patrickson, *supra* note 40 (discussing incongruence between prisoner’s identity and physical body makes them more susceptible to violence).

<sup>129</sup> *See* Osborne & Lawrence, *supra* note 9, at 1654 (suggesting requirement be waived for incarcerated individuals). While the real-life experience test is an integral part of the transition process for those living in noninstitutionalized settings, incarcerated individuals do not have the same range of social, vocational, and romantic opportunities available to those outside prison. *See id.* at 1656 (acknowledging requirement as useful in avoiding crucial outcomes, such as undergoing reversible surgery); *see also* Cox, *supra* note 9 (implying not all medical professionals mandate a version of the real-life experience test); Glezer et al., *supra* note 11, at 553 (noting purpose of real-life experience test was to activate a “public” transition).

<sup>130</sup> *See* Osborne & Lawrence, *supra* note 9, at 1655 (suggesting recommendation has few psychological or mental benefits to patients). The medical experts supported this argument by arguing the WPATH standards were written mainly from an ethical perspective. *See id.* at 1651 (asserting evidentiary basis is insufficient to justify reliance on strict interpretations of standards).

participating in a range of different therapies could replace the test.<sup>131</sup> This would be more similar to the Ninth Circuit's *Edmo* test, which considered claims that Edmo completed the recommendation because she lived a full year on feminizing hormones while in a men's prison, had well documented gender dysphoria, and was not impaired in making her decision to seek gender confirmation surgery.<sup>132</sup> Removing the real-life experience requirement would also represent a significant step in reducing plausible Eighth Amendment violations because it would eliminate the bar to necessary medical treatment.<sup>133</sup> Moreover, abolishing tests like the ones employed at the district court levels in *Campbell* and *Kosilek* would better serve the purpose of the WPATH requirement to prisoners with long sentences.<sup>134</sup>

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<sup>131</sup> See *Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014) (relying on access to vocational and social opportunities to qualify for gender confirmation); cf. *Osborne & Lawrence*, *supra* note 9, at 1657 (articulating real-life experience requirement is not only way to determine readiness for gender confirmation surgery).

Because clinical experience with sexual reassignment surgery in correctional settings is currently nonexistent, we believe that initially imposing additional eligibility requirements would be advisable. These should include: (1) prominent genital anatomic gender dysphoria; (2) a long period of expected incarceration after sexual reassignment surgery; (3) a satisfactory disciplinary record and demonstrated capacity to cooperate with providers and comply with recommended treatment; (4) a period of psychotherapy, if recommended by the responsible practitioner; and (5) willingness to be assigned to a women's prison after sexual reassignment surgery.

*Osborne & Lawrence*, *supra* note 9, at 1657.

<sup>132</sup> See *Edmo v. Corizon, Inc.*, 935 F.3d 757, 777 (9th Cir. 2019) (evaluating strength of other factors beyond social and vocational experiences).

Dr. Gorton opined that GCS is medically necessary for Edmo and that she meets the WPATH criteria for GCS. He explained that Edmo has 'persistent well-documented gender dysphoria,' as shown in her prison medical records; she has the capacity 'to make a fully informed decision and to consent for treatment' because 'she didn't seem at all impaired in her decision-making capacity'; she is the age of majority; she has depression and anxiety, 'but they are not to a level that would preclude her getting [GCS]'; she had 12 consecutive months of hormone therapy.

*Id.* at 777.

<sup>133</sup> See *Estelle v. Gamble*, 429 U.S. 96, 104 (1976) (finding deliberate indifference can arise by pursuing easier and less efficacious treatment); see also *Edmo*, 935 F.3d at 793 (holding prison was deliberately indifferent after repeatedly denying surgery despite severe mental distress); *Campbell v. Kallas*, No. 16-CV-261-JDP, 2020 WL 7230235, at \*5 (W.D. Wis. Dec. 8, 2020) (granting Eighth Amendment claim when real-life experience was vague barrier to necessary medical treatment).

<sup>134</sup> See *Coleman et al.*, *supra* note 5, at 60-61 (providing requirement subjects patient to variety of experiences they would typically experience in a year); *Campbell v. Kallas*, No. 16-CV-261-JDP, 2020 WL 7230235 at \*5 (W.D. Wis. Dec. 8, 2020) (combining factors of long sentence and limited opportunities for life experience in determining requirement fulfilled); *Edmo*, 935 F.3d at 793 (finding Edmo's care was cruel and unusual); cf. *Campbell v. Kallas*, 936 F.3d 536, 540 (7th Cir. 2019) (stipulating real-life experience for purpose of gender confirmation surgery not possible



## V. CONCLUSION

The lack of circuit uniformity surrounding the application of the real-life experience test has played an integral role in the delay and denial of gender confirmation surgery for prisoners suffering from severe gender dysphoria. Considering that this test has limited value in indicating one's likelihood of success post-surgery, the BOP should rewrite their transgender medical treatment policy to exclude it, or the Supreme Court should finally address the circuit split surrounding the constitutional right to gender confirmation surgery under the Eighth Amendment by defining how this real-life experience test is applied in prisons. Until then, circuit courts should remove this arbitrary standard completely in practice. It not only sets an unachievable bar against a medically necessary procedure, but also diminishes the protections and purpose of the Eighth Amendment: to preserve human decency. Redefining the real-life experience test to protect the constitutional right to medically necessary treatment under the Eighth Amendment will reduce the high standard of proof required for access to gender confirmation surgery and improve transgender prisoners' quality of life.

*Allison Eddy*

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while incarcerated); *Kosilek*, 774 F.3d at 78-79 (recommending stopping short of surgery due to lack of experience and finding no deliberate indifference).