

2018

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Recommended Citation

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https://scholarship.shu.edu/student_scholarship/942

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Final Paper
Public Health Law
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December 15, 2016

Prison officials' failure to provide adequate health care for trans prisoners must be presumed to be deliberately indifferent, a key to a cruel and unusual constitutional violation

I. Introduction

The right of access to health care for transgender prisoners is a metaphor for the broader issue of transgender rights in society.¹ However, such a right of access to healthcare can also be a metaphor for public health law in general. How we treat our most vulnerable can and should inform our health care policies for not only trans prisoners, but trans persons in general. The main protection available to trans prisoners seeking healthcare is the Eighth Amendment prohibition on cruel and unusual punishment. However, with no Supreme Court of the United States ruling on the Eighth Amendment's application to healthcare access for trans prisoners, such application varies across jurisdictions.² Public health law makes policies to provide health care in the public, but in the absence of uniformity among the courts, trans prisoners' access to healthcare is on a case by case basis determination in courts applying different standards. This

¹ See Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 Cornell J.L. & Pub. Policy 807, 807 (2011) ("The issue of hormone therapy for transgender inmates, while seemingly limited in importance, is one that involves issues of greater importance for the transgender community.")

² See Laura R. Givens, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. Gender Race & Just. 579, 587-92 (2013).

often means no hormone therapy, or surgery of any kind.³ Failing to provide access to medical treatment for transgender prisoners is a failure of public health law.

Specifically, this paper addresses provision of health care to trans prisoners within the cruel and unusual constitutional framework, which means that the only way trans prisoners can acquire access to appropriate health care, if denied such healthcare, is through the courts. The courts apply the cruel and unusual Eighth Amendment test of *Estelle v. Gamble*, to determine if Gender Dysphoria is a serious medical need, and whether prison officials acted culpably, with deliberate indifference to a serious medical need. This paper argues that courts must presume that prison have a culpable state of mind, deliberately indifferent to Gender Dysphoria as a serious medical need, when denial of trans healthcare is often life threatening, and prison officials are not qualified medical professionals capable of prescribing, or implementing a proper course of treatment.

II. Background

Gender Dysphoria and Gender Identity Disorder (GID) are variations on conditions associated with being transgender or transsexual. “Transgender” is the umbrella term for individuals with a gender identity different from the sex assigned at birth, and transcends culturally-defined conceptualizations of gender.⁴ “Transsexual” is a term for persons, who have changed, or seek to change, bodies through treatment, typically hormone therapy or sex

³ See, e.g., *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986) (psychologists and psychiatrists provided counseling to trans prisoner); *Praylor v. Texas Dept. of Crim. J.*, 430 F.3d 1208, 1209 (5th Cir. 2005) (trans plaintiff provided with mental health screening, but no treatment).

⁴ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 97 (7th ed. 2011); *GLAAD Media Reference Guide – Transgender*, GLAAD <http://www.glaad.org/reference/transgender> (last visited November 30, 2016).

reassignment surgery.⁵ The revised American Psychological Association's (APA) DSM-5 changed the name of "Gender Identity Disorder" to "Gender Dysphoria" in 2013 to destigmatize being transgender or transsexual.⁶ Furthermore, gender nonconformity is defined differently from Gender Dysphoria and GID, and means extent to which gender identity or expression differ from gender norms of persons of a particular sex.⁷ The APA makes it clear that "gender nonconformity is not in itself a mental disorder," but that the crucial "element of gender dysphoria is the presence of clinically significant distress associated with the condition."⁸ Using "gender nonconformity" as a term⁹ rather than "Gender Dysphoria" or "Gender Identity Disorder," is probably less stigmatizing, and somewhat removes the negative connotation associated with "dysphoria" or "disorder."¹⁰ Nonetheless, the Standards of Care, promulgated by the World Professional Association for Transgender Health (WPATH) for "promot[ing] the highest standards of health care," include transgender, transsexual, and gender nonconforming peoples.¹¹ The Standards of Care also embrace the term Gender Dysphoria, and importantly note "co-existing" health concerns (i.e. anxiety, depression, or oppositional defiant disorder), which can accompany Gender Dysphoria.¹² Although this paper uses the term "trans" whenever possible to refer to a transgender, transsexual, or gender nonconforming prisoner, in the context

⁵ *Id.*

⁶ See *Gender Dysphoria*, AMERICAN PSYCHIATRIC ASSOCIATION <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> (last visited October 27, 2016); see also Jordan Rogers, *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 (2015).

⁷ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 4, at 1.

⁸ *Gender Dysphoria*, *supra* note 6, at 1.

⁹ See THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 6, at 1.

¹⁰ See *id.*

¹¹ See *id.*

¹² *Id.* at 13.

of various cases, articles, and further cited sources, the paper also uses the terms transgender, transsexual, gender nonconforming, Gender Dysphoria, or GID as they are presented in a source, for purposes of historical recitation, without necessarily endorsing use of the terms in a particular situation.

The issue of trans prisoners' access to healthcare in prison arises because there are currently no federal laws regarding the right of access to hormones or sex reassignment for transgender prisoners. For instance, the Americans with Disabilities Act (ADA) currently excludes Gender Dysphoria from its list of disabilities.¹³ State laws on access to medical treatment for trans prisoners are also rare, and those that do exist often deny access to transgender healthcare, even if they may be overturned as unconstitutional.¹⁴ The main legal protection for trans prisoners when denied access to healthcare is the Eighth Amendment prohibition on cruel and unusual punishment, laid out as a test for courts to apply in the *Estelle v. Gamble* case.¹⁵ The *Estelle* test includes two prongs: 1) deprivation of basic human needs were objectively sufficiently serious; and 2) subjectively officials acted with a culpable state of mind, deliberate indifference.¹⁶ The *Estelle* test is applied differently across the circuits.

A. The Seventh Circuit

The Eighth Amendment was applied in *Fields v. Smith*, a Seventh Circuit Court of Appeals case, such that GID was a per se serious medical need.¹⁷ This existing framework

¹³ Lindsey V. Gilbert, *Crossing the Line: Examining Sex Reassignment Surgery for Transsexual Prisoners in the Wake of Kosilek v. Spencer*, 23 S. Cal. Rev. L. & Soc. Just. 29 (2013).

¹⁴ See Wis. Stat. Ann. § 302.386 (West). Wisconsin's statute was held unconstitutional by *Fields v. Smith* because it was deliberate indifference for the statute to require that trans prisoners be deprived of hormone therapy when GID was considered a serious medical need. *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011).

¹⁵ *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

¹⁶ *Id.*; *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir. 1991).

¹⁷ *Fields*, 653 F.3d at 555; Givens, *supra* note 2, at 579.

ensures that trans prisoners receive appropriate healthcare if denial of healthcare is challenged in court, and the second prong of the *Estelle* test is met such that prison officials acted with a culpable state of mind, deliberately indifferent to providing healthcare for prisoners with GID.¹⁸ *Fields* is significant because it is a stepping stone to an interpretation of the Eighth Amendment that is more favorable to the health care interests of trans prisoners. However, although the court accepted that GID was a serious medical need without much discussion,¹⁹ it was still difficult for *Fields* to prove that the prison guards were deliberately indifferent to such a need.²⁰ The Court in *Fields* discusses how deference should be given to prison officials, but not to the extent that such deference constitutes bad faith.²¹ Bad faith is a high standard to meet, and prison guards are not doctors with authority to prescribe medical treatment. When doctors prescribe hormone therapy and prison guards refuse access to such healthcare, such a situation highlights the problem of allowing prison guards broad authority in determining whether to administer healthcare.²²

B. First Circuit

The First Circuit applied the Eighth Amendment test in *Kosilek v. Spencer* to determine it was not cruel and unusual punishment to deny sex reassignment surgery to a trans inmate.²³ Though the *Kosilek* court accepted GID as a serious medical need, *Kosilek* was not able to establish facts sufficient to meet the first prong of the *Estelle* test because prudent medical experts differed in their opinions on whether *Kosilek* was ready for, or required, sex

¹⁸ *See id.*

¹⁹ *Fields*, 653 F.3d at 557.

²⁰ *Id.* at 557-59 (discussing authority of prison officials, security benefits, that prison officials thought banning hormone therapy prevented sexual assault, the validity of doctors' prescription of hormone therapy).

²¹ *Id.* at 558.

²² *Id.* at 557.

²³ *Kosilek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015).

reassignment surgery.²⁴ Furthermore, GID was not sufficiently harmful to require sex reassignment surgery because Kosilek was receiving hormone therapy, psychotherapy, facial hair remover, female clothing and accessories.²⁵ The second prong of the *Estelle* test was also not met in *Kosilek* because the prison officials' concerns for security and safety were reasonable.²⁶ The First Circuit reasoned that because Kosilek was suicidal and self-mutilating, providing her with concessions would incite more inmates to threaten suicide in exchange for concessions from prison officials.²⁷ The First Circuit also discussed concerns with inadequate housing for Kosilek post-op and fear of increased assaults against Kosilek after surgery.²⁸ Such concerns are relevant to the discussion, but provide great obstacles for trans prisoners to acquire appropriate healthcare. Instead of providing solutions for trans prisoners, who, according to five doctors in *Kosilek*, require appropriate medical care, the *Kosilek* court agreed with one doctor, who testified that Kosilek did not require additional medical care because prison officials also agreed with the same doctor.²⁹ One doctor's prescription of healthcare for a trans patient should be enough, and

²⁴ *Id.* at 88.

²⁵ *Id.* at 90. It is important to note here that Kosilek's current treatment included the aforementioned treatment, but that Kosilek's case had been litigating for more than twelve years when the First Circuit decided Kosilek's case in 2014. *Id.* In 2002, when the District Court for the District of Massachusetts first decided the case, Kosilek was receiving none of the treatments prescribed for GID in the Standards of Care, which include: "1) hormone therapy; 2) real-life experience of living as a member of the opposite sex; and 3) sex reassignment surgery." *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 212, 231 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014) (quoting *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 166 (D. Mass. 2002)).

²⁶ *Kosilek*, 774 F.3d at 91-96.

²⁷ *Id.* at 92-93.

²⁸ *Id.* at 91-94.

²⁹ *Id.* at 106 (Thompson, J., dissenting). In addition to the five doctors testifying on behalf of Kosilek, and one Dr. Schmidt, who did not follow the Standards of Care, testifying against Kosilek, the District Court also appointed a medical expert, Dr. Levine, who co-authored the Standards of Care, determining that treatment is generally at the discretion of the patient. *Id.* at 77-79, 87. Although Dr. Levine determined that Dr. Schmidt's methods were not medically unacceptable, he noted that generally prudent medical professionals do not deny sex reassignment surgery when an individual is qualified, as he determined Kosilek could be. *Id.*

if not one, certainly two—instead the First Circuit supplanted its own determination that one doctor’s evaluation against provision of sex reassignment surgery superseded testimony of five doctors.³⁰ Such a standard makes it seemingly impossible to meet the second prong’s deliberate indifference standard,³¹ and gives too much power to prison officials to shop around for doctors, whose opinions about the trans inmate are more in line with their own, irrespective of the great weight of medical authority.

C. Additional Circuit Court Decisions

The Second, Third, Sixth, Ninth and Eleventh Circuits have yet to decide on the issue of access to healthcare for trans prisoners. The Fourth, Fifth, Eighth and Tenth Circuits have decided on the issue, but fail to address certain issues regarding the rights of trans prisoners to receive appropriate medical treatment.³²

i. Fourth Circuit

The Fourth Circuit held in *De’Lonta v. Johnson* that the plaintiff could prove cruel and unusual punishment if denied appropriate medical treatment for self-mutilation.³³ However, the court did not determine that GID was a serious medical need, instead citing self-mutilation as a serious medical need, though it did hold that some treatment may not necessarily be enough.³⁴ The holding is further deficient in failing to clearly hold that prison officials had the requisite state of mind as deliberately indifferent in denying an appropriate level of treatment.³⁵

³⁰ See *id.* at 102-07 (Thompson, J., dissenting).

³¹ See Givens, *supra* note 2, at 605-06.

³² See Givens, *supra* note 2, at 587-92.

³³ *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013).

³⁴ *Id.* at 526-27.

³⁵ *Id.*

ii. Fifth Circuit

The Fifth Circuit in *Praylor v. Texas Department of Criminal Justice* more clearly highlights the problem of lacking access to trans healthcare in application of the *Estelle* cruel and unusual punishment test, in holding that the plaintiff was not entitled to hormone therapy.³⁶ Further, there was no decision as to whether or not GID, or “transsexualism,” constitutes a serious medical need.³⁷ Lastly, the Fifth Circuit gave broad discretion to prison officials, without considering any merits of the prisoners’ claim.³⁸

iii. Eighth Circuit

The Eighth Circuit in *Long v. Nix* determined, without deciding the merits of the issue, that GID constitutes a serious medical need, but held that the prison officials did not demonstrate any deliberate indifference.³⁹ With slightly better reasoning than the Fifth Circuit in providing a detailed discussion of the second *Estelle* prong’s deliberate indifference standard and application, the Eighth Circuit held that the decision to provide psychotherapy and tranquilizers was sufficient treatment, even though the plaintiff failed to cooperate, and was thereby not provided with tranquilizers.⁴⁰ Though, the Eighth Circuit noted that the course of treatment was at issue,

³⁶ *Praylor v. Texas Dept. of Crim. J.*, 430 F.3d 1208, 1209 (5th Cir. 2005); Givens, *supra* note 2, at 588.

³⁷ *Praylor*, 430 F.3d at 1209; Givens, *supra* note 10, at 588.

³⁸ *Praylor*, 430 F.3d at 1209. The Fifth Circuit noted that the plaintiff would not be incarcerated long enough (not noting how long), the prison facility had a policy for treating transsexuals that twice provided for denial of plaintiff’s requested hormone therapy, “disruption” of an all-male prison, and the plaintiff did not request any treatment but hormone therapy, which was an issue because, according to the Fifth Circuit, there was no medical need for hormones. *Id.* The Fifth Circuit did not elaborate on any of the prior noted points in *Praylor*. *See id.*

³⁹ *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996)

⁴⁰ *Id.* at 765-66.

which doctors often decide,⁴¹ provision of psychotherapy and tranquilizers falls completely short of the Standards of Care, which recommend prescription of at least hormone therapy and real-life experience living as the opposite sex, if not sex reassignment surgery after adequate provision of the first two steps.⁴² Such a decision further demonstrates that prison officials may ignore the “generally accepted protocols for the treatment of GID.”⁴³

iv. Tenth Circuit

The Tenth Circuit held in *Supre v. Ricketts* that although prison officials were required to provide medical treatment for transsexual prisoners’ medical needs, such officials were under no obligation to provide hormone therapy as a treatment.⁴⁴ The Tenth Circuit in *Brown v. Zavaras* applied the *Supre* rule, holding that because prison officials transferred the inmate to another correctional facility to “expedite his medical evaluation,” prison officials were not deliberately indifferent to the trans inmate’s serious medical needs.⁴⁵ It is unclear as to how “expedit[ing] [the plaintiff’s] medical evaluation” constitutes any medical treatment whatsoever as the Tenth Circuit did not clarify its holding,⁴⁶ but it is clear that such treatment falls completely short of treatment recommended by the Standards of Care, the “generally accepted protocols for the treatment of GID.”⁴⁷

D. Problems with the Circuit Courts’ interpretation of the *Estelle* cruel and unusual test, specifically the second prong’s deliberate indifference standard

⁴¹ *Id.* at 766.

⁴² *Kosilek*, 889 F. Supp. 2d at 212.

⁴³ *Kosilek*, 774 F.3d at 102 (Thompson, J., dissenting) (quoting *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013)).

⁴⁴ *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (citing *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986)).

⁴⁵ *Brown v. Zavaras*, 95 F.3d 1161 (10th Cir. 1996).

⁴⁶ *Id.*

⁴⁷ *Kosilek*, 774 F.3d at 102 (Thompson, J., dissenting) (quoting *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013)).

Deliberate indifference of prisoners is an unnecessarily difficult standard for a trans prisoner to meet to access appropriate healthcare for a few reasons.⁴⁸ First, there is a lack of knowledge amongst professionals about the Standards of Care, as demonstrated specifically by precedential decisions in the Fifth, Eighth and Tenth Circuits, which fail to even acknowledge existence of these generally accepted medical guidelines for treatment of trans persons.⁴⁹ Cases that do cite to the Standards of Care do not necessarily follow the Standards of Care, as in *Kosilek* where one doctor testified against the Standards of Care, and was enough medical authority for the First Circuit to hold against the testimony of five doctors, who supported the Standards of Care, and one doctor, who co-authored the Standards of Care.⁵⁰

Second, the Fourth and Tenth Circuits in *De'Lonta* and *Brown* highlight the challenges of having different views on the appropriate administration of *Estelle* cruel and unusual jurisprudence regarding trans prisoners. Under the Fourth Circuit approach, self-mutilation was a serious medical need, but not Gender Dysphoria.⁵¹ A trans prisoner in the Fourth Circuit could, if not self-mutilating, be denied hormone therapy only to successfully commit suicide at a later date, an act likely arising out of such a denial of appropriate healthcare. Such a decision seems to encourage self-mutilation as the best way for a trans prisoner to successfully acquire hormone treatment,⁵² which, albeit a possible unintended consequence of the decision, would be unacceptable for the Fourth Circuit to propagate as interpretation of law.

⁴⁸ See *Givens*, *supra* note 2, at 605-06.

⁴⁹ See *Praylor v. Texas Dept. of Crim. J.*, 430 F.3d 1208 (5th Cir. 2005); *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *Brown v. Zavaras*, 95 F.3d 1161 (10th Cir. 1996) (none citing to or discussing the Standards of Care).

⁵⁰ See *Kosilek*, 774 F.3d at 77-79, 87, 106.

⁵¹ *De'Lonta*, 708 F.3d at 525; *Givens*, *supra* note 2, at 590 (citing *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003)).

⁵² *De'Lonta*, 708 F.3d at 525 (holding that self-mutilation was a serious medical need requiring medical treatment, but not Gender Dysphoria).

Under the Tenth Circuit approach in *Supre v. Ricketts*, where it was held that some form of therapy is required when emphasizing treatment of self-mutilation, but not hormone therapy,⁵³ a dangerous, across the board denial of hormone therapy for all trans prisoners is possible, even if the prisoners self-mutilate or attempt suicide. The Tenth Circuit decision, like the Fourth Circuit decision could also further encourage self-mutilation by perversely incentivizing self-mutilation in order to receive hormone therapy. The Fourth and Tenth Circuit decisions demonstrate that it can be easy for prison officials to deny prisoners life-saving medication, and this should never be the case.

III. Analysis—the second prong of the *Estelle* test should be interpreted to presume deliberate indifference of prison officials when trans prisoners are denied appropriate healthcare

The two prong test in *Estelle* for determining whether or not the Eighth Amendment cruel and unusual punishment ban is violated is based on two elements: 1) deprivation of basic human needs were objectively sufficiently serious; and 2) subjectively officials acted with a culpable state of mind, deliberate indifference.⁵⁴ Though the objective prong can be clearer from a legal and medical standpoint,⁵⁵ a prison official meets subjective deliberate indifference when they know of and disregard a serious medical need.⁵⁶ Courts across the country apply the Eighth Amendment cruel and unusual test to deprivation of medical care cases, but not all apply the test to cases about transgender access to hormone therapy or sex reassignment surgery.⁵⁷ For those

⁵³ *Supre*, 792 F.2d at 963; *Givens*, *supra* note 2, at 595.

⁵⁴ *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir. 1991).

⁵⁵ *See, e.g., Long*, 86 F.3d at 764 (relying on the opinions of medical staff to determine whether patient had a serious medical need); *Fields*, 653 F.3d at 555 (basing such a determination of GID as a serious medical need on medical evidence).

⁵⁶ *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Long*, 86 F.3d at 765 (citing *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995)).

⁵⁷ *See Givens*, *supra* note 2, at 593-603 (the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have considered transgender prisoners' access to healthcare, and the Second, Third, Sixth, Ninth, and Eleventh have not).

courts that do, the circuits approach the *Estelle* test without uniformity.⁵⁸ This paper presses a particular interpretation of the *Estelle* test across the board, namely that the second prong of the cruel and unusual test must be interpreted to presume deliberate indifference when prison officials deny healthcare to trans prisoners.

The deliberate indifference prong of the *Estelle* cruel and unusual punishment test applies when prison officials know of and disregard prisoners' needs for reasonably sanitary conditions, medical treatment, exercise, or reasonable safety from prison risks.⁵⁹ Furthermore, deliberate indifference to serious medical needs can be shown by sufficiently harmful acts or omissions (i.e. deprivation of required medical treatment),⁶⁰ or in the context of prison guards inflicting pain on prisoners "unnecessar[ily] and wanton[ly]".⁶¹ These standards of deliberate indifference may be appropriate for determining whether it is cruel and unusual punishment when a prisoner is shot in the leg by prison officials during a prison riot,⁶² when a handcuffed prisoner was not "seriously injured" after prison officials beat him for not complying,⁶³ or when a prisoner alleges unlivable confinement conditions (i.e., overcrowding, noise, locker storage space etc.)⁶⁴—these are all situations prison officials commonly face, whether or not they approach the situation properly. However, prison guards are not trained doctors, may not have been trained on proper medical

⁵⁸ See *supra* Part II.

⁵⁹ Ian M. Ogilvie, *Cruel and Unusual Punishment: The Ninth Circuit Analyzes Prison Security Policy with "Deliberate Indifference" to Penological Needs in Jordan v. Gardner*, 68 St. John's L. Rev. 259 (1994).

⁶⁰ *Hudson v. McMillian*, 503 U.S. 1, 20 (1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 105 (1976)).

⁶¹ *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (citing *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

⁶² *Id.* at 312.

⁶³ *Hudson*, 503 U.S. at 1.

⁶⁴ *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

treatment of trans prisoners,⁶⁵ and currently existing, legally unenforceable prison policies are insufficient to provide full protection for trans prisoners.⁶⁶ Additional protections are required for trans prisoners when prison officials ignore medical necessity, knowing that trans prisoners are particularly vulnerable inmates, who require prescribed health care.

This argument is based on three premises: 1) seeking to destigmatize trans prison populations is an important step in remedying denial of appropriate healthcare;⁶⁷ 2) prison officials are the accountable parties when denying healthcare trans prisoners require;⁶⁸ and 3) treating Gender Dysphoria of trans prisoners as a “serious medical need” is a part of the solution

⁶⁵ See NATIONAL INSTITUTE OF CORRECTIONS, A QUICK GUIDE FOR LGBTI POLICY DEVELOPMENT FOR ADULT PRISONS AND JAILS 8-9 (2012) available at <https://s3.amazonaws.com/static.nicic.gov/Library/026702.pdf>. It is important to note that although federal and state guides do exist to train prison officials on the proper healthcare requirements of transgender prisoners, such guides do not have the binding effect of law. See e.g., *id.* It is further important to note that though many states do not publish guides on transgender health care policies for prisoners, some states and cities have, and publish such policies. See, e.g., MIAMI-DADE CORRS. AND REHAB. DEP’T, TRANSGENDER INMATES (2009) available at <https://www.prearesourcecenter.org/sites/default/files/library/miamidadelgbti.pdf>; MASS. DEP’T OF CORR., INDEM., TREATMENT AND CORR. MGMT. OF INMATES DIAGNOSED WITH GENDER DYSPHORIA (2016) available at <http://www.mass.gov/eopss/docs/doc/policies/652.pdf>. One state, California, even adopted policies to become the first state to approve provision of sex reassignment surgery for prisoners, though none have been provided yet. See Richard Perez Pena, *California is First State to Adopt Sex Reassignment Surgery Policy for Prisoners*, N.Y. TIMES (Oct. 21, 2015) available at <http://www.nytimes.com/2015/10/22/us/california-is-first-state-to-adopt-sex-reassignment-surgery-policy-for-prisoners.html>.

⁶⁶ See, e.g., *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings*, NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, <http://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care> (last visited Nov. 30, 2016).

⁶⁷ Gilbert, *supra* note 13, at 29 (2013).

⁶⁸ See *Kosilek*, 774 F.3d at 106, (Thompson, J., dissenting) (discussing how five doctors testified that sex reassignment surgery was “medically necessary and the only appropriate treatment for Kosilek,” but prison officials denied Kosilek sex reassignment surgery.); *Praylor*, 430 F.3d at 1209 (court assumed that “transsexualism” is a serious medical need in holding that it was not deliberate indifference to deny trans prisoners access to hormone therapy).

for ensuring that trans prisoners receive appropriate healthcare.⁶⁹ The premises intersect because in order to destigmatize transgender prison populations, being trans must not be seen as an “abnormal” medical condition,⁷⁰ and we must hold prison officials accountable when they deny trans prisoners appropriate healthcare—if denying trans prisoners such healthcare, prison officials are further stigmatizing trans prisoners as abnormal, but also as unworthy of appropriate treatment.⁷¹ Such a denial of healthcare has serious consequences for trans prisoners, to be discussed at length in this paper, but suffice it to say that such consequences can be avoided if prison officials know outright that failing to provide requisite healthcare for trans prisoners is presumed to be an element of cruel and unusual punishment, a part of a constitutional violation. If courts follow the recommendation of the medical community in accepting Gender Dysphoria as a serious medical need, as did the Seventh Circuit in *Fields v. Smith*, cruel and unusual punishment will be more easily met, and prison officials will be more clearly accountable as deliberately indifferent to denying appropriate healthcare.⁷²

The Supreme Court has denied certiorari to the only two trans prisoner health care Circuit Court cases appealed to the Supreme Court, *Kosilek v. Spencer* and *Fields v. Smith*.⁷³ Based on

⁶⁹ Eve Glicksman, *Transgender Today*, 44 *Monitor on Psychology* 36 (2013) (“While still somewhat stigmatizing, a diagnosis of gender dysphoria ensures that more services for transgender people will be covered by health insurers.”)

⁷⁰ Maruri, *supra* note 1, at 821. Eighth Amendment analysis of transgender issues plays into mainstream fears that transgender prisoners are “abnormal.” *Id.* Furthermore, “recognizing that a diagnosis of GID remains necessary to get hormone therapy and surgery, even outside the prison context, the transgender community has struggled with the idea of advocating against” Gender Dysphoria as a serious medical condition. *Id.*

⁷¹ *Id.* at 807.

⁷² See *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (holding that “GID is a serious medical condition”); see also *Givens*, *supra* note 2, at 601 (the Supreme Court of the United States should adopt a standard of treating Gender Dysphoria as a “per se serious medical need” if determining Eighth Amendment issues).

⁷³ *Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015) (certiorari denied); *Smith v. Fields*, 132 S. Ct. 1810 (2012) (certiorari denied).

denial of certiorari to these two cases, the holdings of both remain intact, such that it was cruel and unusual punishment for prison officials to deny Fields access to hormone therapy, but not cruel and unusual punishment for prison officials to deny Kosilek sex reassignment surgery.⁷⁴ Though these cases are not an indication of how the Supreme Court would necessarily rule regarding transgender prisoners and access to appropriate healthcare, a clear rule is required in the courts to destigmatize being trans in prison, hold prison officials accountable for not providing appropriate healthcare, and ensure that trans prisoners receive care so required.

It is unclear as to which medical treatment is the best to treat Gender Dysphoria, but some available options include hormone therapy, psychotherapy and sex reassignment surgery,⁷⁵ though no inmate has yet received sex-reassignment surgery in prison.⁷⁶ For instance, Michelle Kosilek was to be the first transgender inmate to receive sex reassignment surgery at the expense of taxpayers,⁷⁷ but ultimately, the United States District Court's decision that Kosilek required sex reassignment surgery was overturned on appeal.⁷⁸ This paper uses the term "appropriate healthcare" whenever possible to discuss various Gender Dysphoria treatment options because one type of medical treatment cannot be provided to all trans prisoners in all situations.⁷⁹ When such appropriate healthcare is not provided, someone must be held accountable. When such healthcare is sought, this paper advances the theory that the second prong of the Eighth

⁷⁴ *Kosilek*, 774 F.3d at 63; *Fields*, 653 F.3d at 550.

⁷⁵ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 4, at 1-2 (recommending psychotherapy, hormone therapy, sex reassignment surgery, and certain additional kinds of surgery in various circumstances).

⁷⁶ *See* Gilbert, *supra* note 13, at 30.

⁷⁷ *Kosilek*, 889 F. Supp. 2d at 190; *see also* Gilbert, *supra* note 12, at 30.

⁷⁸ *Kosilek*, 774 F.3d at 63.

⁷⁹ *See generally*, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 4 (recommending various types of health care for various types of patients with Gender Dysphoria).

Amendment cruel and unusual test must be interpreted to presume culpability for denial of access to appropriate healthcare, a basic requirement for trans prisoners. Such a presumption will remove subjectivity of determining whether prison guards without medical expertise acted in bad faith by failing to seek out, or provide appropriate healthcare, and promote universal access to life-saving treatment for trans prisoners.

A. Suicide, self-mutilation, and additional reasons prison officials must be presumed to be deliberately indifferent for denying trans prisoners appropriate healthcare

It is widely accepted that medical treatment, such as access to hormone therapy, sex-reassignment surgery, psychotherapy, and additional forms of treatment provides appropriate care for persons with Gender Dysphoria,⁸⁰ but still prison officials ignore such medical knowledge when incarcerating trans inmates in certain jurisdictions (and can legally do so), a practice that must be seen as deliberate indifference when trans prisoners are suffering from self-mutilation, attempts at suicide, depression, and other mental health concerns “co-existing” with Gender Dysphoria.⁸¹ For instance, WPATH recommends hormone therapy in many cases of Gender Dysphoria, because such treatment can reduce the suicidality from 20-30% for “untreated transsexual patients” to 1-2% after treatment.⁸² This reduction in suicidality suggests that 1-2% of transsexuals, even after receiving hormone treatment, may require additional treatment, perhaps in the form of sex reassignment surgery.⁸³ Prison officials cannot simply

⁸⁰ *Id.*

⁸¹ *See id.* at 24. Such “co-existing mental health concerns” include “anxiety, depression, self-harm, a history of abuse and neglect, compulsivity, substance abuse, sexual concerns, personality disorders, eating disorders, psychotic disorders, and autistic spectrum disorders.” *Id.*

⁸² Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 *Geo. J. Gender & L.* 585, 608 (2014) (quoting THE SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE:” A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 22 (2007), available at <http://srlp.org/files/warinhere.pdf>).

⁸³ *See id.* at 585.

ignore suicidality associated with Gender Dysphoria when the weight of the medical authority demands treatment that can drastically reduce suicidality because to do so is inherently culpable behavior, potentially leading to death or serious bodily injury.

At the outset, this paper noted that the argument for presuming deliberate indifference of prison officials who deny trans prisoners access to hormone therapy is premised on accepting Gender Dysphoria as a serious medical need, which would automatically meet the first prong of the *Estelle* test. This is critical to note because the second prong of deliberate indifference can only be met if there is a serious medical need to address—prison officials are not doctors, and must know or be informed that allowing trans prisoners to self-mutilate, or commit suicide is always culpable. The *De'Lonta* court distinguishes GID as a serious need from self-mutilation as a serious medical need, holding the latter to meet the first prong of the *Estelle* test, when the former does not.⁸⁴ However, the Fourth Circuit decision in *De'Lonta* does not go far enough because it does not recognize culpability for failure to provide access to treatment for Gender Dysphoria. Such a distinction suggests that trans persons *must* self-mutilate or attempt suicide in order to receive treatment for GID, or Gender Dysphoria, which is a dangerous precedent to set. It is precisely because trans prisoners feel as though self-mutilation is the only way to receive access to healthcare that courts must hold prison officials accountable for failing to provide appropriate healthcare—there must be ways for trans prisoners to receive appropriate healthcare without feeling compelled to self-mutilate or commit suicide.⁸⁵ Prison officials must be

⁸⁴ *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003).

⁸⁵ See THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 4, at 1 (some type of health care is *always* required for transitioning trans persons, including “primary care, gynecologic and urologic care, reproductive options, voice and communication therapy, mental health services (e.g., assessment, counseling, psychotherapy), and hormonal and surgical treatments.”).

presumed to be deliberately indifferent under the second prong of the *Estelle* cruel and unusual punishment test when failing to provide appropriate healthcare for trans prisoners because prison officials know that denying access to trans healthcare can cause self-mutilation or attempted suicide, and disregarding such knowledge is directly furthering prison inmates' death or serious bodily injury.

B. Various types of treatment: holding prison guards accountable as presumptively culpable and deliberately indifferent when denying medical treatment to trans prisoners

i. Prison guards are or should be aware that hormone therapy is basic healthcare for Gender Dysphoria, and cannot ignore prescription of such required care

Denial of access to hormone therapy is a tragic reality in prisons across the United States, and one that must lead courts to hold that prison officials are presumptively culpable and deliberately indifferent when denying access to hormone therapy because prison officials are or should be aware that hormone treatment is basic healthcare for trans persons.⁸⁶ Often such cases of denial arise when prisoners are seeking access to hormone therapy because they are engaging in self-mutilation, or contemplating or attempting suicide.⁸⁷ Hormone therapy may or may not be an adequate treatment, depending on the situation.⁸⁸ However, some prisoners, seek out and acquire hormone treatment in violation of prison policies.⁸⁹ For instance, though a doctor prescribed Prozac to Kosilek, a prison guard illegally provided birth control as a form of

⁸⁶ Rogers, *supra* note 6, at 196 (discussing how the *Fields v. Smith* trial court found it was cheaper to administer hormone therapy than common antipsychotic drug often administered to prisoners).

⁸⁷ See, e.g., *Kosilek*, 774 F.3d at 63.

⁸⁸ See THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 39, at 2, (there are many types of treatment, though often surgery is “essential and medically necessary to alleviate” gender dysphoria).

⁸⁹ *Kosilek*, 889 F. Supp. 2d at 213.

hormone therapy.⁹⁰ Shortly after taking the birth control and Prozac, Kosilek attempted suicide.⁹¹ It is unclear as to what exactly caused Kosilek to commit suicide, but such a case highlights the importance of providing trans prisoners with doctor-prescribed healthcare. Failure to do so could directly lead to trans prisoners feeling compelled to acquire healthcare in any manner possible.⁹² Prison guards are not doctors, and should not provide health care of any type. However, courts can and must presume that prison officials are deliberately indifferent for failing to implement policies for provision of appropriate healthcare to trans prisoners, so prisoners do not feel compelled to seek out healthcare that is neither prescribed, nor appropriate for treatment of Gender Dysphoria.⁹³ Trans prisoners' access to healthcare is not a typical preventing the prison riot, or punishing a non-compliant prisoner by force situation,⁹⁴ but requires medical expertise that prison officials often do not have—failing to properly prescribe and treat Gender Dysphoria is a technical decision only doctors cannot make.

- ii. **Dress, antidepressants, and psychotherapy can be additional types of medical treatment for Gender Dysphoria, though the degree varies to which they are medically accepted, or prison officials know of and authorize use of such treatment**
 - a. **Prison officials cannot disregard clothing as a relatively simple way to provide greater healthcare in accordance with a trans prisoner's gender identity**

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See generally*, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 39 (hormone therapy is a common treatment for Gender Dysphoria, but birth control is not mentioned as a medically authorized type of hormone treatment).

⁹⁴ *See generally*, Part III.

Prison officials should provide gender-identity appropriate clothing, though there is currently no constitutional right to particular types of clothing for transgender inmates.⁹⁵ Providing clothes that are not in accordance with trans prisoners' gender identity could be considered a "profound dignitary harm and injury to one's sense of self."⁹⁶ However, this is a difficult argument to make because although the Eighth Amendment cruel and unusual punishment test of *Estelle* contemplates Gender Dysphoria, a psychological manifestation, as a serious medical need,⁹⁷ the Supreme Court has not expressly held psychological harm to constitute cruel and unusual punishment.⁹⁸ Failure to provide gender-identity appropriate clothing nonetheless could theoretically be cruel and unusual punishment because there is a cognizable harm to traditional notions of self. As Justice Blackmun's concurrence in *Hudson v. McMillian* suggested, the requisite harm of cruel and unusual punishment is "pain," which "surely includes a notion of psychological harm," further citing precedent that recognized "aesthetic" injury and student feelings of psychological inferiority due to public school segregation.⁹⁹ Though clothing is ultimately a relatively simple and effective way to create the "real-life experience of living as a member of the opposite sex" required in the Standards of Care prior to sex reassignment surgery,¹⁰⁰ it would be difficult to prove that prison officials are deliberately indifferent in denying a particular type of clothing to trans prisoners—a doctor may

⁹⁵ Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 Buff. Pub. Int. L.J. 133 (2010).

⁹⁶ Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. Rev. 859 (2012).

⁹⁷ See Long, 86 F.3d at 765.

⁹⁸ See *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).

⁹⁹ *Id.* at 16 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955)) (Blackmun, J., concurring).

¹⁰⁰ *Kosilek*, 889 F. Supp. 2d at 231.

recommend clothing appropriate to the inmate's gender identity, but it is unlikely a prison official would know and ignore that the inmate required such clothing to alleviate Gender Dysphoria.

b. A prison guard would not be presumed to be deliberately indifferent for failing to provide make-up and cosmetics to trans prisoners

It is a stretch to say the second prong of the *Estelle* cruel and unusual punishment test must be interpreted to presume deliberate indifference when a prison guard denies access to make-up and cosmetics because it is not generally reasonable to provide inmates with cosmetics.¹⁰¹ Transgender prisoners have basic rights to access clean air, water, food, clothing, housing and safety to maintain proper health.¹⁰² The World Professional Association for Transgender Health does not consider make-up in its Standards of Care.¹⁰³ Though some trans prisoners may seek make-up,¹⁰⁴ it cannot be said that denying anything more than basic health care is cruel and unusual punishment.

c. Providing trans prisoners antidepressants when something more should be provided is deliberately indifferent in failing to properly treat Gender Dysphoria

Antidepressants are commonly prescribed in prisons, and are often prescribed when hormone therapy and sex reassignment are not, which suggests that in circumstances where antidepressants are ineffective to treat Gender Dysphoria, prison officials should be culpable

¹⁰¹ Howell, *supra* note 103, at 157. To date, “two courts have ruled that there is no obligation on the part of the state to allow male-to-female transgender inmates to receive or wear cosmetics.”

¹⁰² *Id.* at 158.

¹⁰³ See generally THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 58 (7th ed. 2011) (the only mention of cosmetics are that of aesthetic or plastic surgery, “mostly regarded as not medically necessary”).

¹⁰⁴ See, e.g., Long, 86 F.3d at 763 (the prisoner repeatedly sought to wear feminine clothing and make-up); see also Kosilek, 774 F.3d at 71 (Kosilek was provided make-up in addition to hormone therapy and feminine attire, and exhibited “joy.”).

under the *Estelle* test second prong for providing antidepressants instead of some other, more effective treatment.¹⁰⁵ It is unlikely then that prison officials would deny antidepressants as treatment for mental health concerns co-existing with Gender Dysphoria.¹⁰⁶ However, antidepressants seem, at best, an ineffective method to treat Gender Dysphoria because they treat depression, a possible symptom of Gender Dysphoria, and not the discomfort with one's sex assigned at birth. One trans prisoner attempted suicide while taking antidepressants.¹⁰⁷ Furthermore, the prisoner's doctor testified that antidepressants do not significantly ameliorate Gender Dysphoria.¹⁰⁸ WPATH makes no specific mention of antidepressants as treatment for Gender Dysphoria, though it does mention that coexistence of mental health concerns, such as depression, must be "optimally managed prior to or concurrent with treatment of Gender Dysphoria," further noting that psychotropic medications and pharmacotherapy may be useful "to treat co-existing mental health concerns."¹⁰⁹ It seems then that prison officials should be culpable, or deliberately indifferent, not for failing to prescribe antidepressants for mental health concerns co-existing with Gender Dysphoria, but for providing antidepressants when hormone therapy or something more is required. If antidepressants are commonly prescribed to prisoners, but Gender Dysphoria symptoms are more than depression, often resulting in self-mutilation or suicidality, prison officials must be presumed to know of and disregard trans prisoners' Gender

¹⁰⁵ *Kosilek*, 740 F.3d at 763 (Antidepressants and psychotherapy were provided when hormone therapy and sex reassignment surgery were not.); Jacques Baillargeon et. al., *Anti-depressant Prescribing Patterns Among Prison Inmates with Depressive Disorders* 7 (Nat'l Crim. Just. Reference Serv., Working Paper No. 194054, 2012) (Antidepressants are commonly prescribed to prison populations at rates exceeding fifty percent.).

¹⁰⁶ *See, e.g. Kosilek*, 740 F.3d at 763.

¹⁰⁷ *Kosilek*, 889 F. Supp. 2d at 197.

¹⁰⁸ *Kosilek*, 774 F.3d at 88.

¹⁰⁹ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 38, at 24-25.

Dysphoria as a serious medical need because “mental health care, while necessary [for treatment of Gender Dysphoria], is not sufficient.”¹¹⁷

d. Psychotherapy for treating Gender Dysphoria is inadequate without providing additional types of treatment for trans prisoners, and must be presumed to be deliberately indifferent

Prison officials should further be deemed deliberately indifferent if providing psychotherapy, because although talk-therapy is *a* treatment, it is not adequate for treating Gender Dysphoria.¹¹⁰ The Tenth Circuit effectively legalized denying hormone therapy, as long as some treatment, of which psychotherapy is typically contemplated, was provided to trans prisoners.¹¹¹ In *Supre v. Ricketts* the Tenth Circuit held that a trans prisoner who self-mutilated before and after receiving hormone therapy was not entitled to continue hormone therapy because of the “the dangers of estrogen treatment,” though the prisoner was provided with psychotherapy and psychiatry.¹¹² Furthermore, it is unclear from the *Supre* decision, precisely what the court would find appropriate treatment to be since the court does not specify a recommendation.¹¹³ However, as the Standards of Care suggest, psychotherapy could help

¹¹⁷ *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings*, National Commission on Correctional Health Care (last visited Nov. 30, 2016) available at <http://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care>.

¹¹⁰ *Id.*; Rena Lindevaldsen, *A State's Obligation to Fund Hormonal Therapy and Sex-Reassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 *Liberty U.L. Rev.* 15 (2012).

¹¹¹ See Givens, *supra* note 2, at 579. It is most common for prison officials, when denying healthcare, to provide psychotherapy, and not hormone therapy or sex reassignment surgery. See Travis Cox, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 *Wis. J.L. Gender & Soc'y* 341 (2009) (Providing psychotherapy in lieu of hormone therapy is the practical reality in Wisconsin since the Seventh Circuit decided *Meriwether v. Faulkner* in 1987.).

¹¹² *Supre*, 792 F.2d at 960.

¹¹³ See *id.* (the court flatly states it cannot conclude that hormone therapy is required for trans prisoners under federal law).

integrate gender nonconformity into the gender-expression of sex assigned at birth.¹¹⁴ Although psychotherapy is “highly recommended” in the Standards of Care, it is not required for hormone therapy or sex reassignment surgery.¹¹⁵ That psychotherapy is not required here is telling because psychotherapy treats symptoms of Gender Dysphoria, not Gender Dysphoria itself—psychotherapy can make one feel better about one’s assigned gender, promote resiliency and interpersonal skills, and alleviate depression and other co-existing mental health issues.¹¹⁶ Only hormone therapy and sex-reassignment surgery can physically change a person’s gender or sex.¹¹⁷ Providing only psychotherapy when a trans prisoner and his doctor, or, as in *Supre*, the prisoner, endocrinologist and psychiatrist,¹¹⁸ believe hormone therapy is the proper prescription, merits a presumption of deliberate indifference on the part of prison officials because treating depression, a co-existing health concern, is not treating Gender Dysphoria.

iii. Failure to provide sex reassignment surgery to trans prisoners can be presumptively deliberately indifferent when against the great weight of medical authority

Denial of sex reassignment surgery for every trans prisoner requiring the surgery should presumptively be a violation of the second prong of the Eighth Amendment cruel and unusual punishment when doctors find such treatment is the only way to effectively treat a prisoner’s Gender Dysphoria. *Kosilek v. Spencer* was the first case to effectively mandate sex reassignment surgery for a trans prisoner because not doing so was cruel and unusual punishment.¹¹⁹ The court held GID was a sufficiently serious medical condition, and corrections officers acted with

¹¹⁴ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 38, at 8.

¹¹⁵ *Id.* at 28.

¹¹⁶ *Id.* at 8, 28.

¹¹⁷ *Id.* at 8-9.

¹¹⁸ *Supre*, 792 F.2d at 963.

¹¹⁹ *See Kosilek*, 889 F. Supp. 2d at 248.

deliberate indifference because doctors and corrections officers knew Kosilek would likely self-mutilate and attempt suicide when she was only provided with hormone therapy, and not sex reassignment surgery.¹²⁰ Kosilek did, in fact, attempt suicide in prison after receiving anti-depressants.¹²¹ The novelty of *Kosilek* was short lived when the First Circuit overturned the lower court decision, noting that adequate care was provided in the form of hormone therapy, electrolysis, feminine garb and psychotherapy, and that denial of sex reassignment surgery by prison officials was not sufficiently harmful to be deliberately indifferent because time passed since Kosilek was suicidal or self-mutilating, and treatment seemed to be working.¹²²

That *Kosilek* was overturned in the First Circuit, is akin to saying that denial of sex reassignment surgery is not deliberate indifference even when there is strong evidence, i.e. testimony of five doctors, that sex reassignment surgery and hormone therapy are the only effective treatments for Gender Dysphoria, a serious medical need.¹²³ Courts must hold prison officials accountable when doctors determine sex reassignment surgery is the only effective way to prevent suicide.¹²⁴

That some treatment seemed to work when Kosilek's suicidality and depression improved after some years¹²⁵ is not the only relevant issue in determining cruel and unusual punishment. The *Estelle* standard requires that "acts or omissions sufficiently harmful" are proven to show deliberate indifference to a serious medical need.¹²⁶ The *Estelle* standard does

¹²⁰ *Id.* at 230.

¹²¹ *Id.* at 213-14.

¹²² *Kosilek*, 774 F.3d at 89-90. Kosilek exhibited a certain "joy" at being feminized. *Id.* at 90.

¹²³ *See Kosilek*, 889 F. Supp. 2d at 233. Kosilek's doctors prescribed sex reassignment surgery as "the only adequate medical care for [Kosilek's] severe gender identity disorder." *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.*

¹²⁶ *Kosilek v. Spencer*, 774 F.3d 63, 89–90 (1st Cir. 2014), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015)

not provide that failing to administer recommended healthcare is acceptable only when a prisoner does not attempt suicide.¹²⁷ Here, prison officials denied sex reassignment surgery, an omission of treatment sufficiently harmful to cause depression and as doctors testified, a likelihood of committing suicide,¹²⁸ and the Eighth Amendment protects against such a future potential harm.¹²⁹

This note does not advocate for sex reassignment surgery for every trans prisoner every time, but instead advocates for a case-by-case determination about medical care based on opinions of doctors, the Standards of Care, and relevant trans healthcare authorities,¹³⁰ such that deliberate indifference must be presumed when prison officials do not care for trans prisoners in the medically accepted way. Prison officials often lack the medical expertise to prescribe treatment and care for trans prisoners in situations that do not always seem standard for prison guards, and trans prisoners must be protected from potential abuses of power, including suicide, and self-mutilation, when prison officials do not provide what doctors prescribe.

¹²⁷ See *Estelle*, 429 U.S. 97 (1976).

¹²⁸ See *Kosilek*, 774 F.3d at 106 (Thompson, J., dissenting). Five doctors “all testified unequivocally that sex reassignment surgery was medically necessary and the only appropriate treatment for Kosilek.” *Id.* (Thompson, J., dissenting). Kosilek testified as well, confirming she might commit suicide if she had to continue existing as an anatomical male. *Id.* at 76.

¹²⁹ *Id.* at 86 (quoting *Baze v. Rees*, 553 U.S. 35 (2008) (“Subjecting individuals to a risk of future harm. . . can qualify as cruel and unusual punishment.”)). The “Eighth Amendment's protections extend beyond present suffering.” *Id.* at 106 (Thompson, J. dissenting).

¹³⁰ See *id.* at 94. The Court notes additional factors, including housing post-operation, non-uniformity in doctors’ opinions, and Kosilek’s criminal nature that ultimately trump doctors’ orders. *Id.* at 91. However, the only non-uniformity amongst medical providers was the Department of Corrections Commissioner’s opinion, ultimately based on security concerns, in addition to the Department of Corrections’ trial expert, Dr. Schmidt. *Id.* at 107-08 (Thompson, J, dissenting). Dr. Schmidt advocates for alternate methods to the Standards of Care for trans patients, and ultimately defers to patient requests for surgery when making recommendations about their readiness. *Id.* at 76. Such ultimate deference to patient requests for surgery can hardly be seen as non-uniformity amongst medical providers. *Id.* at. 104.

C. Utilizing costs as a reason to deny access to healthcare for Gender Dysphoria is deliberately indifferent because it is an inaccurate argument that ignores health concerns of prison inmates

The second prong of the Eighth Amendment test should be interpreted to presume culpability because to say that costs are a valid reason to deny access to medical treatment is an abuse of prison officials' authority. High costs of providing hormone therapy are cited as reasons to deny treatment to transgender prisoners.¹³¹ It is incorrect to assume that the cost of hormone therapy is high. It is actually cheaper to provide hormone therapy for transgender prisoners than to provide antipsychotic drugs commonly used to treat prisoners.¹³² If hormone therapy can be used as a way to medically treat Gender Dysphoria, and prevent mutilation and suicidality, it should be. Still, costs are an issue—even if it is true that hormone therapy is cheap, it is easy to deny access to hormone therapy by saying it costs too much.¹³³

Furthermore, cost in *Kosilek* was determined to be a non-issue because the cost of providing appropriate health care cannot justify denying a trans prisoner access to medical treatment.¹³⁴ In fact, the *Kosilek* court noted, “financial considerations must [not] be considered in determining the reasonableness” of trans prisoners, or prisoners in general.¹³⁵ The *Kosilek*

¹³¹ See e.g., Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?*, 61 Clev. St. L. Rev. 957 (2013) (citing *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (refuting the supposition that hormone therapy costs \$2500 per inmate per year, by showing such therapy costs \$300 to \$1000 per inmate per year).

¹³² Rogers, *supra* note 6, at 196.

¹³³ See Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 Geo. J. Gender & L. 585, 603 (2014) (“allowing prison officials to weigh the cost of housing safety against the benefits of surgery or hormonal treatment, the courts have supplied prison officials with a court-sanctioned excuse to deny transgender prisoners what is rightfully theirs”).

¹³⁴ *Kosilek*, 889 F. Supp. 2d at 210.

¹³⁵ *Id.* at 210 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991)).

court also noted numerous jurisdictions that similarly held cost saving was not a valid concern when determining cruel and unusual punishment.¹³⁶

Still, even if the Eighth Amendment is not legitimately interpreted to consider monetary costs in determining cruel and unusual punishment, it could be possible to cite indirect costs, such as “dangers, security costs, and other impediments,” which make hormone therapy “infeasible.”¹³⁷ There is little to no protection against such imposition of indirect costs, which highlights the need for a reinterpretation of the second prong of the cruel and unusual punishment test—if it is presumptively adjudicated in court that the second prong of the Eighth Amendment is met, any denial of a trans person’s access to hormone therapy will more likely be deemed cruel and unusual punishment. The second prong of the Eighth Amendment thus plays an integral role in shaping decision-making regarding medical and non-medical treatment of trans prisoners. Using costs as a reason to deny hormone therapy is grounded in ignorance because it is inexpensive to provide hormone therapy, and costs are not ever a reason to deny adequate healthcare.¹³⁸ Prison guards must be presumed to be deliberately indifferent when denying healthcare to trans prisoners when trans prisoners self-mutilate, and attempt suicide upon being denied access to healthcare—prison officials cannot supplant monetary needs for medical treatment of trans prisoners, which could mean life or death for such prisoners because to do so would be deliberately indifferent.

D. Acting on fears of enhanced assault and sexual assault merits a presumption of deliberate indifference when prison officials deny appropriate trans healthcare

¹³⁶ *Id.* at 211 (citing *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (court could not locate instances where cost was an official’s defense to cruel and unusual punishment claim); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir.1986) (“Budgetary constraints, however, do not justify cruel and unusual punishment.”); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir.1974) (when state is operating unconstitutionally, fund shortage is not a valid defense)).

¹³⁷ *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011).

¹³⁸ *See supra* notes 130-35 and accompanying text.

Fear of increased sexual assault is often a reason prison officials cite in denying hormone treatment, but the second prong of the Eighth Amendment cannot justify such an imposition on health of trans prisoners.¹³⁶ Transgender prisoners are “thirteen times more likely to be sexually assaulted than cisgender prisoners.”¹³⁹ Prison officials cite that such sexual assault is aggravated by housing transgender women in facilities for male prisoners.¹⁴⁰ The Supreme Court clarified in *Farmer v. Brennan* that such assaults can be the result of cruel and unusual housing practices,¹⁴¹ and not necessarily access to healthcare. Preventing sexual assault, i.e. in male prisons, by denying access to hormone therapy that would increase effeminacy, and thereby increase the chance of rape,¹⁴² is a fundamental misunderstanding of being transgender. A prison official seeking to prevent sexual assault by limiting effeminacy in male prisons is, in effect, seeking to solve a problem without addressing the root of the problem, instead creating a new

¹³⁶ Esinam Agbemenu, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care*, 30 Colum. J. Gender & L. 1 (2015) (that sexual assault will increase is often cited as reason to deny hormone therapy).

¹³⁹ *Id.* at 14.

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (“a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”)

¹⁴² Agbemenu, *supra* note 138 at 44 (security expert for prison involved in *Fields v. Smith* case claimed that effeminate inmate is more “vulnerable,” and an “automatic target” for sexual aggression (quoting *Fields v. Smith*, 712 F. Supp. 2d 830, 854 (E.D. Wis. 2010))); Karri Iyama, *"We Have Tolloed the Bell for Him": An Analysis of the Prison Rape Elimination Act and California's Compliance As It Applies to Transgender Inmates*, 21 Tul. J.L. & Sexuality 23, 31 (2012) (“A study conducted by Human Rights Watch on the pervasiveness of male rape in U.S. prisons found that prisoners who display or fit any of the following characteristics are more likely to be targets of sexual assault: ‘young, small size, and physical weakness; being white, gay, or a first offender; possessing ‘feminine’ characteristics such as long hair or a high voice; being unassertive, unaggressive, shy, intellectual, not street-smart, or ‘passive.’”)

problem by denying appropriate access to medical care.¹⁴³ Cruel and unusual punishment in housing, which increases sexual assault¹⁴⁴ must be distinguished from cruel and unusual punishment in denying access to medical care, which causes increased suicidality and self-mutilation.¹⁴⁵

Some experts claim that denying access to hormone treatment, and preventing much effeminacy in male prisons decreases trans prisoners' vulnerability to sexual assault, thereby decreasing sexual assault.¹⁴⁶ These experts claim effeminacy of a trans woman in male prisons causes such an inmate to be an "automatic target" of sexual assault.¹⁴⁷ However, the vast majority of scholarship does not support such a claim.¹⁴⁸ Denying trans prisoners' access to appropriate healthcare causes more harm than good. Instead of eliminating sexual assault in prisons, which is pervasive even if effeminacy is not enhanced by hormone therapy,¹⁴⁹ denying

¹⁴³ See *supra* part III.B (denial of access to medical care increases rates of suicide and self-mutilation).

¹⁴⁴ Chapter Three: Classification and Housing of Transgender Inmates in American Prisons, 127 Harv. L. Rev. 1746, 1757 (2014) (advocates suggest housing transgender inmates according to their gender-identity unless this increases violence against transgender inmates—such housing does not include solitary confinement or segregation.).

¹⁴⁵ See *supra* part III.A.

¹⁴⁶ See Agbemenu, *supra* note 136 at 38.

¹⁴⁷ *Id.* at 44-46

¹⁴⁸ *Id.* at 45-46. The Prison Rape Elimination Act was promulgated to protect LGBT prison populations from sexual abuse, and says nothing about protecting trans prisoners from sexual assault by denying access to hormone therapy and other appropriate health care. *Id.* Furthermore, case law and scholarship clearly demonstrate that trans prisoners, who are denied access to appropriate health care, including hormone therapy, often self-mutilate, or attempt suicide. *Id.*

¹⁴⁹ Prison rape in male prisons is often targeted at "men other prisoners deem to be un-masculine: gay, bisexual, or transgender (GBT) prisoners, and men who are small, young, naïve, or judged by other prisoners to be pretty, effeminate, or womanish." See Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 Yale L. & Policy Rev. 1 (2010); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 52 (2001), available at <http://www.hrw.org/legacy/reports/2001/prisbn/> (gay men are more likely to be sexually assaulted in prison). Effeminacy is not eliminated by denying hormone therapy, but instead

access to appropriate healthcare enhances trans prisoners' self-mutilation and attempts on suicide, which further enhances the vulnerability of trans prisoners.¹⁵⁰ Such fears about effeminacy of trans prisoners cannot be allowed to spread, but instead must be remedied with greater access to education about transgenderism.¹⁵¹ Furthermore, when education is not enough to change the minds of all prison officials everywhere, the courts must uniformly interpret the second prong of the Eighth Amendment to presume deliberate indifference of prison officials, who fail to protect trans prisoners from self-inflicted pain and sexual assault—prison officials can abuse power with vulnerable trans prisoner populations,¹⁵² and are less familiar with trans persons and inmates. It is easier to say prison officials did not know of medical needs of prisoners with Gender Dysphoria since being trans is stigmatized.

E. Discrimination against trans persons in general can magnify the denial of healthcare for trans prisoners because inmates are more vulnerable, meriting application of a higher standard to actions of prison officials, or presumption of deliberate indifference

It is thought that rights of trans prisoners are a metaphor for trans rights in general.¹⁵³

Such a metaphor is particularly apt for a discussion on the second prong of the Eighth Amendment because it contextualizes trans prisoners' struggle to acquire appropriate healthcare from prison officials as a refusal of society to sponsor appropriate healthcare for trans persons.¹⁵⁴

proponents argue that denying appropriate healthcare, i.e. hormone therapy effectively prevents an increase in effeminacy in prisons. *See* Agbemenu, *supra* note 138, at 44-45.

¹⁵⁰ *See supra* part III.A.

¹⁵¹ *See* Agbemenu, *supra* note 138, at 46.

¹⁵² *See* Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992).

¹⁵³ *See generally*, S Maruri, *supra* note 1, at 831 (“While hormone therapy in the prison context has important implications for the inmate population, within the broader context of the transgender community, the way in which advocates frame legal arguments for hormone therapy will shape society's perspective on transgender identity.”)

¹⁵⁴ *See generally, id.* “The denial of hormone therapy implicates a greater historical struggle within the *transgender* community as to autonomy in self-definition.” *Id.* at 810. Such an idea suggests there must be some sort of approval, not only of prison officials in providing hormone

Specifically, failing to interpret the second prong of the Eighth Amendment fails to properly place fault on prison officials for denying appropriate health care, much as failing to provide healthcare and supportive transitioning is a societal failure to properly educate about acceptance of trans persons, and appropriately insure them.¹⁵⁵ To interpret denial of access to appropriate healthcare as the fault of trans persons is to further “stigmatize” an already vulnerable population.¹⁵⁶ With increased suicidality of untreated trans prisoners and higher rates of sexual assault imposed on the same prisoners, interpreting the second prong of the Eighth Amendment as anything but the prison official’s culpable failure to provide access to healthcare, merely adds another layer of stigmatization to a trans prisoner’s experience, this time increasing the trans prisoners’ own culpability for being trans and being therefore unworthy of appropriate healthcare. Allowing such a failure to be socially faultless by insulating prison officials from blame normalizes denial of healthcare of trans prisoners, which, in itself, could be cruel and

therapy and appropriate healthcare for trans prisoners, but of society in general in accepting the trans person, providing medical insurance for hormone therapy and sex-reassignment surgery, and providing opportunity for a supportive transition, and is at odds with self-determination. *See id.* at based on medical necessity. *See id.* at 811; *see also* Sarah E. Gage, *The Transgender Eligibility Gap: How the Aca Fails to Cover Medically Necessary Treatment for Transgender Individuals and How Hhs Can Fix It*, 49 *New Eng. L. Rev.* 499, 520 (2015) (“Lack of insurance and individual and provider discrimination are not the only barriers to access; rather, insurance companies’ failure to cover gender-confirming treatment makes this medically necessary care prohibitively expensive and thus out of reach.”).

¹⁵⁵ Nicole M. True, *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 *Iowa L. Rev.* 1329 (2012) (“Currently, individuals diagnosed with gender identity disorder face a great deal of difficulty getting Medicaid or private insurance to cover most gender-confirming treatment, particularly sex reassignment surgery.”).

¹⁵⁶ *See* Maruri, *supra* note 61, at 810 (“To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.”) (quoting Judith Butler, *Undiagnosing Gender*, in *Transgender Rights* 274-75 (Paisley Currah et al. eds., 2006)).

unusual punishment,¹⁵⁷ but also affirms self-mutilation, suicidality, and sexual assault as acceptable punishment for a trans prisoners' crimes.

Furthermore, being a transgender prisoner and being transgender in the general population are directly connected because discrimination in society¹⁵⁸ increases trans persons' use of drugs and criminal activity in order to survive, thereby increasing the trans prisoner population.¹⁵⁹ The second prong of the Eighth Amendment cruel and unusual test must be interpreted to presume culpability of prison officials because the trans prison population is especially marginalized,¹⁶⁰ overrepresented,¹⁶¹ and prone to even greater infliction of violence due to discrimination.

A trans person in society may be denied healthcare, and change doctors, but a trans person in prison has no remedy against a denial of healthcare but to bring a court case, which could take years. During the years of pending adjudication, a trans prisoner waiting on a hope that medical care relief will be granted in the courts still remains prone to an approximately thirty percent chance increase in suicidality.¹⁶² Such an increase in suicidality, self-mutilation, or

¹⁵⁷ See De'Lonta 708 F.3d 520 at 525 (denying appropriate healthcare for self-mutilation as a serious medical need was cruel and unusual punishment.)

¹⁵⁸ Gilbert, *supra* note 13, at 44 (standing for the supposition that addressing social ramifications of discrimination of trans will help keep trans people out of prison in the first place).

¹⁵⁹ *Id.*, at 44-45. Trans persons are "so marginalized, they frequently face the outright denial of education, employment, housing, and health care." *Id.* at 44. It is legal to discriminate against and fire trans persons in a majority of states, the American with Disabilities Act explicitly denies protection to trans persons from discrimination, and the welfare system often denies public assistance to trans persons, who are disproportionately impoverished. *Id.* at 44-45. A disproportionately high rate of homelessness and profiling of trans persons increase numbers of trans persons in prison. Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 Hastings Race & Poverty L.J. 109 (2011).

¹⁶⁰ Gilbert, *supra* note 13, at 29.

¹⁶¹ *Id.* at 45.

¹⁶² Etheridge, *supra* note 82, at 608.

sexual assault exacerbated by improper housing of trans prisoners,¹⁶³ demands that officials responsible for imposition of such enhanced violence stemming from discriminatory denial of health care be held accountable and deliberately indifferent under the second prong of the Eighth Amendment cruel and unusual punishment test.

IV. Conclusion

Prisons are supposed to be places of correction, where convicted criminals go to become improved citizens. Public health law is supposed to make society feel better. Neither of these goals are achieved when prison officials rely on unfounded beliefs and fears about trans prisoners, and seek to deprive them of medically accepted, required healthcare. Prison officials know that trans prisoners with Gender Dysphoria require treatment in addition to that treatment required for mental health concerns, such as depression or anxiety. As such, prison officials must be held accountable when they fail to adequately provide criminal correction, instead acting like bad doctors, and denying access to basic medical care to achieve. Prison officials are not doctors. Failing to treat Gender Dysphoria appropriately must be presumed to be deliberate indifference, and meet the second prong of the *Estelle* cruel and unusual test because the consequences of not treating trans prisoners appropriately are too severe. For instance, one should never have to self-mutilate genitalia or attempt suicide to receive proper healthcare in prison or out. If after receiving a doctor's prescription, and undergoing mental health screening, one is determined to have Gender Dysphoria, treatment is immediately required. Ignoring medical authority due to willful ignorance about Gender Dysphoria, discrimination of trans persons, or unjustified fears about treating trans prisoners could amount to murder. Prison officials should know better.

¹⁶³ See *supra* Part III.C.