BEHIND BARS, WITHIN BOUNDS: THE CONSTITUTIONALITY OF DENYING GENDER-AFFIRMING SURGERIES IN PRISONS

I. INTRODUCTION

Gender-affirming surgeries are not a new medical phenomenon;[1] however, the question of whether American taxpayers may be constitutionally required to fund such procedures for incarcerated individuals presents a novel and increasingly contested legal issue.[2] This debate arises from claims that refusing to provide gender-affirming surgery (hereinafter "GAS") in correctional settings constitutes cruel and unusual punishment in violation of the Eighth Amendment.[3] As courts grapple with a growing number of cases alleging constitutional violations based on the denial of treatment, the scope of the Eighth Amendment's protections in the context of prison healthcare demands renewed scrutiny.

The Cruel and Unusual Punishments Clause is among the most debated and evolving provisions in the United States Constitution.[4] Since the Supreme Court's early articulation in *Weems v. United States* in 1910 that punishment must be evaluated in light of the "evolving standards of decency," the Court has progressively expanded the Clause's application beyond barbaric physical punishments to encompass conditions of confinement and medical care.[5] Subsequent decisions have made it clear that incarcerated individuals are entitled to constitutionally adequate medical treatment, yet the Court has also emphasized that the Eighth Amendment does not guarantee prisoners their preferred course of treatment nor requires the state to provide care beyond what is "medically necessary."[6]

As a result, courts are increasingly being asked to determine whether GAS constitutes medically necessary care.[7] This question is particularly fraught given that such procedures are invasive, costly, not universally accessible to American citizens, and that taxpayer dollars

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[1] Kelsey Mumford, *Ethically Navigating the Evolution of Gender Affirmation Surgery*, 25 AMA J. ETHICS E383, 383 (June 2023) (the first gender-affirming surgery was recorded in 1931).

[2] *See $4 Million CA Taxpayer Dollars Have Funded Trans Surgeries for Inmates*, CAL. FAM. COUNCIL (Nov. 10, 2023) [hereinafter *$4 Million CA Taxpayer*], https://www.californiafamily.org/2023/11/4-million-ca-taxpayer-dollars-have-funded-trans-surgeries-for-inmates/.

[3] *See* Edmo v. Corizon, 935 F.3d 757, 766–67 (9th Cir. 2019); Kosilek v. Spencer, 774 F.3d 63, 68–69 (1st Cir. 2014).

[4] Mary Welek Atwell, *Cruel and Unusual Punishment*, EBSCO (2024), https://www.ebsco.com/research-starters/law/cruel-and-unusual-punishment.

[5] *See infra* Sections II.A, II.B.

[6] *See infra* Section II.B.

[7] Elaina Marx, *Trans Medical Care in Prisons, COVID-19, and the Eighth Amendment's Uncertain Future*, 13 CAL. L.R. ONLINE 108, 113 (2022).

would likely fund their provision in prisons.[8] The tension between evolving standards of decency, democratic accountability, and the judiciary's limited institutional competence raises a fundamental constitutional inquiry: whether the Eighth Amendment compels states to provide GAS to prisoners or whether such determinations are more appropriately left to the legislative and executive discretion.

This Article argues that the Supreme Court should hear this issue and hold that refusing GAS in prisons does not constitute cruel and unusual punishment. By examining case precedent and the deliberate indifference standard governing prison medical care, this Article contends that the Constitution does not mandate taxpayer-funded access to treatment that remains controversial, is not universally available, and is not the only medically recognized response to gender dysphoria.

Part I provides a historical and contemporary overview of the Cruel and Unusual Punishment Clause and its evolution. Part II explores gender dysphoria, its broad and invasive types of treatment, and costs in relation to treatment. Lastly, Part III addresses GAS in prisons, including statistics and standards of care, as well as the three branches' differing approaches to approving GAS in prisons.

II. BACKGROUND

A. Historical Overview

The Eighth Amendment declares, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[9] A full century before the ratification of the United States Constitution, the phrase "cruel and unusual punishments" originated in 1689 when England adopted a Bill of Rights.[10] When the United States Constitution was initially ratified, it did not originally contain a Bill of Rights or a Cruel and Unusual Punishment Clause.[11] This is because there were some concerns regarding the increased power of the federal government.[12] Notably, Abraham Holmes argued that Congress may be inclined to replicate the mishandlings of England's power and apply cruel and unusual punishment as a device to torture individuals convicted of federal crimes.[13] Patrick Henry was another advocate for more restraint and argued that Congress would use punishment to advance oppression.[14]

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[8] *See infra* Section III.C.

[9] U.S. CONST. amend. VIII.

[10] Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment,* NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103 (last visited Feb. 9, 2026).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

Although the Clause has strained the lower courts since the "evolving standards of decency" test was created over sixty years ago,[15] The Clause received very little debate in Congress.[16] Two members objected on the grounds that it foreshadowed issues society is seeing today, and Mr. Smith from South Carolina objected because the words were "too indefinite."[17] A second opponent, Mr. Livermore, communicated that while the Clause expressed, "a great deal of humanity . . . it seems to have no meaning . . . [it is not] necessary."[18] Mr. Livermore further questioned the ambiguity of the terms "excessive bail and fines" and cautioned against the limitation on making crucial laws by the declaration made by this Clause.[19] Despite these arguments, the Clause was agreed to by a majority.[20]

Early cases challenging the Cruel and Unusual Punishment Clause primarily addressed punishment imposed at sentencing, rather than the treatment prisoners received while incarcerated.[21] The law viewed prisoners as de facto "slaves of the state" without any constitutional rights.[22] Almost 75 years after the Eighth Amendment's ratification, the Court evaluated the Clause in a 1866 case, where it held that there was nothing excessive, cruel, or unusual about a 50-dollar fine and imprisonment of hard labor for three months for a violation of illegal sale and possession of liquor.[23]

It was not until the late 19th Century that the Supreme Court squarely addressed whether the meaning of the Cruel and Unusual Punishment Clause was fixed at the time of the Constitutional framing or whether it extended beyond prohibiting only the most barbarous forms of punishment.[24] In *Wilkerson v. Utah*, the Court considered a Utah statute permitting individuals convicted of capital offenses to choose death by shooting, hanging, or beheading.[25] In upholding the statute, the court looked to prevailing societal norms and emphasized that capital punishment had long been an accepted sanction for murder within the territory.[26] Drawing on the writings of William Blackstone, the Court acknowledged that criminal punishment may inherently involve residual

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[15] Trop v. Dulles, 365 U.S. 86, 100–01 (1958).
[16] Weems v. United States, 217 U.S. 349, 368 (1910).
[17] *Id.* at 368–69.
[18] *Id.* at 369.
[19] *Id.*
[20] *Id.*
[21] *See* Pervear v. Commonwealth, 72 U.S. 475, 480 (1866); Wilkerson v. Utah, 99 U.S. 130, 136–37 (1878); In re Kemmler, 136 U.S. 436, 438 (1890).
[22] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).
[23] *Pervear*, 72 U.S. at 480.
[24] *See Wilkerson*, 99 U.S. at 136–37; *In re Kemmler*, 136 U.S. at 447.
[25] *Wilkerson*, 99 U.S. at 136.
[26] *Id.* at 135–37.

effects such as terror, pain, or disgrace without necessarily violating the Constitution.[27]

At the same time, the Court distinguished constitutionally permissible punishments from those involving torture, which it deemed unnecessarily cruel and therefore prohibited.[28] This understanding was further refined in *In re Kemmler*, where the Court held that a punishment is cruel only when it entails "torture or a lingering death."[29] While reaffirming the constitutionality of the death penalty, the Court clarified that the Cruel and Unusual Punishments Clause proscribes punishments that are inhuman or atrocious, extending beyond the mere termination of life itself.[30]

The Supreme Court continued to develop its interpretation of the Cruel and Unusual Punishment Clause through an increasingly expansive and flexible standard in *Weems*.[31] It emphasized that punishment must be proportionate to the crime, reasoning that the "[p]urpose of punishment is fulfilled, crime is repressed by penalties of not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."[32] In articulating this approach, the Court expressly recognized that the Clause is not susceptible to a precise definition and that its constitutional boundaries are neither static nor fixed.[33]

B. Contemporary Cruel and Unusual Punishment

Finally, in *Trop v. Dulles*, the Court clarified *Weems*. It held that the Eighth Amendment must derive its intention from the "evolving standards of decency that mark the progress of a maturing society."[34] Although it was not until the late twentieth century, the Supreme Court first recognized that the Cruel and Unusual Punishment Clause extends beyond the proportionality of sentences to encompass conditions of confinement, including the provision of medical care.[35]

In *Estelle v. Gamble*, the Court drew on precedent to affirm that the basic principles of justice impose an obligation on the government to provide basic medical care to prisoners.[36] It ultimately held that the State had a legal obligation to provide medical care for incarcerated individuals,

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[27] *Id.* at 135.
[28] *Id.* at 136.
[29] *In re Kemmler*, 136 U.S. at 447.
[30] *Id.*
[31] *See* Weems v. United States, 217 U.S. 349, 381 (1910).
[32] *Id.*
[33] *Id.* at 378.
[34] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[35] *See* Rhodes v. Chapman 452 U.S. 337, 344–45 (1981); Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).
[36] *Estelle*, 429 U.S. at 102–04.

a standard now understood as care that is "reasonably commensurate with modern medical science," and that follows established guidelines of "a quality acceptable within prudent professional standards."[37] It established a new test and concluded that "deliberate indifference" to the serious medical needs of prisoners established the "unnecessary and wanton infliction of pain" prohibited by the Eighth Amendment.[38] The Court identified that prisoners must rely on authorities to treat medical needs, and if the needs are not met, it may produce physical "torture or a lingering death,"[39] which is the very conduct that the Constitution forbids.[40] The Court noted that even in minor cases, the refusal of medical care may result in pain and suffering, which is inconsistent with contemporary standards of decency because it serves no penological purpose.[41] It cautioned, however, that its conclusion does not necessarily mean that every single claim by a prisoner regarding inadequate medical treatment constitutes a violation of the Eighth Amendment, nor that medical malpractice does not become a constitutional violation solely because the claim involves a prisoner.[42] Although the Court did not specifically define "deliberate indifference," it explained that for a claim to meet the deliberate indifference standard, the prisoner must assert facts that prove the authorities intentionally disregarded a significant health issue.[43]

After two decades, the Supreme Court was compelled to define the precise meaning of "deliberate indifference."[44] While *Estelle* recognized that deliberate indifference requires more than simple negligence, precedent has also clarified that deliberate indifference is satisfied by something less than acts of omission with the intention of causing injury or with the understanding that they will result in injury.[45] In defining "deliberate indifference," the Court has held that it is equivalent to recklessness.[46] However, that definition did not fully answer the level of culpability needed.[47] The Court ultimately held that a prison authority could not be found liable under the Cruel and Unusual Punishment Clause unless the authority was aware of and disregarded the excessive risk to prisoner health or safety; the authority must be aware of the facts that could cause the substantial risk of harm, and it must also conclude

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[37] *Id.;* United States v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987).
[38] *Estelle*, 429 U.S. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182–83 (1976)).
[39] *Id.* at 103 (quoting In re Kemmler, 136 U.S. 436, 447 (1890)).
[40] In re Kemmler, 136 U.S. 436, 447 (1890).
[41] *Estelle*, 429 U.S. at 103.
[42] *Id.* at 105–06.
[43] *Id.* at 106.
[44] Farmer v. Brennan, 511 U.S. 825, 829 (1994).
[45] *Id.* at 835.
[46] *Id.* at 836.
[47] *Id.*

that substantial risk of harm would occur.[48] Thus, an inquiry into the prison authority's state of mind is required. In essence, the Court established a framework that set forth a two-part test. This test required a plaintiff to establish: (1) that the correctional authorities' failure to provide medical care was objectively serious; and (2) that the official subjectively knew about the risk and failed to act on it. Although parties typically concede the objective element of whether there is medical necessity, the second element, whether the parties acted with deliberate indifference, is where contentions typically arise.[49]

III. GENDER DYSPHORIA

A. General Overview

Documentation by medical professionals of patients who report feelings of detachment from their assigned sex dates back as early as the mid-nineteenth century.[50] Throughout the 1950's, this feeling of detachment was considered under the same categories as fetishism, pedophilia, and sexual deviances, and by 1980, it was officially declared as the psychological disorder, "Gender Identity Disorder."[51] At that time, this diagnosis legally established severe and chronic mental illness.[52] Since then, the diagnosis has changed to the term "Gender Dysphoria" and is now used to describe an individual's symptomatic experiences.[53]

Gender dysphoria is still categorized as a mental disorder today.[54] An individual who believes that the sex assigned at birth does not align with their gender identity is referred to as "transgender," and some individuals who are transgender will experience "gender dysphoria."[55] Gender dysphoria is a singular diagnosis that contains independent criteria sets for children, adolescents, and adults.[56] The American Psychiatric Association (hereinafter "APA") asserts that gender dysphoria can often start in childhood; however, some individuals may not encounter

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[48] *Id.* at 837.

[49] *Farmer*, 511 U.S at 834; Jennifer Aldrich, Jessica Kant & Eric Gramszlo, *Gender-Affirming Care, Incarceration, and the Eighth Amendment*, 25 AMA J. ETHICS E407, 408 (June 2023).

[50] *Promoting Transgender and Gender Minority Health Through Inclusive Policies and Practices*, AM. PUB. HEALTH ASS'N (Oct. 31, 2016), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2017/01/26/promoting-transgender-and-gender-minority-health-through-inclusive-policies-and-practices.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 511 (Am. Psychiatric Ass'n 5th ed., text rev. 2022) [hereinafter DSM-5-TR].

[55] Jack Drescher, *What is Gender Dysphoria*?, AM. PSYCHIATRIC ASS'N. (July 2025) https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[56] DSM-5-TR, *supra* note 54.

it until after adolescence or much later.[57] Gender dysphoria is more likely to occur in individuals with intersex conditions compared to the general population.[58] The 5th edition of Diagnostic and Statistical Manual of Mental Disorders (hereinafter "DSM-5-TR") defines gender dysphoria in adolescents and adults as a "marked incongruence between one's experience/expressed gender and assigned gender," that lasts at least six months.[59] According to the DSM-5-TR, this inconsistency is considered the core element of the diagnosis; however, there must also be evidence of distress regarding the incongruence.[60] The individual must also manifest at least two of the following qualities:

> (1) A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
> (2) A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
> (3) A strong desire for the primary and/or secondary sex characteristics of the other gender.
> (4) A strong desire to be of the other gender or in the alternative, a gender different from the individual's assigned gender.
> (5) A strong desire to be treated as the other gender or some alternative gender different from the one assigned at birth.
> (6) A strong conviction that one has the typical feelings and reactions of the other gender or in the alternative, a gender different from the one assigned at birth.[61]

The disorder is coupled with substantial clinical distress or disablement in communal or professional settings.[62] A gender dysphoria diagnosis primarily focuses on any distress and anxiety that affects transgender individuals, instead of on the gender identity itself.[63]

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[57] Drescher, *supra* note 55.

[58] E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S102 (2022).

[59] DSM-5-TR, *supra* note 54, at 512.

[60] *Id.* at 513.

[61] *Id.* at 512–13.

[62] *Id.* at 513.

[63] Coleman et al., *supra* note 58, at S15.

There have been multiple studies that show the number of individuals suffering from gender dysphoria.[64] However, the APA acknowledges that there are no large-scale population findings for it.[65] Its statistics are based on "gender-affirming treatment-seeking populations," demonstrating that the prevalence of gender dysphoria in these populations is less than 1/1,000, which is less than 0.1%, for both males and females.[66] The APA assumes that because many adults with gender dysphoria do not seek care at specialty treatment programs, the statistics are prospectively underestimated.[67] The APA suggests that self-reports from general populations in the United States and Europe yield higher numbers; however, inconsistencies in reporting make comparisons difficult.[68]

B. Treatment for Gender Dysphoria

Treatment for gender dysphoria combines the efforts of several behavioral health and medical professionals.[69] The World Professional Association for Transgender Health (hereinafter "WPATH"), formally known as the Harry Benjamin International Gender Dysphoria Association, is a non-profit organization devoted to transgender health.[70] It established standards of care "for the treatment of individuals with gender dysphoria,"[71] which has been used in prison settings to determine the medically necessary treatment of prisoners.[72] WPATH suggests healthcare professionals provide medically *necessary* gender-affirming health care for transgender and gender diverse people (hereinafter "TGD").[73] This care involves an array of social, psychological, behavioral, and medical interventions that are intended to support and confirm an individual's identity when it is inconsistent with their birth gender assignment.[74]

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[64] *See* Danyon Anderson et al., *Gender Dysphoria and Its Non-Surgical and Surgical Treatments*, HEALTH PSYCH. RSCH., Sept. 23, 2022, at 1, 2–3; Shantel Sullivan, *Gender Dysphoria Statistics in the United States*, BRIGHT PATH BEHAV. HEALTH (last updated Apr. 7, 2025), https://www.brightpathbh.com/gender-dysphoria-statistics/.

[65] DSM-5-TR, *supra* note 54, at 515.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Anderson et al., *supra* note 64, at 3.

[70] *Mission and Vision,* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, http://wpath.org/about/mission-and-vision/ (last visited Feb. 22, 2025).

[71] *Id.*

[72] *See* Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 U.S. Dist. LEXIS 245517, at *5–7 (S.D. Ill. Dec. 27, 2021); Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019).

[73] Coleman et al., *supra* note 58, at S18.

[74] Patrick Boyle, *What is Gender-Affirming Care? Your Questions Answered*, AAMC NEWS (Apr. 12, 2022), https://www.aamc.org/news/what-gender-affirming-care-your-questions-answered.

Rather than attempting to reduce gender dysphoria, WPATH's recommendations emphasize promoting health and well-being.[75] WPATH's medically necessary gender-affirming care comprises, but is not restricted to, hysterectomy, bilateral salpingo-oophorectomy, bilateral mastectomy, chest reconstruction of feminizing mammoplasty, nipple resizing or placement of breast prostheses, genital reconstruction, hair removal, gender-affirming facial surgery and body contouring, voice therapy and/or surgery, puberty blocking medication and gender-affirming hormones, counseling or psychotherapeutic treatment.[76]

Regarding TGD individuals in institutional settings, including prisons, WPATH recommends that health care staff and professionals endorse and support gender-affirming surgical treatments under SOC-8 standards when the individual requests those treatments and to do so without unnecessary delay.[77] It recommends that institutionalized individuals receive the same medically necessary surgical treatments as persons who reside outside the institutions.[78] The denial of medically necessary evaluation for GAS and necessary aftercare for institutionalized individuals conflicts with WPATH's standards of care.[79] Articles of gender expression are also recommended, which include grooming items and clothing of the identified gender, because it reduces gender dysphoria and improves welfare and performance.[80] Although gender dysphoria is categorized as a mental disorder and psychotherapy has a long history of being used to help individuals with gender dysphoria, WPATH does not recommend that health care professionals require psychotherapy before the initiation of gender-affirming treatment.[81] It is claimed that top surgery, a surgical procedure that removes or enhances breast tissue and alters the nipples and chest to create an increased masculine or feminine appearance,[82] has been successful in significantly decreasing gender dysphoria, that there is a rise in satisfaction with body appearance, and the frequency of remorse remains very low, but it also acknowledges that additional inquiry is needed to form a more complete conclusion.[83]

Although there seems to be a consensus among the medical professionals that gender-affirming care, including surgery, is medically

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[75] Coleman et al., *supra* note 58, at S17.

[76] *Id.* at S18. Note that most of the treatment includes surgery rather than mental health care.

[77] *Id.* at S106.

[78] *Id.*

[79] *Id.* at S107.

[80] Coleman et al., *supra* note 58, at S107.

[81] *Id.* at S175.

[82] *Top Surgery (Chest Feminization of Chest Masculinization)*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/top-surgery (last visited June 2, 2026).

[83] Coleman et al., *supra* note 58, at S128.

necessary,[84] Studies are slowly being published that highlight discrepancies across those studies.[85] An article published by the Lancet Regional Health supported the claim that gender-affirming care was an integral protective factor for transgender individuals' mental health; however, twenty of the studies referenced had moderate, high, or serious risk of bias in the study designs and consisted of small sample sizes.[86]

Another article published by the Society for Evidence-Based Gender Medicine (SEGM) identified that after a reanalysis of a study from Karolinska Institute in Sweden and Yale School of Public Health, there was no mental health improvement from GAS in individuals suffering from gender dysphoria.[87] The original published study assumed that conclusion because the individuals who had undergone GAS had fewer "mental health events."[88] When the reanalysis was completed, the data found no statistically significant differences in the mental health of gender dysphoric patients who underwent GAS and those who did not.[89] Progressively, cases are being filed against medical providers for willfully ignoring psychological "red flags" and pressing their transgender ideologies.[90]

C. Costs and Health Insurance Coverage

According to the Gender Confirmation Center, general cost estimates for the various GAS include:

- Chest Reconstruction Top Surgery: $8,500-$11,500
- Revision top surgery (scar revision, dog ears): $1,500-$3,000
- Breast augmentation with implants: $8,500-$10,000

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[84] William M. Kuzon, Jr. et al., *Exclusion of Medically Necessary Gender-Affirming Surgery for America's Armed Services Veterans*, AMA J. ETHICS (Apr. 2018), https://journalofethics.ama-assn.org/article/exclusion-medically-necessary-gender-affirming-surgery-americas-armed-services-veterans/2018-04.

[85] *See* Richard Armitage, *Misrepresentations of Evidence in "Gender-Affirming Care is Preventative Care,"* LANCET REG. HEALTH AM., Aug. 2023, at 1, 1; *Correction of a Key Study: No Evidence of "Gender-Affirming" Surgeries Improving Mental Health*, SOC'Y FOR EVIDENCE-BASED GENDER MED. (Aug. 30, 2020), https://segm.org/ajp_correction_2020 [hereinafter *Correction of a Key Study*]; Ryan T. Anderson*, Sex Reassignment Doesn't Work. Here Is the Evidence.*, HERITAGE FOUND. (Mar. 9, 2018), https://www.heritage.org/gender/commentary/sex-reassignment-doesnt-work-here-the-evidence.

[86] Armitage, *supra* note 85, at 1.

[87] *Correction of a Key Study*, *supra* note 85.

[88] *Id.*

[89] *Id.*

[90] *See* Amended Complaint at 6, 10, Ulery v. Rafferty, No. PC-2023-05366 (R.I. Super. Ct. Oct. 23, 2023); Grant Atkinson, *Preventable Tragedies: Why De-transitioners Are Suing Doctors*, ALL. DEFENDING FREEDOM (Oct. 14, 2024), https://adflegal.org/article/preventable-tragedies-why-de-transitioners-are-suing-doctors/.

- Body masculinization (trunk, thigh, buttocks): $8,500-$14,000
- Body feminization (trunk, thigh, buttocks): $15,000-$19,500
- Facial surgery
  - upper third (hairline, frontal bone, brow: $10,000-$50,000
  - middle third (nose, cheeks): $6,000-$18,000
  - lower third (lip, jaw, chin, neck): $4,500-$50,000
- Metoidioplasty: $19,000-$42,000
- Phalloplasty: $35,000-$50,000
- Vaginoplasty: $23,000-$24,500
- Vulvaplasty: $20,500-$22,000
- Labioplasty: $8,500-$15,500.[91]

Generally, these estimates do not include anesthesia, facility, or pathology fees.[92] Factors that may increase or decrease costs associated with GAS include the surgeon's experience and reputation, the type of procedure, geographic location, hospital or surgical center fees, post-surgery expenses, and additional treatments, such as follow-up consultations.[93] Some patients will also need to undergo revision procedures after the initial surgery. Revision surgeries are to correct aesthetic issues and treat complications that occurred during or after surgery.[94] Another additional cost is long-term healthcare costs following the surgery and initial recovery, such as continuing hormone therapy.[95]

Employer-sponsored plans often exclude gender-affirming treatment, such as puberty blockers, sex hormones, and surgical procedures, from its policies; however, even when employee-sponsored plans cover gender-affirming treatment, they contain inconsistencies in the scope of included benefits.[96] In addition, most states and territories do not mention gender-affirming treatment coverage in state employee health plans.[97] "[Twelve] States and [five] territories do not mention or have no clear policy regarding [gender-affirming treatment]. . . [fourteen]

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[91] Jennifer Richman, *How Much is Gender Reassignment Surgery?*, GENDER CONFIRMATION CTR. (Oct. 9, 2024), https://www.genderconfirmation.com/blog/gender-reassignment-surgery-cost-guide-price-breakdown.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability 90 Fed. Reg. 12942, 12986 (proposed Mar. 19, 2025) (to be codified at 45 C.F.R. pts. 147, 155, 156).

[97] *Id.*

States explicitly [omit gender-affirming treatment] from their State-employee" health insurance plans.[98]

Even when a state or private health care plan covers the medically necessary GAS, out-of-pocket costs are common and can be expensive. Medicare, one of the most affordable health care plans in America, still includes "a deductible of $1,676 per benefits period" and a coinsurance that could cost anywhere from "$0.00 to $838.00 per day, depending on the length of [the] hospital stay."[99] Meanwhile, a 2022 study showed that individuals' out-of-pocket expenses in commercial plans ranged from $1,223 to $3,982, depending on the type of surgery, accounting for between 2.9% and 15.3% of the total cost.[100]

IV. GENDER-AFFIRMING SURGERY IN PRISONS

A. Statistics

Studies on the number of prisoners who are transgender and have gender dysphoria are sparse or outdated**.** However, in 2020, it was estimated that there were approximately 5,000 transgender prisoners in the United States state prisons and another 1,200 prisoners in the federal system.[101] As of March 2025, California alone had 2,138 prisoners who identified as transgender, non-binary, or intersex.[102] Another study revealed that "[o]ne in six transgender individuals have been incarcerated at some point in their lives."[103]

California was the first state in the United States to fund GAS for inmates, following a contentious legal battle.[104] After this case and others like it, a wave of requests for GAS rushed in.[105] Since 2017, 20 inmates in

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[98] *Id.*

[99] Eleesha Locket & Alina Sharon, *Does Medicare Cover Gender Reassignment Surgery?*, HEALTHLINE (last updated Mar. 28, 2025), https://www.healthline.com/health/medicare/does-medicare-cover-gender-affirmation.

[100] Kellan Baker & Arjee Restar, *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, 50 J.L. MED. & ETHICS 456, 465 tbl.2.3 (2022).

[101] Aldrich et al., *supra* note 49, at 407.

[102] CAL. DEP'T OF CORR. & REHAB., S. BILL 132, TRANSGENDER RESPECT, AGENCY & DIGNITY ACT AS OF MAR. 5, 2025, CURRENT INCARCERATED POPULATION, CSR# STA472-032025-M (Mar. 10, 2025).

[103] Erin McCauley et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, 3.1 TRANSGENDER HEALTH 34, 34 (2018).

[104] *California Funds First Inmate "Sex Re-Assignment" Surgery*, CAL. FAM. COUNCIL (Feb. 11, 2017), https://www.californiafamily.org/2017/02/california-funds-first-inmate-sex-re-assignment-surgery/.

[105] *See id.*; Caroline Downey, *Trans Inmate Medical Procedures Cost Washington State $500,000 since 2020*, NAT'L REV. (Sept. 30, 2024, 2:55 PM), https://www.nationalreview.com/news/trans-inmate-medical-procedures-cost-washington-state-500000-since-2020/ (as of September 2024, forty-four inmates have received taxpayer-funded gender-affirming surgery.).

California have undergone GAS, but between 2021 and 2022, requests for GAS increased from 99 to 270.[106] In response, between 2017 and 2023, California budgeted $4 million in taxpayer funds to provide gender-affirming procedures and enhancements for a total of 157 inmates.[107] Notably, some of those inmates were on death row.[108] Budget documents estimated that 348 GAS would be performed in 2023 and 462 surgeries in 2024.[109] In Illinois, seven prisoners were approved for GAS in 2023.[110] As of August 2024, an additional fifteen surgeries were approved, and five had already been completed.[111] The government mostly pays for medical care costs; however, when states do require copays, the cost only averages between $2.00 to $5.00 per visit.[112]

B. Standards of Care

When determining the medically necessary treatment for transgender individuals with gender dysphoria, the prisons look to the National Commission on Correctional Health Care (hereinafter "NCCHC") for guidance.[113] These standards were "[d]eveloped by leaders in the fields of health, mental health, law, and corrections . . . and lay the foundation for constitutionally acceptable health services";[114] however, prisoners who have succeeded in receiving GAS focused more on WPATH standards instead.[115]

The NCCHC states that "health staff should evaluate and treat transgender patients in a manner that respects their unique transgender, medical, mental health, and psychosocial needs" and lists several guiding

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[106] Matthew Impelli, *California Prisons Struggle to Process Inmates' Gender-Affirming Surgery,* NEWSWEEK (June 27, 2023, 9:30 AM), https://www.newsweek.com/california-prisons-struggle-process-inmates-gender-affirming-surgery-1809132.

[107] *$4 Million CA Taxpayer*, *supra* note 2.

[108] *Id.*

[109] Impelli, *supra* note 106.

[110] Fourth Report of the First Co-Monitor at 9, Monroe v. Meeks, No. 3:18-cv-00156-NJR (S.D. Ill. Dec. 30, 2024) (No. 849).

[111] *Id.*

[112] Emily Widra, *New Research Links Medical Copays to Reduced Healthcare Access in Prisons*, PRISON POL'Y INITIATIVE (Aug. 29, 2024), https://www.prisonpolicy.org/blog/2024/08/29/fees-limit-healthcare-access/.

[113] John Ferraro, *The Eighth for* Edmo*: Access to Gender-Affirming Care in Prisons*, 62 B.C.L. REV. E. SUPP. II.-344, II-348 (2021).

[114] *Jail and Prison Standards,* NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/jails-and-prisons/ (last visited Feb. 1, 2026).

[115] *See* Edmo v. Corizon, Inc., 935 F.3d 757, 769, 771, 787 (9th Cir. 2019); Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 U.S. Dist. LEXIS 245517, at *5–7, 35–36, 57, 80–83 (S.D. Ill. Dec. 27, 2021); United States v. Langan, 2024 U.S. Dist. LEXIS 220408, at *4, 7 (S.D. Ohio 2024).

principles addressing the needs of transgender patients.[116] It states that all incarcerated individuals who experience gender dysphoria, among other mental disorders, should be provided with psychotherapy and other mental health treatment.[117] This differs from the WPATH standards, which do not recommend mental health treatment. The guidelines also state that the medical decisions initiating or progressing hormone medication treatment to surgical interventions while incarcerated or upon release require it to be based on individual medical need, risks and benefits, analysis of alternatives, ruling out contraindications, accepted standards of care, and a thorough informed-consent process.[118] Furthermore, it recommends that "[t]ransgender patients with gender dysphoria who have not received hormone therapy before incarceration should be evaluated by a health care provider qualified in the area of gender-related health care to determine their evaluation and treatment needs."[119] "When [it is] determined to be medically necessary for a patient . . . hormone therapy or pubertal suppression [is required], and regular laboratory monitoring [is] conducted according to accepted medical standards."[120]

The Executive, State Legislators, and the Judiciary have disagreed on procedures dealing with transgender individuals in prison settings, let alone prisoners who request GAS.

C. Executive Branch

In its last two days of office, the Obama Administration seemed to expand transgender rights by producing several guidelines for how prisons and guards should treat transgender inmates.[121] Specifically, it recommended that inmates be housed by gender identity when appropriate.[122] However, during President Trump's first Administration in 2018, it rolled back those new policies and posted an updated manual that struck the language that inmates' housing would be based on gender identity.[123] Instead, the gender equality language was removed, and the Transgender Executive Council (hereinafter "TEC") was required to use biological sex as the initial determination for an inmate's housing

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[116] *Transgender and Gender Diverse Health Care in Correctional Settings*, NAT'L COMM'N ON CORR. HEALTH CARE 2 (Nov. 2020), https://www.ncchc.org/wp-content/uploads/Transgender-and-Gender-Diverse-Health-Care-in-Correctional-Settings-2020.pdf.

[117] *Id.* at 3.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Christal Hayes, *Trump Rolls Back Obama Rules that Helped Transgender Prisoners*, USA TODAY (Updated May 12, 2018), https://www.usatoday.com/story/news/2018/05/11/trump-obama-rules-protecting-transgender-inmates/603904002/.

[122] *Id.*

[123] *Id.*

designation.[124] It could still, however, consider the health and safety of the transgender inmate, allowing the TEC to explore suitable available options to mitigate risk.[125] The Notice further reports hormone and necessary medical treatment, but it did not specifically address GAS.[126]

President Biden's Administration promised reform during his campaign by ensuring that all transgender inmates in the federal prisons would have access to proper doctors and medical care.[127] His Administration reinstated President Obama's policies that considered inmates' housing based on gender identity.[128] In Biden's updated version of the Bureau of Federal Prisons' manual, it stated that when deciding housing assignment to a transgender or intersex inmate, the agency will decide on a case-by-case basis and evaluate the decision based on the inmate's health and safety, and whether the location would present management or safety issues.[129]

The Bureau of Federal Prisons' manual also discussed the process by which an inmate could acquire GAS.[130] Surgery *may* be the final stage in the transition process and would only be considered after one year of good behavior and acquiescence with mental health, medical, and programming services at a gender-affirming facility.[131] After one year, the individual could submit a request to their warden for surgical consideration, which would then be passed to the TEC.[132] This Council is the exclusive organization that *may* decide that all criteria and objectives for surgical consideration have been met.[133] During this process, the case is referred to the agency's Medical Director for medical evaluation.[134] The Medical Director has the discretion to review existing records and/or interview the inmate, institution staff, and other members of the TEC.[135] Once the individualized assessment has been completed, the Medical Director decides whether the surgery is "medically appropriate" for a

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[124] *Id.*

[125] *Id.*

[126] U.S. DEP'T OF JUST., PROGRAM STATEMENT: TRANSGENDER OFFENDER MANUAL, at 8–9 (2017).

[127] Candace Norwood & Kate Sosin, *Has the Biden Administration Made Gender-Affirming Surgery Accessible for Federal Prison? Officials Won't Say*, THE 19TH NEWS (Mar. 9, 2023), https://19thnews.org/2023/03/bureau-of-prisons-gender-affirming-surgery-incarcerated-trans-people/.

[128] *Id.*

[129] TRANSGENDER OFFENDER MANUAL, *supra* note 126, at 5.

[130] *Id.* at 9.

[131] Norwood & Sosin, *supra* note 127; TRANSGENDER OFFENDER MANUAL, *supra* note 126, at 9.

[132] Norwood & Sosin, *supra* note 127.

[133] TRANSGENDER OFFENDER MANUAL, *supra* note 126, at 9.

[134] *Id.*

[135] *Id.*

recommendation to a gender-affirming surgeon.[136] It is unclear what symptoms, history, or qualities an individual must have to qualify for GAS, other than the one-year wait.

The Biden Administration gestured support for gender-affirming care in prisons outside the published manual by issuing an official statement of interest in backing Ashley Diamond, a transgender woman inmate, who sued twice for gender-affirming care access.[137] However, after Donna Langan became the first transgender person to undergo GAS in a federal prison in December of 2022, Biden's Administration declined to comment on its policies or confirm whether the Administration will shift to broader policies that would make it easier to access GAS.[138] Under Biden's Administration, only two federal prisoners acquired GAS, but only after lengthy, extensive legal battles.[139]

Policies are changing again under President Trump's 2025 Administration. On January 20, 2025, President Trump issued Presidential Action: "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."[140] Under Section Three, it is ordered that it be recognized that women are biologically distinct from men.[141] All federal employees who act in an official capacity on behalf of their agency shall use the term "sex" instead of "gender" in all relevant Federal procedures and documents.[142] Agencies are to eliminate statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology in its entirety.[143] Agencies are also to terminate releasing those types of "statements, policies, regulations, forms, communications, or other implications."[144] Agencies are to take all essential measures to terminate Federal funding of gender ideology as allowed by law.[145]

Section 4(c) of the Order delegates the authority to ensure that the Bureau of Prisons revises its policies concerning medical care to be consistent with the Order to the Attorney General.[146] It is to ensure that

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[136] *Id.*

[137] Norwood & Sosin, *supra* note 127.

[138] *Id.*

[139] Grace Abels, *Harris Has Supported Gender-Affirming Care for Incarcerated People, but Trump Ads Need Context*, THE 19TH (Oct. 28, 2024), https://19thnews.org/2024/10/harris-gender-affirming-care-incarcerated-people-fact-check/.

[140] Exec. Order 14168, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025) [hereinafter Defending Women].

[141] *Id.* at 8616.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Defending Women, *supra* note 140.

[146] *Id.*

no Federal funds are expended for any medical procedure, treatment, or drug for the purpose of conforming an inmate's appearance to that of the opposite sex.[147] Currently, there is no Transgender Offender Manual available on the Federal Bureau of Prisons (hereinafter "FBOP") website.[148] The website explains that the content is "temporarily unavailable as we implement the Executive Order on Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."[149] Although the site states it is "temporarily unavailable," a brief directive from William Lothrop was circulated to FBOP employees on February 25, 2025, rescinding the agency's Transgender Offender Manual entirely.[150]

D. Legislative Branch

State legislatures seem to be on opposite sides of the spectrum when it comes to transgender prisoner rights, and many have acted swiftly in response to President Trump's Order.[151]

Kentucky has already proposed a Senate Bill that would prevent public funds from being directly or indirectly applied, granted, paid, or allocated for the intent of providing "cosmetic service or elective procedure to an inmate in a correctional facility."[152] "Cosmetic service or elective procedure" is defined in the proposed bill as "any procedure, treatment, or surgery to enhance or alter the appearance of any area of the head, neck, and body, which includes [GAS]."[153] So far, the proposed bill has passed in both the Senate and the House and has become law without the Governor's signature.[154]

Georgia has also similarly proposed Senate Bill 185, which bans using state funds or resources for certain gender-affirming treatments for inmates in state custody.[155] In a vote of 37 yeas and 15 nays, the bill passed with both Republican and some Democratic support.[156] Other

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[147] *Id.*

[148] Shawn Musgrave, *Trump Administration Abolishes Rules Protecting Trans Prisoners*, THE INTERCEPT (Feb. 28, 2025), https://theintercept.com/2025/02/28/trump-bureau-prisons-trans-inmates/; *See Policy and Forms Temporarily Unavailable*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/policy/progstat/520.04.pdf (last visited Mar. 15, 2025).

[149] *See Policy and Forms Temporarily Unavailable*, *supra* note 148.

[150] Musgrave, *supra* note 148.

[151] Nada Hassanein, *Here's How State Lawmakers Are Taking Aim at Transgender Adults' Health Care*, STATELINE (Feb. 14, 2025), https://stateline.org/2025/02/14/heres-how-state-lawmakers-are-taking-aim-at-transgender-adults-health-care/.

[152] An Act Relating to Correctional Facilities, 25 RS BR 1254 (Feb. 18. 2025).

[153] *Id.*

[154] 2025 Ky. Acts 529.

[155] S.B. 185, 158th Gen. Assemb., Reg. Sess., at 3–4 (Ga. 2025).

[156] *Id.*

representatives completely refused to vote.[157] The proposed bill was a swift reaction to three lawsuits that were filed by inmates seeking gender-affirming care.[158] Democratic State Senator Sonya Halpern voted for the bill stating, "[T]he simple truth is that I cannot in good conscience support a taxpayer-funded medical procedures for prisoners that we do not provide to law abiding citizens who are struggling every day to afford basic health care."[159] Although Democratic opponents of the bill described it as cruel, unconstitutional, and "downright immoral,"[160] the proposed bill passed in the House with 100 yeas and only 2 nays,[161] and was forwarded to Governor Brian Kemp for signature on April 10, 2025.[162]

The New York State Senate, on the other hand, proposed a bill called the "Gender Identity Respect, Dignity and Safety Act" that would provide New York prisoners with access to GAS.[163] There have been four other versions of this bill in other Legislative Sessions between 2021 and 2024; however, all of them failed to pass.[164] The current proposed bill was referred to the Crime Victims, Crime and Correction Committee on January 8, 2025, where it has sat stagnant ever since.[165]

Although many of these states enacted bills in reaction to President Trump's Order, California has had guidelines for transgender state prisoners who request GAS since 2015.[166]

E. Judicial Branch

Transgender prisoners increasingly seek judicial intervention, rather than Congress, for greater protections. One reason may be the result of statements made by representatives at prior congressional

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[157] *Id.*

[158] Ross Williams, *Georgia Senate Oks Bill to Outlaw Gender-Affirming Care for Inmates in State Custody*, GEORGIA RECORDER (Mar. 4, 2024), https://georgiarecorder.com/2025/03/04/georgia-senate-oks-bill-to-outlaw-gender-affirming-care-for-inmates-in-state-custody/.

[159] *Id.*

[160] *Id.*

[161] S.B. 185, 158th Gen. Assemb., Reg. Sess., at 3–4 (Ga. 2025).

[162] Williams, *supra* note 158; OFF. GOVERNOR, https://gov.georgia.gov/about-us/about-governor-brian-p-kemp (last visited Mar. 24, 2026); 2025 Ga. Laws 39.

[163] Jackson Walker, *Proposed NY Law Would Provide Transgender Prisoners with Gender Transition Surgery*, NBC 15 NEWS (Jan. 16, 2025), https://mynbc15.com/news/nation-world/proposed-ny-law-would-provide-transgender-prisoners-with-gender-transition-surgery-new-york-gender-identity-respect-dignity-and-safety-act; S.B. S1049, 2025-26 Reg. Sess., at 1–6 (N.Y. 2025).

[164] S.B. S1049, 2025-26 Reg. Sess., at 1–6 (N.Y. 2025).

[165] *Id.*

[166] Alexander Kirkpatrick, *The Caged Bird Sings of Freedom*, 26 S. CAL. REV. LAW & SOC. JUST. 37, 48–50 (Fall 2016).

hearings.[167] At a hearing regarding gender-affirming care for minors, Representative Mike Johnson asserted, "[s]ex is not something you are assigned at birth. It is a natural prenatal development that occurs when every unborn child is in the mother's womb. No one can surgically free themselves from this objective and obvious fact of life or free anyone else from it."[168] Another reason is the opinion that there is a "lack of medical and surgical intervention."[169] Courts that have decided whether refusing GAS is cruel and unusual punishment interpret the Cruel and Unusual Punishment Clause by looking to whether medical care was so unconscionable that it falls below society's minimum standards.[170] However, some jurisdictions have also added a textualist and originalist element, in which the court looks to the Clause's plain meaning and text.[171]

On January 5, 2023, Peter Langan, also known as Donna Langan, was the first federal prisoner to undergo GAS.[172] Based on the facts of the amended complaint, the FBOP staff conceded that Langan suffered from gender Dysphoria since at least 2017.[173] It is asserted that the FBOP medical staff and administrators agreed that the current gender-affirming treatment, such as hormones, therapy, and social transition treatments, were not adequately controlling Langan's disease and that genital surgery was medically necessary as it was the last remaining treatment for gender dysphoria.[174] Langan requested GAS continuously since 2016, but the requests were never approved or denied, but stayed.[175] In response to the Complaint, the FBOP's TEC referred Langan for GAS to the FBOP's medical director, which signaled the first time that the TEC had referred

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[167] Olivia Bridges, *In Congress and Courts, a Push for Better Care for Trans Prisoners*, CONG. EQUAL. CAUCUS (Feb. 21, 2024), https://equality.house.gov/media-center/in-the-news/congress-and-courts-push-better-care-trans-prisoners.

[168] *The Dangers and Due Process Violations of "Gender-Affirming Care" for Children: Hearing Before the Subcomm. on the Constitution and Limited Government of the H. Comm. On the Judiciary*, 118-41st Cong. 6 (2023) (statement of Rep. Mike Johnson).

[169] Aldrich, *supra* note 49.

[170] *See* Edmo v. Corizon, Inc., 935 F.3d 757, 757 (9th Cir. 2019); Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014); Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 U.S. Dist. LEXIS 245517, at *49 (S.D. Ill. Dec. 27, 2021); Gibson v. Collier, 920 F.3d 212, 228 (5th Cir. 2019).

[171] *See* United States v. Langan, 2024 U.S. Dist. LEXIS 220408, at *2 (S.D. Ohio 2024).

[172] *Langan*, No. 2:96-cr-15, 2024 U.S. Dist. LEXIS 220408, at *2; Candice Norwood & Kate Sosin, *Has the Biden Administration Made Gender-Affirming Surgery Accessible for Federal Prisons? Officials Won't Say.*, THE 19th, (Mar. 9, 2023, 2:39 PM), https://19thnews.org/2023/03/bureau-of-prisons-gender-affirming-surgery-incarcerated-trans-people/.

[173] Complaint at 3, 9, Langan v. Fed. Bur. Prisons, No. 1:21-cv-02524 (D.D.C. Sept. 28, 2021).

[174] *Id.* at 9, 16–17.

[175] *Id.* at 16.

this type of surgery to any prisoner.[176] The FBOP's Medical Director issued a memorandum approving the surgical consultation process and began to procure a surgeon to perform the procedure.[177] In this case, the FBOP did not even attempt to fight the Eighth Amendment assertion, but instead conceded to the inmate's wishes.

The Seventh Circuit gave a little more pushback in *Iglesias v. FBOP*, in which the second-ever federal prisoner received GAS.[178] In this case, the FBOP conceded that gender dysphoria was a serious medical condition; however, they disputed whether the FBOP was deliberately indifferent to Iglesias's disease.[179] The Court focused a significant amount of time on the timeline of gender-affirming treatment, and lack of it, in making its decision to grant the motion for injunctive relief.[180] But the Court seemed to ignore the facts that Iglesias declined antidepressant medication or that he agreed that the psychological sessions were helpful.[181] Instead, it held that Iglesias made a strong showing that the FBOP was deliberately indifferent.[182]

The First Circuit was the first federal court of appeals to apply the Estelle deliberate indifference framework relating to GAS.[183] In a case that spanned over twenty years, the First Circuit held that the Department of Corrections ("DOC") did not violate the Cruel and Unusual Punishment Clause by choosing an alternative to GAS.[184] Kosilek was born male but suffered from gender dysphoria and identified as a female.[185] During his murder trial, Kosilek attempted suicide twice and failed attempted self-castration by tying a string around his testicles.[186] When Kosilek initially sued the DOC, the Court determined that Kosilek proved that he suffered from a serious medical need and that the current treatment plan of receiving only supportive therapy to cope was

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[176] Consent Motion at 2, Langan v. Fed. Bur. Prisons, et al., No. 21-cv-2524 (D.D.C. Sept. 29, 2021).

[177] Joint Status Report, Langan v. Fed. Bur. Prisons, et al., No. 21-cv-2524 (D.D.C. June 17, 2022).

[178] Marc Ramirez, Transgender Prisoner Who Fought for Gender-Affirming Care for All Inmates Undergoes Surgery, USA TODAY (Apr. 6, 2023), https://www.usatoday.com/story/news/nation/2023/04/06/transgender-federal-inmate-gets-long-awaited-gender-affirming-surgery/11615333002/; Federal Bureau of Prisons Provides Gender-Affirming Surgery Amid Historic Legal Victory, ACLU ILLINOIS (Apr. 6, 2023), https://www.aclu-il.org/press-releases/federal-bureau-prisons-provides-gender-affirming-surgery-amid-historic-legal-victory/.

[179] Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 U.S. Dist. LEXIS 245517, at *49 (S.D. Ill. Dec. 27, 2021).

[180] *See id.* at *49–50.

[181] *Id.* at *53–54.

[182] *Id.* at *54.

[183] Ferraro, *supra* note 113 at II-354.

[184] Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).

[185] *Id.*

[186] *Id.* at 68–69.

inadequate.[187] Initially, the DOC had a "freeze frame" policy in which a prisoner's treatment would stay at the same level attained before incarceration.[188] In response, the DOC revamped its policies that allowed prisoners to receive additional treatment that surpassed the level before incarceration.[189] In Kosilek's case, the DOC began providing Kosilek with substantial ameliorative treatment specifically targeted at the mental distress caused by his gender dysphoria.[190] In addition, Kosilek was provided female, gender-appropriate clothing and personal effects, hormone therapy, and a medical process that permanently removed facial hair.[191]

In alignment with the Harry Benjamin Standards of Care,[192] Kosilek's doctor recommended that he be considered for GAS after one year of hormonal treatment.[193] It was determined that Fenway Community Health Center would conduct the evaluation, although there was expressed concern that it would include proposals that globally authorized an array of treatments rather than a more objective evaluation.[194] Fenway ultimately determined that Kosilek appeared ready for GAS based on the observation that Kosilek was likely to attempt suicide again and was distressed by having male genitalia and not having female genitalia.[195] Fenway believed that Kosilek would have "full relief from the symptoms of gender dysphoria . . . [and] increase his chance for survival."[196] Based on prior concerns about Fenway, the DOC chose to have the Fenway report peer-reviewed by another doctor, which meant the doctor could not formally diagnose Kosilek.[197] This review noted several discrepancies in the Fenway report, including the absence of any indication that Kosilek had been assessed for other pathologies linked to self-harming behavior.[198] The report also expressed belief that the threats of self-harm and suicide should serve as a contraindication to surgery, ultimately determining that the GAS was not a medically necessary

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[187] *Id.* at 69.

[188] *Id.*

[189] *Kosilek*, 774 F.3d at 69.

[190] *Id.* at 69.

[191] *Id.* at 69–70

[192] These standards have evolved to what is now known as the World Professional Association for Transgender Health (WPATH) standards of care. *About WPATH*, WPATH, https://wpath.org/about/mission-and-vision/ (last visited Mar. 29, 2026); *See* Coleman et al., *supra* note 58 at S1; *Kosilek*, 774 F.3d at 70.

[193] *Kosilek*, 774 F.3d at 70.

[194] *Id.*

[195] *Id.* at 71.

[196] *Id.*

[197] *Id.* at 72.

[198] *Id.*

means to reduce the likelihood that Kosilek would attempt suicide again.[199]

In its analysis of the objective medical necessity prong, the Court highlighted that the question before the Court was not whether the treatment of antidepressants and psychotherapy alone was sufficient to treat gender dysphoria or whether gender dysphoria constituted a medical necessity.[200] The question, instead, is whether the decision to refuse GAS is so harmful to Kosilek as to violate the Cruel and Unusual Punishment Clause.[201] The Court found that the law plainly established that where there were two alternative courses of medical treatment, it was not the Court's duty to "second guess medical judgments" or to require the DOC to adopt the, "more compassionate" of the two; therefore, the DOC's decision of the course of treatment, which is reasonable and commensurate with medical standards of prudent professionals, is a decision that does not violate the Clause. The Court concluded that the Clause prohibited only medical care so unconscionable as to fall below the minimum standards of decency, which the DOC did not do here.[202]

The Fifth Circuit is also of the opinion that a state does not inflict cruel and unusual punishment by declining to provide the prisoner with GAS to treat gender dysphoria or gender identity disorder.[203] This jurisdiction seems to take a stronger approach because the Texas prison policy did not authorize GAS at all.[204] Instead, the policy stated that the transgender prisoners are evaluated on a case-by-case basis and treated based on current, acceptable standards of care.[205] Medical professionals denied the prisoner's request for gender-affirming care because the policy did not specifically designate the surgery as included in the treatment protocol for gender dysphoria.[206] Like the First Circuit, the State of Texas conceded that the prisoner had a serious medical condition, but contested that it acted with deliberate indifference to the prisoner's medical requirements.[207]

The Court first focused a significant amount of its analysis not only on a doctor's professional diagnosis of whether GAS was medically necessary, but on the fact that GAS was controversial in the medical community.[208] At the time, California was the only state that had provided GAS to a prisoner, but only because of a settlement of a federal lawsuit,

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[199] Kosilek v. Spencer, 774 F.3d 63, 72–73 (1st Cir. 2014).
[200] *Id.* at 89.
[201] *Id.*
[202] *Id.*
[203] Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019).
[204] *Id.* at 215–16.
[205] *Id.* at 217–18.
[206] *Id.* at 218.
[207] *Id.* at 219.
[208] *Gibson*, 920 F.3d at 216; *see* Kosilek v. Spencer, 774 F.3d 63, 70 (1st Cir. 2014).

not because the court determined it was medically necessary.[209] Although the Standards of Care recommended by WPATH declared GAS as both effective and necessary to treat some cases of gender dysphoria, the First Circuit concluded that WPATH did not reflect a consensus among medical professionals.[210] Instead, it was a one-sided, "sharply contested medical debate over [GAS]."[211]

Acknowledging that it can be cruel and unusual punishment to deny essential medical care to a prisoner, the Court in *Gibson* explained that the Cruel and Unusual Punishment Clause does not mean that the prison *must* provide the prisoner's choice of care.[212] In contrast, the Clause only prohibits preventing care that is so "unconscionable as to fall below society's minimum standards of decency."[213] The inmate must show that the prison officials acted with "malicious intent," which the Fifth Circuit has defined as knowledge that the officials were refusing medically necessary treatment.[214] The officials must have "refused to treat him, ignore his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would evince a wanton disregard for any serious medical needs."[215] Dispute regarding the type of medical treatment given does not constitute a claim for medical indifference.[216] In conclusion, the court looked to the interpretation of "unusual" and determined that it is not unusual if the exercise is widely practiced in prisons nationwide under the plain meaning; therefore, the denial of GAS does not violate the Eighth Amendment.[217]

Less than five months after the *Gibson* decision, the Ninth Circuit held for the first time that refusing GAS to an individual suffering from gender dysphoria was cruel and unusual punishment in violation of the Eighth Amendment.[218] In an almost analogous case, the Court's decision completely contradicted the First and Fifth Circuit Court decisions.[219] Adree Edmo had been incarcerated since pleading guilty to sexually abusing a fifteen-year-old when he was twenty-one.[220] At the time of the

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[209] *Gibson*, 920 F.3d at 227–28.

[210] *Id.* at 221.

[211] *Id.*

[212] *Id.* at 216.

[213] *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102–05 (1976)).

[214] *Id.* at 220.

[215] *Id.* (quoting Johnson v. Treen, 759 F.2d 1236, 1238 (5th Cir. 1985)).

[216] Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019).

[217] *Id.* at 226–27 ("[U]nusual should mean what it says. . .. [S]o long as Congress routinely authorized a particular punishment, it would be hard to say that the punishment, even if concededly cruel, was cruel and unusual." Citing Amar, 120 YALE L.J. at 1778–70).

[218] Edmo v. Corizon, Inc., 935 F.3d 757, 766–67, 803 (9th Cir. 2019).

[219] *See Gibson*, 920 F.3d at 215–16, 219; *Edmo*, 935 F.3d at 766–67; Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).

[220] *Edmo*, 935 F.3d at 772.

abuse, Edmo was living full-time as a woman.[221] Edmo was medically diagnosed with gender dysphoria around the time of his incarceration, which both sides concede is a serious medical condition.[222] Prison officials provided hormone therapy since 2012, which he agreed alleviated his gender dysphoria to some extent.[223] Medical records documented that Edmo continued to feel disgusting and that he also suffered from major depressive disorder with anxiety and drug and alcohol addiction.[224] Edmo took prescribed medications for depression and anxiety and saw his psychiatrist when scheduled, which helped him work through serious mental health issues and pre-incarceration history of trauma, abuse, and suicide attempts; however, he did not meet with his treating clinician because Edmo considered her not qualified to treat his gender dysphoria.[225] Additionally, Edmo attended group therapy sessions inconsistently.[226] Although Edmo attempted castration in 2015 and 2016, when he was evaluated, it was reported that he was happy, but wanted to increase the hormone replacement therapy.[227]

Both sides also conceded that the WPATH Standards were the appropriate benchmark for treatment of gender dysphoria, rather than using the NCCHC standards.[228] Furthermore, the Court notes that the State did not seriously dispute that in certain circumstances, GAS can be medically necessary treatment for gender dysphoria.[229] The case hinged on whether GAS was medically necessary for Edmo specifically.[230] According to the Court, Edmo's medical expert testimonies were convincing, whereas the State's medical experts lacked pertinent knowledge, testified inconsistently, and could not explicitly defend their differences from generally accepted guidelines.[231] In its conclusion, the Court stressed that this outcome was specific to Edmo's case and "emphatically do[es] not speak to other cases."[232]

The Supreme Court has decided not to decide on this heavily controversial issue. In 2019 and 2020, the Supreme Court denied two petitions for certiorari concerning GAS for prisoners.[233]

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[221] *Id.*
[222] *Id.* at 767.
[223] *Id.* at 772.
[224] *Id.*
[225] *Edmo*, 935 F.3d at 772–73.
[226] *Id.* at 773.
[227] *Id.*
[228] *Id.* at 767.
[229] *Id.*
[230] *Edmo*, 935 F.3d at 767.
[231] *Id.*
[232] *Id.* at 803.
[233] Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019), *cert. denied*, Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020); Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

V. CONCLUSION

The Supreme Court of the United States should hear this issues and determine that refusing GAS in the prisons does not constitute cruel and unusual punishment under the Eighth Amendment because (1) there are alternative, safer treatments available to prisoners, (2) GAS is, for the most part, funded by taxpayer money, and (3) the treatment is still widely controversial; therefore, the refusal does not meet the deliberate indifference standard.

First, gender dysphoria is categorized as a mental disorder.[234] But instead of recommending psychological help, which has been shown to have positive effects on gender dysphoric patients in prisons, WPATH encourages physically and permanently altering an individual's body, essentially masking the symptoms, rather than fixing the root issue.[235] Second, allowing prisoners to undergo this procedure would effectively reward them for committing crimes. WPATH recommends that institutionalized individuals receive the same medically necessary surgical treatments as persons who reside outside the institutions; however, it fails to acknowledge that Americans, who are not in prison for committing crimes, pay out-of-pocket expenses for GAS.[236] Even Americans who have health insurance could pay up to 15% of the costs out of pocket. Prisoners, on the other hand, may have to pay a $2.00 to $5.00 copay, but the American taxpayer funds the remainder.[237]

Lastly, allowing transgender individuals the ability to have GAS does not fit within the societal norms required by the *Weems* standard. To date, the Ninth Circuit is the only jurisdiction to have held that refusing GAS constitutes cruel and unusual punishment in violation of the Eighth Amendment.[238] Other federal cases that have resulted in GAS for prisoners were only acquired by settlement, not by court order, and were a result of the deliberately delayed care by the prison system, not because there was a better, safer alternative.[239] Two other jurisdictions explicitly held that the surgery did not violate the Eighth Amendment.[240] This demonstrates a lack of consensus within the judiciary, leading to a circuit split. Although it could be argued that the case-by-case analysis complicates each Court's decision, Gibson's and Edmo's cases were almost analogous, including the fact that both prisoners benefited from psychological treatment.[241] Furthermore, there is significant controversy

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[234] DSM-5-TR, *supra* note 54, at 511.
[235] *See supra* Section III.B.
[236] *See supra* Section III.B.
[237] *See supra* Section III.B.
[238] *See supra* Section IV.E.
[239] *See supra* Section IV.E.
[240] *See supra* Section IV.E.
[241] *See supra* Section IV.E.

between the legislative and executive branches. Procedures relating to prisoners and GAS have interchanged between presidential administrations and legislators across the United States, resulting in regulatory whiplash.[242]

The threshold prohibits treatment that is so cursory, delayed, or grossly inadequate that it effectively denies care, which *can rise* to the level of deliberate indifference. Today, refusing GAS clearly does not rise to that level.

-- Jordan Burgan*

[242] *See supra* Section IV.E.

* J.D., Regent University School of Law, May 2026.