

TRANSGENDER INMATES AND SEX REASSIGNMENT SURGERY IN FLORIDA: WHY FAILING TO PROVIDE THIS STANDARD OF CARE IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE 8TH AMENDMENT

EDWYNA ESTIME*

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I. INTRODUCTION

The Eighth Amendment of the United States Constitution protects against cruel and unusual punishment.¹ This constitutional right is afforded to prison inmates to ensure that prison systems refrain from unnecessary and wanton infliction of pain on those convicted of crimes.² This right includes adequate healthcare for prison inmates.³ The Supreme Court has declared that

* Edwyna Estime earned her bachelor’s degree in Criminal Justice at Florida Atlantic University. She is currently a Juris Doctor Candidate for May 2022 at Nova Southeastern University Shepard Broad College of Law. Edwyna would first like to thank her parents for their love and support that has made it possible for her to become the person she is today. Moreover, she thanks her friends and family for always being there through thick and thin, especially throughout the journey of her law school career. Edwyna thanks Lakshmi Apolinario for persuading her to pursue the Nova Law Review’s Summer Candidacy Program alongside her. Edwyna dedicates this comment to her father, who has not only shown unwavering strength as the rock of her family but serves as her role model and best friend. Finally, Edwyna extends a special thanks to the executive board members, the editorial board members, and her fellow colleagues of *Nova Law Review*, Volume 46 for all of their hard work and dedication to Edwyna’s work.

1. U.S. CONST. amend. VIII.
2. *Id.*; see *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).
3. *Gamble*, 429 U.S. at 103.

prison officials have an obligation to all prisoners to provide adequate medical care for severe medical conditions under the Eighth Amendment.⁴ Among those entitled to adequate healthcare are incarcerated transgender prisoners suffering from a severe illness called “gender dysphoria.”⁵ This Comment will discuss the appropriate standards of care for treating transgender inmates and the responsibility of Florida prisons to adopt a necessary treatment option.⁶ Part II of this Comment will briefly examine the history of gender dysphoria in prison systems, the cases that made it possible to consider the standards of care necessary to treat gender dysphoria, and the necessity for sex reassignment surgery.⁷ Part III of this Comment will explain the cases that sparked the conversation of applying the deliberate indifference standard to a prison’s refusal to provide sex reassignment surgery and the need for Florida prisons to adopt this specific standard of care.⁸

II. HISTORY OF GENDER DYSPHORIA IN TRANSGENDER PRISON INMATES

Protecting transgender prisoners has not always been at the forefront of America’s framework.⁹ However, courts and prison systems have recently attempted to provide legal protections for transgender prisoners.¹⁰ In 2013, the Diagnostic and Statistical Manual of Mental Disorders coined the term “gender dysphoria” as a “psychological . . . [illness] that results from . . . [a discrepancy] between one’s sex assigned at birth and one’s gender identity.”¹¹ In other words, gender dysphoria is when a person feels as though their external genitalia does not match the gender they are born with.¹² Gender dysphoria may be experienced and diagnosed in adolescents and adults, with manifestations lasting at least six months.¹³ These manifestations include:

4. Farmer v. Brennan, 511 U.S. 825, 832 (1994); see also *Gamble*, 429 U.S. at 103–05.

5. Lindsey Ruff, Note, *Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who Are Transgender and Incarcerated*, 28 CORNELL J.L. & PUB. POL’Y 127, 142–43 (2018); see also *Gamble*, 429 U.S. at 103.

6. See discussion *infra* Parts II–III.

7. See discussion *infra* Part II.

8. See discussion *infra* Part III.

9. See Ruff, *supra* note 5, at 127.

10. *Id.*

11. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited Jan. 10, 2021); see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

12. See *What Is Gender Dysphoria?*, *supra* note 11.

13. *Id.*

“[a] strong desire to be rid of one’s primary . . . sex characteristics, . . . [a] strong desire to be treated as the other gender,” and a firm conviction of having “typical feelings and reactions of the other gender.”¹⁴ Gender dysphoria may produce symptoms of anxiety, depression, and suicidal thoughts.¹⁵

There are specific treatments that the World Professional Association for Transgender Health (“WPATH”) has deemed appropriate to treat gender dysphoria.¹⁶ It may be treated in several ways, including “changes in gender expression and role, hormone therapy, and psychotherapy”¹⁷ Accordingly, sex reassignment surgery is appropriate for inmates who suffer from severe cases of gender dysphoria.¹⁸ To be in accordance with the principles that govern inmate care, an inmate is entitled to be provided with adequate medical care.¹⁹ This right came from the seminal case *Estelle v. Gamble*,²⁰ where the Supreme Court ruled that deliberate indifference to an inmate’s medical needs constitutes cruel and unusual punishment under the Eighth Amendment.²¹

A. *Estelle v. Gamble’s Role in Securing Adequate Medical Care for Inmates*

Before the ruling in *Gamble*, prison policies did not implicate the Eighth Amendment in prioritizing the medical needs of inmates.²² This Supreme Court case created the serious medical need standard used today to bring a successful Eighth Amendment claim.²³ The Court held that when prison authorities are deliberately indifferent to an inmate’s serious medical need, those actions constitute cruel and unusual punishment in violation of the Eighth Amendment.²⁴ Due to an inmate’s inability to care for themselves medically because of their incarceration, the Court reasoned that an inmate

14. *Id.*

15. Victor J. Genchi, Note, *Sex Reassignment Surgery & the New Standard of Care: An Analysis of the Role the Federal Court System, the States, Society, and the Medical Community Serve in Paving the Way for Incarcerated Transgendered Persons’ Constitutional Right to a Sex Change*, 22 BARRY L. REV. 93, 94 (2016).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

20. 429 U.S. 97 (1976).

21. *See id.* at 101, 104.

22. *See* Alexa Raspa, Note, *Protecting Transgender Prisoners: Defending Access to Gender Confirmation Surgery*, 27 WIDENER L. REV. 91, 96 (2021).

23. *Id.*

24. *See Gamble*, 429 U.S. at 101, 104.

must rely on prison authorities to treat his or her medical needs.²⁵ If prison authorities ignore an inmate's medical needs, their actions could produce excruciating physical pain for the inmate, or even worse, death.²⁶ Therefore, the effects that come from ignoring an inmate's medical needs can lead to a wanton infliction of pain and suffering in violation of a prisoner's right to be free from cruel and unusual punishment.²⁷

Although *Gamble* ensured that medical care is given to prisoners, a later case provided a two-prong analysis to determine what constitutes an Eighth Amendment violation.²⁸ In *Kosilek v. Spencer*,²⁹ the United States Court of Appeals for the First Circuit established a two-prong test that an inmate must satisfy to prevail on an Eighth Amendment claim.³⁰ To prove an Eighth Amendment violation, an inmate must: (1) provide proof of a serious medical need, and (2) show prison authorities' deliberate indifference to that need.³¹ The first prong is an objective standard, where an inmate's need can be satisfied by a diagnosis from a physician, or the need is so apparent that "a layperson would easily recognize the necessity for medical" treatment.³² The second prong is a subjective standard that requires a showing that prison authorities purposefully failed to treat an inmate's serious medical need.³³ There has not been a clear, concise definition of what a "serious" medical need is, yet many courts acknowledge diagnosis by physicians.³⁴ Although the court in *Kosilek* held that denial of gender confirmation surgery was not a violation of the Eighth Amendment, it grappled with whether the treatment plan prison authorities provided violated the Eighth Amendment.³⁵

The court in *Kosilek* analyzed each prong respectively, holding, as to the objective prong, it was adequate medical care to provide the inmate with hormone therapy, mental health counseling, facial hair removal, and feminine clothing.³⁶ Regarding the subjective prong, the court held that the treatment plan provided, and did not blatantly ignore, the inmate's medical needs.³⁷ The court stated that when two treatment options relieve an inmate's pain and

25. Raspa, *supra* note 22, at 96; *see Gamble*, 429 U.S. at 103.

26. Raspa, *supra* note 22, at 96; *Gamble*, 429 U.S. at 103.

27. *See* Raspa, *supra* note 22, at 96.

28. *Id.* at 97; *see also* *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014).

29. 774 F.3d 63 (1st Cir. 2014).

30. *Id.* at 82.

31. *Id.*

32. *Id.*

33. *Id.* at 83.

34. Raspa, *supra* note 22, at 97; *Kosilek*, 774 F.3d at 82.

35. *See Kosilek*, 774 F.3d at 89.

36. *See id.* at 90.

37. *See id.* at 91–92.

suffering, courts do not have to force medical professionals to adopt a specific one.³⁸ There is no genuine dispute that gender dysphoria is a serious medical need under the Eighth Amendment, which satisfies the objective prong of *Kosilek's* two-prong test.³⁹ Several federal appellate courts have recognized that gender dysphoria is a serious medical need to be taken seriously with adequate medical care.⁴⁰ The debate, on the other hand, is whether inmates diagnosed with gender dysphoria have been given suitable treatment.⁴¹

B. *Standards of Care Suitable to Treat Gender Dysphoria*

The Standards of Care under the WPATH have become a popular source for managing the health of transsexuals.⁴² Since 1979, the WPATH has been recognized, both internationally and locally, by health professionals as a guide on managing transsexual and transgender people seeking medical attention.⁴³ Although there are highly suggested treatment options offered by the WPATH, treatment ultimately depends on the person.⁴⁴ The treatment options include: hormone therapy, feminine or masculine products, psychotherapy, mental health counseling, and sex reassignment surgery.⁴⁵ Some individuals may benefit from hormones, and others may benefit from psychotherapy; however, it is clear that each treatment option, including sex reassignment surgery, is not adequate for every individual diagnosed with gender dysphoria.⁴⁶

1. Hormone Therapy

Severe forms of gender dysphoria may produce harmful effects such as psychological distress, self-mutilation, depression, and suicide.⁴⁷ Individuals that experience a severe form of gender dysphoria may be prescribed hormones to relieve the effects of psychological distress.⁴⁸ In cases where one does not wish to undergo surgery, hormone therapy is a desirable

38. *Id.* at 90.

39. *See id.* at 86.

40. Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 295 (2016).

41. *Id.* at 296.

42. *Id.* at 299.

43. *See id.* at 299–300; Genchi, *supra* note 15, at 101.

44. Ruff, *supra* note 5, at 139.

45. *See* Bourcicot & Woofter, *supra* note 40, at 299–300.

46. *See id.* at 300.

47. *See id.* at 285–86.

48. *Id.* at 305.

treatment option.⁴⁹ To be prescribed hormone therapy, one must have “[p]ersistent, well-documented gender dysphoria”, “[c]apacity to make a fully informed decision and consent to treatment”, meet the age required for that jurisdiction, and any “significant medical [and] mental health concerns . . . must be reasonably well-controlled.”⁵⁰

Hormone therapy can, and is intended to, cause male-to-female transsexual individuals to experience breast enlargement, sterilization, and the feeling of living their lives as the gender they believe they are.⁵¹ In instances where hormone therapy is not maintained, it may result in pain, suffering, and even life-threatening conditions.⁵² Courts have not always encouraged prisons to offer hormone therapy due to the high-security risks of providing a real-life experience to transgender inmates.⁵³ Therefore, prisons have been more willing to offer less invasive treatments, such as psychotherapy, instead of hormone therapy.⁵⁴ Courts rarely require prisons to adopt policies that require hormone therapy.⁵⁵ Instead, the medical opinion of prison physicians is considered and given deference when needed.⁵⁶

2. Psychotherapy

Psychotherapy is a treatment that encourages gender identity, gender role, and gender expression, as well as the familiarization of the negative impact of gender dysphoria by addressing one’s mental health related to suffering from gender dysphoria.⁵⁷ Unlike hormone therapy or sex reassignment surgery—where the form of treatment targets one’s physicality—psychotherapy focuses more on an individual’s mental stability and how he or she can seek relief psychologically from the pressures and symptoms of gender dysphoria.⁵⁸ To be prescribed psychotherapy, an individual is encouraged to be evaluated by a health professional.⁵⁹ A “[m]ental health professional[] may serve as a psychotherapist, counselor, or

49. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 24, 34 (2012), <http://www.wpath.org/publications/soc>.

50. *Id.*

51. Bourcicot & Woofter, *supra* note 40, at 305.

52. *Id.*

53. *See id.* at 307.

54. *See id.* at 306.

55. *See id.* at 307.

56. Bourcicot & Woofter, *supra* note 40, at 307.

57. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 49, at 10.

58. *See id.* at 10, 29.

59. *Id.* at 28.

family therapist,” where they determine an individual’s reason for seeking treatment based on that person’s particular issues.⁶⁰ The evaluation includes “an assessment of gender identity and gender dysphoria,” a discussion of the “history and development of gender dysphoric feelings,” an assessment of the “impact of stigma attached to gender nonconformity on mental health,” and considers the available support from family, friends, and peers, if there is any.⁶¹

While hormone therapy is a prerequisite for sex reassignment surgery, psychotherapy is not.⁶² Psychotherapy is a recommended treatment, but it is still effective in matters where an individual’s needs are severe.⁶³ According to the WPATH, psychotherapy assists transsexuals and transgender people with the following:

(i) clarifying and exploring gender identity and role, (ii) addressing the impact of stigma and minority stress on one’s mental health and human development, and (iii) facilitating a coming-out process, which for some individuals may include changes in gender role and expression and the use of feminizing [or] masculinizing medical interventions.⁶⁴

In cases where an individual who suffers from gender dysphoria severely needs psychotherapy, it may also treat anxiety and depression.⁶⁵

3. Sex Reassignment Surgery

Sex reassignment surgery is a medical procedure that involves genital reassignment, chest surgery, facial reconstruction, liposuction, gluteal augmentation, and feminine or masculine surgery.⁶⁶ In instances where an individual’s gender dysphoria is severe, sex reassignment surgery is almost necessary.⁶⁷ According to the WPATH, for an individual to qualify for sex reassignment surgery, one must meet the following criteria:

60. *Id.* at 23.

61. *Id.*

62. *See* WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 49, at 28.

63. *See* Bourcicot & Woofter, *supra* note 40, at 300–01.

64. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 49, at 29

(citations omitted).

65. *Id.*

66. Bourcicot & Woofter, *supra* note 40, at 307–08.

67. *Id.* at 307.

(1) persistent, well-documented gender dysphoria, (2) capacity to make a fully informed decision and to consent for treatment, (3) age of majority in the individual's given country, (4) well-controlled significant medical or mental health concerns (when present), (5) twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual, and (6) twelve continuous months of living in a gender role that is congruent with the patient's gender identity.⁶⁸

The WPATH does not require an individual to meet all of the criteria, but inmates suffering from gender dysphoria are better inclined to need sex reassignment surgery if he or she can meet all of the criteria.⁶⁹ Sex reassignment surgery involves many types of procedures.⁷⁰ For transgender men, it may encompass the removal of ovaries, restructuring the clitoris, performing a hysterectomy, and removing the fallopian tubes.⁷¹ For transgender women, it may include genital castration, creating a neovagina, and any other post-operative changes needed.⁷² Members of the medical community have advocated for sex reassignment surgery as a necessary treatment for severe forms of gender dysphoria.⁷³ However, the courts and many prison systems have not agreed that it is a treatment option that should be adopted everywhere.⁷⁴ A few reasons for this include the cost and security risks that exist with affording every transgender inmate with surgery.⁷⁵ In addition, transgender inmates suffer an increased risk of sexual violence compared to any other inmate.⁷⁶ Some courts have held that the denial of sex reassignment surgery is not a violation of the Eighth Amendment, while other courts have agreed that surgery is a necessary procedure in extreme cases.⁷⁷ However, in many cases, inmates are not provided just surgery alone but are treated with a combination of treatment options that are part of a routine prescribed by the prison's physician.⁷⁸

Since sex reassignment surgery is unnecessary for every transgender person and an inmate's condition solely individualizes it, the courts place a

68. *Id.* at 308.

69. *See id.*

70. Travis Cox, Comment, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 368 (2009).

71. *Id.* at 367.

72. *Id.*

73. *See* Bourcicot & Woofter, *supra* note 40, at 308.

74. *Id.* at 308–09.

75. *See id.* at 298–99; Ruff, *supra* note 5, at 148; Cox, *supra* note 70, at 349.

76. Ruff, *supra* note 5, at 149.

77. *See* Bourcicot & Woofter, *supra* note 40, at 309; Ruff, *supra* note 5, at 145.

78. Bourcicot & Woofter, *supra* note 40, at 309.

great deal of deference on prison authorities and physicians to provide the best possible forms of care to treat gender dysphoria.⁷⁹ This is not always efficient because, although the Eighth Amendment does not explicitly require sex reassignment surgery, it does require inmates to be provided adequate treatment options.⁸⁰ With this sentiment in mind, prison authorities are put in a position to assess the inmate's condition balanced with what treatment can be feasibly provided by the prison to be under the Eighth Amendment.⁸¹ Accordingly, one issue that has been presented as a challenge for prison systems regarding transgender inmates and the medical care they are given is housing restrictions.⁸² Historically, prison systems did not adopt policies determining housing placements based on an inmate's gender identity, but instead on his or her sex assigned at birth.⁸³ When an inmate sought to be placed in a housing facility equal to an inmate's gender identity, he or she must have legally changed his or her sex.⁸⁴ Therefore, most states require that a physician provide a medical opinion towards a person seeking genital reassignment or body modification.⁸⁵ Even then, surgery is not always performed due to issues affecting the transgender population, such as being underage, poor, or the individuals are not citizens of the country they are seeking the surgery from.⁸⁶

Sex reassignment surgery is ultimately considered the last step in treating gender dysphoria because it is the most invasive treatment option.⁸⁷ For some, surgery is unnecessary, but for others with severe gender dysphoria, surgery may be the only option for relief.⁸⁸ Furthermore, it may be important for individuals with severe gender dysphoria to undergo genital surgery to be comfortable in society.⁸⁹ In addition to feeling more comfortable in their own bodies, surgery can help alleviate discomfort in settings such as doctors' offices, swimming pools, and health clubs.⁹⁰ Therefore, sex reassignment surgery is often necessary for individuals who have tried other forms of treatment, but have not felt complete relief from the symptoms of gender

79. *See id.* at 287, 309.

80. *Id.* at 291; *Know Your Rights: Medical, Dental and Mental Health Care*, 21 NAT'L PRISON PROJECT J. 13, 16 (2009).

81. Bourcicot & Woofter, *supra* note 40, at 292.

82. Ruff, *supra* note 5, at 138.

83. *Id.*

84. *Id.* at 138–39.

85. *Id.* at 139.

86. *Id.*

87. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54.

88. *Id.*

89. *See id.* at 54–55.

90. *Id.* at 55.

dysphoria.⁹¹ Although it may be a necessary form of treatment, the underlying ethical issues that it can present may be looked at as disturbing for health professionals.⁹² Health professionals take an oath to “above all do no harm,” so to reconstruct, remove, and add functions to one’s normal body may cause some health professionals to feel as though they are behaving unethically.⁹³ Therefore, it is important for health professionals to understand that: (1) the symptoms the individual is experiencing are severe, and (2) surgery is the last resort and may be the only thing that can help.⁹⁴ This requires the professional conducting the surgery to ask various questions, discuss the patient’s history, and request the patient provide insight on what led to the decision to have the surgery.⁹⁵ Once the surgeon has been informed of the patient’s pertinent information, it is also important for the surgeon to discuss the limitations, risks, advantages, and disadvantages of the surgery.⁹⁶

After consulting a health professional and securing a surgeon, transgender and transsexual individuals who decide to have surgery may be prevented from undergoing surgery for lack of health care coverage.⁹⁷ Unless the individual seeking sex reassignment surgery can pay for the operation out of pocket, it may be difficult to receive the operation because some private insurance companies decline to cover this type of operation.⁹⁸ Due to the nature of the operation, many transgender and transsexual individuals experience discrimination and hostility, which causes that individual to be declined health care coverage for the surgery.⁹⁹ The denial of sex reassignment surgery is largely due to some states declaring that surgery is not medically necessary and placing the surgery in the category of “cosmetic” services.¹⁰⁰ This belief cannot be further from the truth.¹⁰¹ Treatments such as hormone therapy, psychotherapy, and sex reassignment surgery are as medically necessary for treating gender dysphoria as pain medication is for treating a bodily injury.¹⁰² Preventing this treatment option from happening could have severe health consequences including depression, anxiety, and

91. *Id.* at 54–55.

92. WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 49, at 55.

93. *Id.*

94. *See id.* at 55.

95. *Id.* at 55–56.

96. *Id.* at 56.

97. Nancie Palmer et al., *Identity: Societal and Legal Ramification with Special Focus on Transsexuals*, 39 NOVA L. REV. 119, 154 (2015).

98. *Id.*

99. *Id.*

100. *Id.* at 155.

101. *Id.*

102. *See* Palmer et al., *supra* note 97, at 155.

suicide.¹⁰³ This is not to say that a few states have not taken action to reduce the health care discrimination directed toward transgender people and transsexuals.¹⁰⁴ For example, California has expressly prohibited health insurance discrimination against transgender people, thus making equal access to healthcare possible.¹⁰⁵ Following California, states such as Colorado, Oregon, and Vermont have prohibited health insurance discrimination based on gender identity and expression related to transgender and transsexual people.¹⁰⁶ The majority of states in the United States should model California, Colorado, Oregon, and Vermont in outlawing insurance discrimination because equal access to healthcare should be provided to all people of any race, gender, gender preference, or nationality.¹⁰⁷

III. WHY FLORIDA PRISONS SHOULD ADOPT SEX REASSIGNMENT SURGERY AS A SUITABLE TREATMENT OPTION

According to the Florida Department of Corrections, Florida has the third-largest state prison system in the country with about 80,000 incarcerated inmates and a budget of \$2.7 billion dollars.¹⁰⁸ In addition, the Florida Department of Corrections happens to be Florida's largest state agency.¹⁰⁹ Prisons and correctional facilities are required to provide health care *and* adequate health care to their inmates.¹¹⁰ In the larger prison systems, on-site infirmaries exist to provide medical care to the inmates.¹¹¹ Unfortunately, those sentenced to incarceration are usually low-income and uninsured people, and a considerable amount of inmates enter the prison system with significant physical and mental health needs.¹¹² These needs include tuberculosis, HIV, Hepatitis B and C, arthritis, diabetes, and sexually transmitted diseases, with almost half of the prison population suffering from mental health disorders.¹¹³

103. *Id.* at 156.

104. *Id.*

105. *Id.*

106. *Id.*

107. Palmer et al., *supra* note 97, at 157.

108. *About the Florida Department of Corrections*, FLA. DEP'T CORR., <http://www.dc.state.fl.us/about.html> (last visited Jan. 10, 2022).

109. *Id.*

110. See Alexandra Gates et al., *Health Coverage and Care for the Adult Criminal Justice-Involved Population*, KFF (Sept. 5, 2014), <http://www.kff.org/uninsured/issue-brief/health-coverage-and-care-for-the-adult-criminal-justice-involved-population/>.

111. *Id.*

112. *See id.*

113. *Id.*

Accordingly, there are approximately 300 transgender individuals in Florida's state prisons.¹¹⁴ When inmates enter the prison system, they are required to go through “reception,” where they are examined by doctors and interviewed about their medical and emotional needs.¹¹⁵ In addition, an inmate may disclose his or her level of education, drug abuse history, and sexual orientation for the prison to be informed of the necessities an inmate may need during their incarceration.¹¹⁶ Therefore, transgender inmates are able to express their preferred gender and disclose relevant information to prison officials who can subsequently decide what accommodations are afforded for that particular inmate.¹¹⁷ However, Florida prisons base an inmate’s housing on the gender he or she has at birth, so it is not a smooth transition for transgender people when sentenced to incarceration after living a transgender life in society.¹¹⁸

In situations where transgender inmates live their life as their preferred gender outside of prison, then enter the prison system living a completely different life, the immediate change can be traumatic.¹¹⁹ This can produce a tremendous amount of mental and physical distress that requires prison officials to comply with the ruling of providing adequate medical care to all incarcerated persons.¹²⁰ With gender dysphoria becoming more prevalent across the nation and incarceration rates significantly rising, there have been increasing civil and constitutional rights claims that further the conversation of allowing suitable treatment options.¹²¹ However, the conversation did not start in Florida prisons, nor is it a recent conversation.¹²² The 1994 Supreme Court case *Farmer v. Brennan*¹²³ became a vital case to the transgender and transsexual community because it held that prison officials might be held liable under the Eighth Amendment for acting with “deliberate indifference” to an inmate’s health or safety.¹²⁴ This not only held prison officials

114. Romy Ellenbogen, *Outcasts Among the Outcasts*, MIAMI HERALD, Dec. 17, 2019, at A1.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.*

119. *See Armstrong v. Mid-Level Practitioner John B. Connally Unit*, No. SA-18-CV-00677, 2020 WL 230887, at *1 (W.D. Tex. Jan. 15, 2020).

120. *See id.*; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

121. *See Armstrong*, 2020 WL 230887, at *4.

122. *See id.* at *4–5.

123. 511 U.S. 825 (1994).

124. *See id.* at 825, 828, 832.

accountable for turning a blind eye to inmates' needs, but it ensured inmates received proper food, clothing, shelter, and medical care.¹²⁵

In *Farmer*, the petitioner, Dee Farmer—who is biologically male but identifies as a woman—is a transsexual sentenced to incarceration for credit card fraud.¹²⁶ The petitioner was diagnosed by medical personnel of the Bureau of Prisons as suffering from a rare psychiatric disorder, similar to gender dysphoria, where she felt consistently uncomfortable with the genitals she was born with.¹²⁷ According to the American Medical Association Encyclopedia of Medicine, this psychiatric disorder can be treated with hormone therapy and surgery to provide relief and ultimately permanently change one's sex.¹²⁸ Since the history of prisons has been to house inmates according to their biological sex, it is utterly traumatic for inmates to live their lives as the sex they feel they are, only to be incarcerated as the opposite sex, creating an almost out-of-body experience.¹²⁹ In this case, before becoming incarcerated, the petitioner essentially lived life as a woman by wearing women's clothing, undergoing estrogen therapy, having breast implants, and unsuccessfully trying to receive "testicle-removal surgery" from the black market.¹³⁰ Since petitioner exhibited feminine behavior inside and outside of prison, it was no surprise that she was subjected to physical and sexual violence after being transferred to a high-security prison that generally houses inmates with more troublesome factors than medium or low-security prisons.¹³¹ The petitioner alleged she was beaten and raped by another inmate in her cell within two weeks of transferring to the United States Penitentiary in Terre Haute, Indiana, after she was placed in the general population with the other inmates.¹³²

Before the ruling of this case, it was not common knowledge for prison officials to take delicate care in treating transgender people and transsexuals with proper confinement conditions.¹³³ However, it can be said that prison officials—who know that the prison has a violent atmosphere because of the number of violent inmates it houses and the history of inmate assaults or deaths—should provide certain precautions for incoming

125. *Id.* at 832.

126. *Id.* at 829.

127. *Id.*

128. *Farmer*, 511 U.S. at 829 (citing 2 AM. MED. ASS'N, ENCYCLOPEDIA OF MED. 1006 (Charles B. Clayman ed., 1989)).

129. *See id.*

130. *Id.*

131. *See id.* at 830.

132. *Id.*

133. *Farmer*, 511 U.S. at 831–32.

vulnerable inmates like the petitioner, Dee Farmer.¹³⁴ Although prison officials failed to do this in the petitioner's case, the Supreme Court did not outrightly rule the prison's actions as deliberately indifferent because the petitioner never voiced any concern for her safety.¹³⁵ Therefore, with *Gamble* setting a standard for adequate medical care to all inmates and *Farmer* holding prison officials accountable for not only inmates' health but also their safety, there is a clear line to draw when it comes to transgender people receiving proper confinement conditions under the Eighth Amendment.¹³⁶

Nearly twenty years later, the conversation of deliberate indifference under the Eighth Amendment has been introduced into the transgender community in the 2013 case *De'lonta v. Johnson*.¹³⁷ The District Court of Appeals for the Fourth Circuit ruled that Ophelia De'lonta, an incarcerated transsexual, had a plausible Eighth Amendment claim against prison officials that had denied De'lonta consideration for sex reassignment surgery.¹³⁸ De'lonta was convicted of bank robbery and sentenced to incarceration at the Virginia Department of Corrections for seventy-three years.¹³⁹ Not only is she a preoperative transsexual, but she also suffers from an illness, much like gender dysphoria, that causes mental anguish called "gender identity disorder."¹⁴⁰ Gender identity disorder is described as the "feeling of being trapped in a body of the wrong gender. . . ." and produces severe forms of mental pain and agony.¹⁴¹ De'lonta expressed to prison officials, on numerous occasions, her desire to self-castrate and perform her own sex reassignment surgery because the distress of her gender identity disorder was too much to bear.¹⁴² As outlined above, the adequate treatment options for disorders pertaining to gender happen to be hormone therapy, psychotherapy, and, in the most severe cases, sex reassignment surgery.¹⁴³ Since an inmate is not entitled to *all* forms of treatment options under the Eighth Amendment, but is still entitled to an *adequate* treatment option, an inmate in De'lonta's position should be considered for sex reassignment surgery.¹⁴⁴ In response to De'lonta's condition, the Virginia Department of Corrections allowed De'lonta to live as a woman inside the prison system and provided hormone

134. *See id.* at 831.

135. *See id.* at 832.

136. *See id.* at 837; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

137. 708 F.3d 520 (4th Cir. 2013).

138. *Id.* at 522.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See De'lonta*, 708 F.3d at 522.

143. *Id.* at 522–23.

144. *See id.* at 526; *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

therapy, as well as allowing her to wear women's clothing and obtain consistent psychological counseling.¹⁴⁵

However, despite the treatment plan for De'lonta, she still felt an overwhelming need to self-castrate and even wrote countless letters and formal grievances to prison officials to notify them of the inadequacy of the treatment provided.¹⁴⁶ Unfortunately, after years of inadequate treatment and ignored repeated pleas for help, De'lonta was hospitalized after attempting to self-castrate.¹⁴⁷ This is a direct violation of an inmate's Eighth Amendment right to be free from cruel and unusual punishment because De'lonta underwent the treatment plan provided by prison officials, voiced her concerns that the treatment had not provided relief, and ultimately was harmed after prison officials refused to consider other options.¹⁴⁸ Moreover, prison officials cannot hide behind the excuse of *not knowing* a substantial risk of harm exists when inmates outrightly request a certain type of treatment option.¹⁴⁹ The WPATH considers sex reassignment surgery a last resort option, and since De'lonta did many years of hormone therapy, psychiatric counseling, and is now requesting sex reassignment surgery, it is in accordance with the Standards of Care for transgender health.¹⁵⁰ The Virginia Department of Corrections denied De'lonta consideration for sex reassignment surgery despite all the factors and threats of self-mutilation, and such denial should constitute a deliberate indifference to an inmate's serious medical needs.¹⁵¹ However, the court in De'lonta's case did not decide that Virginia Department of Corrections' prison officials acted with deliberate indifference; rather, the court held that De'lonta had a "sufficient basis" for an Eighth Amendment violation.¹⁵²

This is an unfortunate conclusion to the traumatic experience of De'lonta; it should not take an attempt to severely harm oneself for the intervention of the justice system.¹⁵³ Nor should a possible life-threatening situation occur to hold prison officials accountable for their blatant disregard for an inmate's life.¹⁵⁴

145. *De'lonta*, 708 F.3d at 522.

146. *Id.*

147. *See id.*

148. *See id.* at 525.

149. *See id.* at 525–26.

150. *See De'lonta*, 708 F.3d at 522–23.

151. *See id.*

152. *Id.* at 526.

153. *See id.* at 525–26.

154. *See id.*

Although the ruling in *De'lonta* made it possible for transgender inmates to bring forth an Eighth Amendment claim due to inadequate treatment options, later cases are split on whether sex reassignment surgery is a necessary treatment option.¹⁵⁵ *Gibson v. Collier*¹⁵⁶ expanded the conversation of what actions rise to the level of deliberate indifference related to a medical professional's opinion of treatment.¹⁵⁷ The Fifth Circuit Court held that a "[p]laintiff's disagreement with the diagnostic decisions of medical professionals does not provide the basis for a civil rights lawsuit."¹⁵⁸ Now, this ruling imposes a cap on Eighth Amendment claims that can be brought; while it is possible to bring forth an Eighth Amendment claim based on inadequate treatment, an inmate must now provide a showing more than just a mere disagreement or dislike in the treatment being delivered.¹⁵⁹ Therefore, in cases where transgender inmates are suffering from gender dysphoria, it is not enough to just express that a treatment option is not working.¹⁶⁰ One example of this is Scott Lynn Gibson, a transgender prison inmate at the Texas Department of Criminal Justice, who was convicted of two counts of aggravated robbery.¹⁶¹ Gibson is biologically male but suffers from gender dysphoria, and has identified as a female since the age of fifteen.¹⁶² Due to her illness, she experiences acute distress, depression, and has attempted self-castration and suicide.¹⁶³ As a result, the Texas Department of Criminal Justice started her on mental health counseling and hormone therapy, which Gibson expressed to prison officials did not fully relieve her symptoms of gender dysphoria.¹⁶⁴

After receiving hormone therapy and counseling, Gibson requested sex reassignment surgery; she asserted that the prison's policy of evaluation by appropriate medical and mental health professionals, along with treatment determined individually, reflected the accepted standards of care.¹⁶⁵

155. See *De'lonta*, 708 F.3d at 526; *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019), *cert. denied sub nom. Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020); *Armstrong v. Mid-Level Practitioner John B. Connally Unit, No. SA-18-CV-00677*, 2020 WL 230887, at *9 (W.D. Tex. Jan. 15, 2020); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1275–76 (11th Cir.), *reh'g denied*, 981 F.3d 994 (11th Cir. 2020) (en banc).

156. 920 F.3d 212 (5th Cir. 2019).

157. *Id.* at 220.

158. *Id.*

159. See *id.*

160. See *id.*

161. *Gibson*, 920 F.3d at 216–17.

162. *Id.* at 217.

163. *Id.*

164. *Id.*

165. *Id.* at 217–18.

Unfortunately, the court concluded that since there is no consensus in the medical community about the necessity of sex reassignment surgery, there are no standards binding medical professionals to provide it.¹⁶⁶ The court relied on the fact that Gibson never actually harmed herself, coupled with the existence of alternative treatment options that the WPATH also recommends in cases similar to Gibson's.¹⁶⁷ This case gives great deference to medical professionals who may or may not have experience treating transgender inmates diagnosed with gender dysphoria, instead of considering the WPATH's recommendation that sex reassignment surgery is a last resort option.¹⁶⁸ It should be quite clear that when treatment options are not working, the consideration of a treatment that has not been used is the next best thing.¹⁶⁹ Prisons that refuse to consider sex reassignment surgery and ignore an inmate's plea for efficient care should be declared as going against the very principle set out under the Eighth Amendment: To provide adequate care and confinement conditions to inmates.¹⁷⁰ In fact, the dissent in this case correctly explains that the Eighth Amendment requires individualized assessments of an inmate's medical needs, and should not provide a blanket ban on sex reassignment surgery as a whole solely because the majority of the medical community has yet to adopt it.¹⁷¹ Unfortunately, the court did not decide this case in the best interest of a human life suffering mental distress, but rather took the side of medical professionals, who simply did not believe in a treatment that could very well relieve symptoms of an illness that neither the court nor medical professionals had ever experienced.¹⁷²

Interestingly, a case in the same year took a different route and finally decided in favor of sex reassignment surgery, making significant headway in the conversation concerning transgender inmates and gender dysphoria.¹⁷³ In *Edmo v. Corizon, Inc.*,¹⁷⁴ the Ninth Circuit Court of Appeals held that a transgender prisoner's treating psychiatrist acted with deliberate indifference to that inmate's serious medical needs after denying her a gender confirmation surgery.¹⁷⁵ Adree Edmo, a male-to-female transgender prisoner serving a

166. *Gibson*, 920 F.3d at 221.

167. *See id.*

168. *Id.* at 222–23; *see also* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54.

169. *See Gibson*, 920 F.3d at 241 (Barksdale, J., dissenting).

170. *See id.* at 238 (Barksdale, J., dissenting).

171. *See id.* at 225.

172. *See id.*

173. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).

174. 935 F.3d 757 (9th Cir. 2019).

175. *Id.* at 767.

prison term at the Idaho Department of Correction, suffers from gender dysphoria.¹⁷⁶ Edmo has experienced severe mental distress, which caused her to attempt to remove her male genitalia twice.¹⁷⁷ Although Edmo experienced the same symptoms as the plaintiff's in cases mentioned above, her case and the ruling of the Ninth Circuit are different because prison authorities were deliberately indifferent to Edmo's ongoing, extreme suffering.¹⁷⁸ Edmo's first attempt at castration occurred after she was being treated with hormone therapy and attending counseling.¹⁷⁹ Although unsuccessful, it was noted by Edmo's treating physician that Edmo left a note stating that she did not want to commit suicide—instead, she just wanted to help herself.¹⁸⁰ At that time, the treating physician reviewed the prison's policy which stated that gender confirmation surgery would not be considered within the Idaho Department of Correction, unless deemed medically necessary according to the treating physician.¹⁸¹ Even after Edmo's first castration attempt, gender confirmation surgery was not contemplated.¹⁸²

Unfortunately, Edmo's second attempt *was* successful, and she was able to self-mutilate by removing her genitals with a razor blade.¹⁸³ Still, she only received hormone therapy, and prison officials refused to consider gender confirmation surgery, even after the gruesome attempt from Edmo to perform the procedure herself.¹⁸⁴

At this point, something should be said about how much emotional and mental torment the transgender community must go through in order to have their rights protected.¹⁸⁵ It is not enough for transgender prisoners to contemplate enduring life-threatening injuries, suffer physical or mental turmoil, and submit countless complaints of inadequate medical care, as they are *only considered* for an alternative form of treatment *after* they have injured themselves.¹⁸⁶ The Ninth Circuit Court should be applauded for coming to the proper ruling, however, the cost that Edmo—and all the other transgender prisoners that came before—had to pay hardly seems like a win for the transgender community.¹⁸⁷ In reaching their holding, the court considered the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Edmo*, 935 F.3d at 773.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 774.

184. *Edmo*, 935 F.3d at 774.

185. *Id.* at 774, 785.

186. *Id.* at 774; *De'lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013).

187. *See Edmo*, 935 F.3d at 780; *De'lonta*, 708 F.3d at 522.

record and the judgments of prison medical officials versus the views of prudent medical professionals in the field to decide whether the decision of prison medical officials was acceptable.¹⁸⁸ The court assured its ruling did not stem from pitting both sides of medical professionals against each other; instead, they gave great deference to Edmo's medical experts, who had years of experience in treating individuals with gender dysphoria, and correctly decided that Edmo needed gender confirmation surgery based on her ongoing and extreme suffering.¹⁸⁹ The court ultimately found that the prison's medical professionals, acting as the State's expert witnesses, lacked the qualifications and expertise necessary to treat inmates with gender dysphoria and inappropriately decided that gender confirmation surgery was unnecessary.¹⁹⁰

Unfortunately, subsequent cases that do not hold a similar record as *Edmo* get the same results as cases holding that sex reassignment surgery is medically unnecessary for inmates with severe gender dysphoria.¹⁹¹ For example, in *Armstrong v. Mid-Level Practitioner John B. Connally Unit*,¹⁹² the San Antonio District Court held that an inmate's medical records lacked a showing of deliberate indifference.¹⁹³ Perzia Bakari Armstrong was sentenced to life imprisonment in 1995.¹⁹⁴ Since childhood, she identified and lived as a woman despite being born a biological male.¹⁹⁵ In 2016, Armstrong was diagnosed with gender dysphoria and expressed "great mental and physical distress . . . threaten[ed] self-castration, attempt[ed] suicide, and engag[ed] in drug use . . ." to cope with her illness.¹⁹⁶ Armstrong was prescribed hormone therapy, the common treatment option, but still felt that it was insufficient to deal with her symptoms.¹⁹⁷ After Armstrong initiated the lawsuit against the prison, the District Court reviewed her medical records and decided that deliberate indifference did not exist because there was no evidence suggesting inadequate treatment, despite her claims that hormone therapy was not helping.¹⁹⁸

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

189. *Id.* at 787.

190. *Id.*

191. *See id.* at 767; *Armstrong v. Mid-Level Practitioner John B. Connally Unit*, No. SA-18-CV-00677, 2020 WL 230887, at *6 (W.D. Tex. Jan. 15, 2020); *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

192. *Armstrong*, 2020 WL 230887, at *1.

193. *Id.* at *4–5.

194. *Id.* at *1.

195. *Id.*

196. *Id.*

197. *Armstrong*, 2020 WL 230887, at *1

198. *Id.* at *2, *6.

Accordingly, the precedent that has been set across the nation for transgender inmates suffering from gender dysphoria is clear, absent actual *physical* harm, no relief is granted to inmates suffering from severe gender dysphoria.¹⁹⁹ Unfortunately, this 2020 case is no different, illustrating that even as time goes on and courts become more aware of what the transgender community is experiencing, not much progress has been made in securing the rights of transgender people who are also incarcerated.²⁰⁰

However, it should be noted that while many gender dysphoria inmates do in fact need and rightfully request reassignment surgery, not *all* transgender prisoners suffering from gender dysphoria meet the requirements to undergo sex reassignment surgery and therefore, prison officials should not be *forced* to incur the monetary and physical constraints that come with housing a post-operative inmate.²⁰¹ Sex reassignment surgery, on the other hand, should be performed in prisons as a treatment of last resort when alternative and less invasive treatments fail to alleviate the pain and suffering from these individuals, therefore, it is critical to distinguish an *eligible candidate* from an inmate with gender dysphoria who seeks the comfort of having genitalia they identify with, but who does not otherwise meet the criteria for a sex reassignment surgery.²⁰² This in no way suggests that prisons should have unfettered discretion to deny sex reassignment surgeries—this outcome should only be reached after properly consulting with medical professionals who are experienced with the transgender community.²⁰³ Similar to the state prisons mentioned above, Florida has not adopted sex reassignment surgery as an adequate treatment option.²⁰⁴ In fact, Florida prisons are less progressive than the prisons previously examined because, in Florida, a transgender inmate cannot receive *the common forms* of treatment to treat gender dysphoria.²⁰⁵

In *Keohane v. Florida Department of Corrections Secretary*,²⁰⁶ the Eleventh Circuit Court of Appeals held that denying a transgender inmate's social-transitioning related requests did not amount to deliberate

199. *See id.* at *6.

200. *See id.* at *5; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019), *cert. denied sub nom. Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020).

201. *See Raspa, supra* note 22, at 94; *Kosilek v. Spencer*, 774 F.3d 63, 81 (1st Cir. 2014).

202. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54–55.

203. *See Armstrong*, 2020 WL 230887, at *5.

204. *See Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1275–76 (11th Cir.), *reh'g denied*, 981 F.3d 994 (11th Cir. 2020) (en banc).

205. *See id.* at 1262–63.

206. 952 F.3d 1257 (11th Cir. 2020).

indifference.²⁰⁷ Reilyn Keohane is a male-to-female transgender inmate serving a fifteen-year sentence at the Florida Department of Corrections for attempted murder.²⁰⁸ At fourteen years old, she began identifying as female, and by the time she turned sixteen, she was diagnosed with gender dysphoria.²⁰⁹ At nineteen years old—six months before starting her incarceration sentence—Keohane began the hormone therapy prescribed by her pediatric endocrinologist.²¹⁰ Surprisingly, she was denied hormone therapy when she was housed at a county jail following her arrest.²¹¹ Months later, when she was transferred to the Florida Department of Corrections and was again denied hormone therapy treatment, even after submitting a written grievance stating she would have harmed herself and considered suicide without it.²¹² For the next two years, despite Keohane’s continued requests and repeated threats to harm herself, every single request was denied due to the prison’s “freeze-frame policy” that stated: “Inmates who have undergone treatment for [gender dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department.”²¹³ This means that inmates suffering from gender dysphoria can only receive the treatment they were receiving at the time of their incarceration; thus, the care of an inmate is not determined by an inmate’s current medical needs.²¹⁴

The treatment options that Keohane requested included her ability to live consistently with her identity by dressing in female undergarments, wearing makeup, and utilizing women’s hairstyles.²¹⁵ Since Keohane had not undergone these social-transitioning steps before incarceration, prison officials refused to grant her requests, claiming it would violate the prison’s policy of requiring male inmates to wear undershorts and cut their hair.²¹⁶ In addition, the prison officials noted safety concerns associated with Keohane’s social-transitioning that would have resulted in the use of additional protection for Keohane and extra responsibility for prison officials to prevent future endangerment.²¹⁷

As a result of the prison’s denial of Keohane’s social-transitioning requests, she tried to hang herself as well as castrate herself as a result of the

207. *Id.* at 1277.

208. *Id.* at 1262.

209. *Id.*

210. *Id.*

211. *Keohane*, 952 F.3d at 1262.

212. *Id.*

213. *Id.* at 1262–63.

214. *See id.* at 1263.

215. *Id.*

216. *Keohane*, 952 F.3d at 1263.

217. *Id.*

distress caused by her gender dysphoria.²¹⁸ It was only after a lawsuit was initiated that the prison referred her to an endocrinologist who immediately prescribed hormone therapy.²¹⁹ This is yet another devastating instance where a transgender inmate believed they had no other choice but to physically harm themselves in order to successfully petition the courts to receive some type of relief.²²⁰ Thereafter, the Florida Department of Corrections attempted to rectify their behavior by lifting the freeze-frame policy and replacing it with a policy that permits the individualized assessment and treatment of inmates suffering from gender dysphoria.²²¹ However, despite the new policy, prison officials refused to grant Keohane's social-transitioning requests, except for allowing a sports bra to assist with her breast enlargement that stemmed from hormone therapy.²²²

Like the cases discussed above, the opinions of the medical professionals differed in *Keohane*.²²³ During the bench trial, Keohane presented a medical expert who confirmed that social transitioning to encourage gender dysphoria patients to live out their gender identity is medically necessary.²²⁴ The medical expert testified:

(1) [A]llowing an individual to present consistently with her gender identity is one “of the medically necessary components for the treatment of Gender Dysphoria,” (2) that it would be “medically and logically inconsistent” and “potentially harmful” to provide Keohane hormone therapy while denying her the ability to socially transition, and (3) [f]orcing one to live in conformity with a gender with which she doesn't identify “would likely” cause her to engage in self-harm.²²⁵

On the other hand, the prison's medical officials who granted Keohane's hormone therapy disagreed with Keohane's expert at trial, stating that Keohane's social transition was not medically necessary due to her current regimen, which was sufficient to treat her gender dysphoria at the time.²²⁶ Prison officials claimed that Keohane's treatment plan of mental health counseling, the use of female pronouns, safer housing accommodations,

218. *Id.*

219. *Id.*

220. *See id.*

221. *Keohane*, 952 F.3d at 1263.

222. *Id.*

223. *Id.* at 1264.

224. *Id.*

225. *Id.*

226. *See Keohane*, 952 F.3d at 1264.

private shower facilities, and hormone therapy should have been enough to treat her condition.²²⁷ The Florida Department of Corrections seemed to overlook the fact that an individual assessment of transgender inmates with gender dysphoria is essential to build a treatment plan, and because every transgender inmate suffering from gender dysphoria is different, all available treatment options should be considered.²²⁸ The State contended that the treatment plan in place was sufficient, and permitting social distancing would pose high-security risks.²²⁹ This contention held no merit due to prisons requiring high-security functions regardless of whether a transgender inmate is receiving treatment or not.²³⁰ The nature of prison itself can be a violent and threatening place for an ordinary person, such as a corrections officer or security guard, to spend countless hours providing safety measures for those housed in a prison.²³¹ Independent of housing a post-operative inmate, a prison will have to provide exclusive safety measures for any inmate, so utilizing security concerns as a justification for denying adequate inmate care is unacceptable.²³² Still, the Eleventh Circuit Court refers to deliberate indifference only as an official acknowledgment of an inmate's serious "[m]edical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate"²³³

Alongside the Florida Department of Corrections, the court seemed to misunderstand the standards of care relevant to transgender health.²³⁴ The WPATH rightfully mentioned that stigma attached to gender nonconformity can lead to prejudice and discrimination; it is uncommon to live in a world where individuals are uncomfortable with their bodies while attempting to rectify them.²³⁵ Society has not entirely accepted that some individuals do not conform to their gender roles, spurring tension in our county's militaries, school systems, employment contexts, prisons systems, and most importantly, the criminal justice system—designed to safeguard our rights.²³⁶ New developments are researched, discovered, and experimented with each day, providing further information about the up-keep of transgender health and providing a stable life for transgender people, whether diagnosed with gender

227. *Id.*

228. *See id.* at 1297, 1298 (Wilson, J., dissenting).

229. *Id.* at 1264.

230. *See id.*

231. *See Keohane*, 952 F.3d at 1275–76.

232. *See id.* at 1294–95 (Wilson, J., dissenting).

233. *Id.* at 1266–67.

234. *See id.* at 1296 (Wilson, J., dissenting).

235. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 4.

236. *See id.* at 31–32.

dysphoria or not.²³⁷ Unfortunately, over the past two years, Keohane was compelled to fight for adequate medical care and unprejudiced consideration of the disparities between the needs of transgender inmates and the inflexible policies affecting them.²³⁸ The balancing act that takes place, with regard to providing exemplary care to inmates versus the prison's legitimate security concerns, is often used as a shield to avoid addressing the bigger issue.²³⁹ The more significant problem is the failure of prisons to adopt acceptable forms of treatment capable of sufficiently treating inmates with gender dysphoria.²⁴⁰ Unfortunately, Florida prisons are slower than other states' prisons because sex reassignment surgery is not even a topic addressed for the approximately three-hundred transgender inmates currently jailed in Florida's prisons.²⁴¹ Instead, social-transitioning is a contested treatment option despite being a standard treatment option in other states.²⁴²

The Eleventh Circuit held that the subjective prong of the deliberate indifference standard, which requires knowledge of a substantial risk of harm and the action of disregarding said risk, had not risen past mere negligence when the Florida Department of Corrections denied Keohane's social-transitioning requests.²⁴³ Similar to *Edmo*, the court grappled with the medical opinions of both sides' experts, who were divided on whether a sex reassignment surgery was needed in order to treat Keohane's gender dysphoria after looking at the totality of the circumstances.²⁴⁴ Mere disagreements about an inmate's course of treatment between medical experts do not rise to the level of deliberate indifference, and the court is in no position to force prisons to adopt one treatment option over the other, if both options provide relief.²⁴⁵ The court explained that for the prison to violate the Eighth Amendment, the treatment it provides must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be tolerable to fundamental fairness," and that was not the case here.²⁴⁶ It seems the court and Florida prisons collectively have not progressed as much as the rest of the nation in

237. *See id.* at 89.

238. *See id.* at 4; *Keohane*, 952 F.3d 1262–63.

239. *See Cox, supra* note 70, at 351; Bourcicot & Woofter, *supra* note 40, at 298–99.

240. *See Cox, supra* note 70, at 351; Ruff, *supra* note 5, at 142–43.

241. Ellenbogen, *supra* note 114.

242. *See Keohane*, 952 F.3d at 1275–76.

243. *Id.* at 1296 (Wilson, J., dissenting).

244. *Id.* at 1260.

245. *Id.* at 1274.

246. *Id.* at 1275 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (quotation omitted)).

lieu of its recent decision in what constitutes adequate care for transgender inmates suffering from gender dysphoria.²⁴⁷

The attempt to address the needs of transgender inmates by Florida Prison's are not adequate enough to *actually* treat the inmates' gender dysphoria.²⁴⁸ For instance, a male-to-female transgender inmate at Dade Correctional Institution was found hanged in her cell after prison officials refused to legally change the inmate's name to a female name.²⁴⁹ Unfortunately, the horrors of Florida prisons for the transgender community do not end at social-transitioning requests or sex reassignment surgery.²⁵⁰ It goes as far as a simple name change, which depicts how difficult it is for transgender inmates to receive an ounce of protection for their rights to identify and live wholeheartedly as the gender they believe themselves to be.²⁵¹ Florida prisons have some work to do when it comes to understanding the mental health of its transgender inmates, and empathically reflect on the true *necessity* of basic standards of care for transgender health.²⁵²

Regardless of whether health professional accept the WPATH or not, it exists to ensure those who are uneducated in transgender health, like Florida prisons, have clear guidelines on what is appropriate to help the uneducated to begin to grasp what is medically needed for the well-being of transgender inmates.²⁵³

IV. CONCLUSION

Understanding gender dysphoria is difficult for the average person, so it is especially difficult for prison officials to know whether inmates are suffering from gender dysphoria, as explained in various cases and periodicals discussed throughout this Comment.²⁵⁴ Even qualified health professionals grapple with suitable treatments for gender dysphoria, further complicating the appropriate standard of care.²⁵⁵ However, there is something to be said about society's evolving standards, coupled with how far the history of the Eighth Amendment's Cruel and Unusual Punishment Clause has come.²⁵⁶ Society

247. *See Keohane*, 952 F.3d at 1277–78.

248. *See Ellenbogen*, *supra* note 114.

249. *Id.*

250. *See id.*; *Keohane*, 952 F.3d at 1262.

251. *See Ellenbogen*, *supra* note 114.

252. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 4.

253. *Id.* at 1.

254. *See* *Edmo v. Corizon, Inc.*, 935 F.3d 757, 773 (9th Cir. 2019), *cert. denied sub nom. Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020).

255. *See Keohane*, 952 F.3d at 1274.

256. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

has progressed from ensuring adequate medical care for prisoners to holding prison officials accountable for failure to provide adequate healthcare and living conditions, to expanding the deliberate indifference standard to apply to transgender health.²⁵⁷ Though the courts are not qualified to deem what is the best course of treatment to treat gender dysphoria, it is the courts' responsibility to apply the deliberate indifference standard accurately, and decide each case properly on its merits.²⁵⁸ Hopefully, transgender inmates in Florida prisons will be shown more significant consideration for the rights they too are afforded by the Constitution, and though there are still hurdles to overcome, at some point, sex reassignment surgery will become the new standard of care.²⁵⁹

257. *See id.* at 103–04.

258. *See id.* at 106.

259. *See id.* at 109 (Stevens, J., dissenting).