

A (CRUEL AND) UNUSUAL DECISION:
 QUESTIONS RAISED FOR THE FIFTH
 CIRCUIT MOVING FORWARD FROM
GIBSON V. COLLIER

*J. Gregory Cloward**

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INTRODUCTION

The same month Caitlyn Jenner debuted herself to the world on the cover of *Vanity Fair* magazine, the *Guardian* published a profile about Michelle-Lael Norsworthy and her years-long struggle to get treatment for gender dysphoria while in the custody of the California Department of Corrections and Rehabili-

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tations.¹ There are thousands of transgender persons incarcerated in America.² For most, incarceration comes with taunts, threats, sexual violence, and isolation.³ For many, this experience is compounded, as it was in Ms. Norsworthy's case, by a refusal from correctional departments to provide adequate treatment for gender dysphoria.⁴ In many of these cases, the only recourse is civil litigation, where the individual must rely on a court to enforce the constitutional right to adequate medical treatment.⁵

The American Psychiatric Association defines gender dysphoria as “a marked incongruence between one's experienced/expressed gender and assigned gender.”⁶ The condition is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”⁷ The World Professional Association for Transgender Health (“WPATH”) provides standards of care for the treatment of individuals diagnosed with gender dysphoria.⁸ The WPATH Standards of Care outline best practices related to,

¹ Ed Pilkington, ‘Prison Within Prison’: A Transgender Inmate's Years-Long Battle for Treatment, *GUARDIAN* (July 26, 2015, 7:09 AM), <https://www.theguardian.com/us-news/2015/jul/26/transgender-woman-inmate-prison-michelle-norsworthy> [perma.cc/NPV8-T2E2].

² The Justice Department's latest estimate comes from 2014 and was 3,209. BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: SUPPLEMENTAL TABLES (2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf [perma.cc/JFS2-9M98]. This Note uses the American Psychological Association's definition of transgender: “[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.” *A Glossary: Defining Transgender Terms*, *MONITOR ON PSYCH.*, Sept. 2018, at 32, <https://www.apa.org/monitor/2018/09/ce-corner-glossary> [perma.cc/2RTH-9FG4]. Despite a history of stigma, to be transgender is not a mental health disorder or a medical condition. See Suyin Haynes, *The World Health Organization Will Stop Classifying Transgender People as Having a ‘Mental Disorder.’* *TIME* (May 28, 2019, 12:25 PM), <https://time.com/5596845/world-health-organization-transgender-identity/> [perma.cc/24Y9-LXCM]. Many transgender people, however, suffer from gender dysphoria, a medical diagnosis for persons who experience serious emotional distress caused by the difference between the gender assigned to them at birth and the gender they know themselves to be. *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [perma.cc/2LF6-3C62]. The plaintiffs involved in the cases discussed in this Note suffer from gender dysphoria and requested treatment associated with that medical diagnosis.

³ See, e.g., Editorial Board, *Prisons and Jails Put Transgender Inmates at Risk*, *N.Y. TIMES* (Nov. 9, 2015), <https://www.nytimes.com/2015/11/09/opinion/prisons-and-jails-put-transgender-inmates-at-risk.html> [perma.cc/T5ZW-QYX6] (describing the experience many transgender people have while incarcerated).

⁴ See, e.g., Pilkington, *supra* note 1.

⁵ See discussion *infra* Part II.

⁶ AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 452 (5th ed. 2013).

⁷ *Id.* at 453.

⁸ See generally ELI COLEMAN ET AL., *WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE* (2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf [perma.cc/J6MR-W6WR]

among others, mental health, hormone therapy, and sex reassignment surgery (“SRS”).⁹ The Standards of Care are based on “the best available science and expert professional consensus” and are widely accepted as the guidelines for treatment of individuals with gender dysphoria.¹⁰

During the past three decades, incarcerated individuals suffering from gender dysphoria have filed lawsuits seeking court orders requiring correctional departments to provide the individuals with SRS.¹¹ These suits are generally brought as deliberate medical indifference claims under 42 U.S.C. § 1983 in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.¹² Three circuit courts of appeals have addressed these claims. Despite reaching opposite results for the respective plaintiffs involved, the First and Ninth Circuits both held that each case required an individualized inquiry into the specific facts of the plaintiffs’ cases.¹³ These decisions closely follow Eighth Amendment jurisprudence as it relates to deliberate medical indifference claims.¹⁴ In an unusual decision, however, the Fifth Circuit held that prisons could impose blanket bans on SRS entirely.¹⁵ This Note discusses the *Gibson v. Collier* decision in the context of other Eighth Amendment cases and brings attention to the potential questions the decision might raise for the Fifth Circuit moving forward.

Part I of this Note outlines policies related to the housing and treatment of transgender persons as they differ by correctional department. Part II briefly summarizes the history of Eighth Amendment jurisprudence and traces the development of the deliberate medical indifference claim. Part III summarizes the three circuit court opinions addressing SRS for incarcerated individuals. Finally, Part IV analyzes *Gibson* against Eighth Amendment precedent and calls attention to questions raised by this unusual decision.

[hereinafter WPATH].

⁹ *Id.* at 1. Many transgender people prefer the term “gender confirmation surgery” because “[a]s many trans folks have noted, surgery doesn’t change one’s gender—it changes the body in which one experiences that gender.” KC Clements, *What to Expect from Gender Confirmation Surgery*, HEALTHLINE (Dec. 21, 2018), <https://www.healthline.com/health/transgender/gender-confirmation-surgery> [perma.cc/9KEL-RJMS]. This Note uses “sex reassignment surgery” because that is the term used in both the current WPATH standards of care and in each case discussed in this Note.

¹⁰ WPATH, *supra* note 8, at 1; *see infra* Section IV.B.

¹¹ *See* discussion *infra* Part III. This Note focuses only on cases in which the plaintiff seeks SRS and does not include cases where the plaintiff disputes the adequacy of mental health or hormonal treatments.

¹² *See* U.S. CONST. amend. VIII; 42 U.S.C. § 1983; *see also* discussion *infra* Part II.

¹³ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 794 (9th Cir. 2019) (“*Edmo I*”); *see* *Kosilek v. Spencer*, 774 F.3d 63, 90–91 (1st Cir. 2014) (“*Kosilek IV*”).

¹⁴ *See* discussion *infra* Section IV.A.

¹⁵ *Gibson v. Collier*, 920 F.3d 212, 215–16 (5th Cir. 2019).

I. PRISON POLICIES RELATING TO TRANSGENDER INDIVIDUALS

Prison policies relating to the treatment of persons with gender dysphoria vary widely. Some correctional departments provide detailed guidelines covering diagnosis, housing, property, and medical treatment, including the opportunity to be reviewed for SRS eligibility.¹⁶ Others provide guidelines for intake, housing, and treatment in the form of counseling or hormone therapy but remain silent as to whether SRS might be an option.¹⁷ Finally, some correctional departments provide a general plan for compliance with the Prison Rape Elimination Act (“PREA”), with no specific treatment guidelines for persons with gender dysphoria.¹⁸ While some states have undertaken to address the healthcare issues faced by transgender individuals behind bars, in a majority of states, the adequacy of the treatment these individuals receive creates concern.¹⁹

In 2017, Prison Policy Initiative undertook an evaluation of twenty-one states’ policies as related to PREA and the WPATH Standards of Care.²⁰ The evaluation included findings that 81 percent of state policies failed to provide for psychotherapy, let alone pharmaceutical therapy or SRS for incarcerated persons with gender dysphoria.²¹ The findings further showed that 37 percent of transgender individuals who were receiving hormone therapy prior to incarceration were denied hormones once inside, resulting in exposure to serious medical consequences.²² Prison Policy Initiative ultimately concluded that “[a]ll but one [state came] up short” in treating transgender individuals.²³

¹⁶ See, e.g., CAL. CORR. HEALTH CARE SERVS., CAL. DEP’T OF CORR. AND REHAB., CCHCS/DHCS CARE GUIDE: TRANSGENDER (2020), <https://cchcs.ca.gov/wp-content/uploads/sites/60/CG/Transgender-CG.pdf> [perma.cc/RQ2H-B3JZ]; CAL. CORR. HEALTH CARE SERVS., CAL. DEP’T OF CORR. AND REHAB., GUIDELINES FOR REVIEW OF REQUESTS FOR GENDER AFFIRMING SURGERY 5 (2018), <https://cchcs.ca.gov/wp-content/uploads/sites/60/CG/Guidelines-ReviewRequestsGender-Affirming-Surgery.pdf> [perma.cc/XVG3-QPLY].

¹⁷ See, e.g., COLO. DEP’T OF CORR., OFFENDER HEALTH SERVICES: PRACTICES CONCERNING TRANSGENDER OFFENDERS, REG. NO. 700–14 (2019), <https://drive.google.com/file/d/1UPLY18Ojom9C4S9OKxEAKahBL0ZuAql7J/view> [perma.cc/6KX2-9GQ6].

¹⁸ See, e.g., CORR. INST. DIV., TEX. DEP’T OF CRIM. JUST., SAFE PRISONS/PREA PLAN (2019), https://www.tdcj.texas.gov/documents/cid/Safe_Prisons_PREA_Plan.pdf [perma.cc/V8AK-AVWP].

¹⁹ See Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL’Y INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender/> [perma.cc/9CFJ-HY57].

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* Oberholtzer spotlights Delaware as having the “best policy for the treatment of transgender people in prison.” *Id.* Even still, Delaware’s “excellent policy” does not expressly provide for mastectomies, indicating, according to Oberholtzer, “an additional barrier to care for trans men: the faulty assumption, almost universal in these policies, that the only transgender individuals who end up incarcerated are trans women.” *Id.* Oberholtzer’s article was written prior to California’s new policy being implemented. See *infra* notes 39–52 and accompanying text.

Every state except Utah has agreed to comply with PREA,²⁴ and most have outlined a general compliance plan that at least touches on the classification and housing of transgender individuals.²⁵ The Texas Department of Criminal Justice's "Safe Prisons/PREA Plan," for example, provides guidelines for determining where a transgender individual will be housed on a case-by-case basis.²⁶ The guidelines balance security concerns against the health and safety of the individual, including giving "serious consideration" to the individual's views with respect to the individual's own safety.²⁷ The guidelines further permit transgender persons to shower separately from other incarcerated persons and require staff to be trained in the methods of conducting pat-down searches in the "least intrusive manner possible."²⁸ While the department's guidelines dictate that all individuals identified as transgender be referred to medical staff,²⁹ they are silent as to the manner or scope of treatment an individual may receive.

Other states outline methods for treating transgender individuals but are silent as to whether SRS would be an option.³⁰ For example, the Colorado Department of Corrections' "Practices Concerning Transgender Offenders" Administrative Regulation provides procedures for the intake, housing, and medical treatment specific to incarcerated persons with gender dysphoria.³¹ The procedures allow for the continuation (or commencement) of hormone therapy, along with access to psychiatric and mental health services, including individual and group support therapy.³² The procedures are silent as to SRS, but do provide for a "Gender Dysphoria and Treatment Committee," which proposes individualized treatment plans for transgender individuals.³³ The procedures specifically note that treatment plans may include but are not limited to "real life experiences consistent with the prison environment, hormone therapy, and counseling."³⁴ As such, the procedures may be read to imply that SRS could be

²⁴ Utah has rejected to implement PREA's standards since the bill's passage in 2003, choosing instead to forfeit approximately \$140,000 in federal grant money each year. See Luke Ramseth, *Utah One of Only Two States Not Complying with Federal Prison-Rape Guidelines, DOJ Says*, SALT LAKE TRIB. (May 15, 2017, 10:45 AM), <https://archive.sltrib.com/article.php?id=5284203&itype=CMSID> [perma.cc/K5Q6-CY EK]. That article mentions Arkansas as well; however, the state appears to have now implemented PREA. See ARK. DEP'T OF CORR., PRISON RAPE ELIMINATION ACT (PREA), ADMIN. DIRECTIVE NO. 15-29 (2017), https://adc.arkansas.gov/images/uploads/AD_2015-29_PREA.pdf [perma.cc/9UMU-AC5D].

²⁵ See *supra* note 18 and accompanying text.

²⁶ CORR. INST. DIV., TEX. DEP'T OF CRIM. JUST., *supra* note 18, at 19.

²⁷ *Id.*

²⁸ *Id.* at 9, 34.

²⁹ *Id.* at 16.

³⁰ See COLO. DEP'T OF CORR., *supra* note 17.

³¹ *Id.*

³² *Id.* at 5.

³³ *Id.* at 1.

³⁴ *Id.* at 5.

granted in certain cases; however, there is no evidence that the department has ever granted SRS or denied it.³⁵

Delaware, California, and Oklahoma lay out explicit policies and guidelines for SRS, should the treatment be medically necessary for a transgender individual behind bars.³⁶ Delaware's Department of Correction policy provides for SRS to be "considered on a case-by-case basis as a component of the individualized treatment plan."³⁷ Oklahoma's Department of Corrections policy allows for SRS only in "extraordinary circumstances."³⁸ The California Department of Corrections and Rehabilitations ("CDCR") has the most permissive guidelines for the treatment of transgender individuals, permitting any request for SRS to be considered by three separate committees, provided the individual meets basic prerequisite criteria.³⁹ All requests are ultimately reviewed by an SRS Review Committee comprised of two physicians from CDCR's Medical Services, two physicians from CDCR's Mental Health Program, and two psychologists from CDCR's Mental Health Program.⁴⁰ The Committee considers a number of factors, including the continuously manifested desire to live as one's preferred sex, the individual's distress due to gender dysphoria,⁴¹ and whether the individual can be expected to adjust to confinement postoperatively.⁴² The

³⁵ The Federal Bureau of Prisons' guidelines similarly mention "hormone or other necessary medical treatment," while remaining silent as to SRS specifically. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., TRANSGENDER OFFENDER MANUAL 9 (rev. 2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> [perma.cc/B2KE-H6WT].

³⁶ *See* DEL. DEP'T OF CORR., POLICY E-14 TREATMENT OF TRANSGENDER PERSONS 4 (2020), https://doc.delaware.gov/assets/documents/policies/policy_11-E-14.pdf [perma.cc/R3X9-S4NV]; CAL. CORR. HEALTH CARE SERVS., CAL. DEP'T OF CORR. AND REHAB., GUIDELINES FOR REVIEW OF REQUESTS FOR GENDER AFFIRMING SURGERY, *supra* note 16; OKLA. DEP'T. OF CORR., OP-140147 DETERMINATION AND MANAGEMENT OF INMATES WITH GENDER DYSPHORIA (2020), <http://doc.publishpath.com/Websites/doc/images/Documents/Policy/op140147.pdf> [perma.cc/97UW-EQTR]. While the Massachusetts Department of Correction's guidelines for treating transgender individuals do not expressly mention SRS, they do provide for an individualized treatment plan that must comply with "the most current version" of the WPATH Standards of Care, implying that SRS would fall within the possible scope of treatment. *See* MASS. DEP'T. OF CORR., IDENTIFICATION, TREATMENT AND CORRECTIONAL MANAGEMENT OF INMATES DIAGNOSED WITH GENDER DYSPHORIA 9 (2017), <https://www.mass.gov/files/documents/2016/09/qz/652.pdf> [perma.cc/H66P-6DSP].

³⁷ DEL. DEP'T OF CORR., *supra* note 36, at 4.

³⁸ OKLA. DEP'T. OF CORR., *supra* note 36, at 5. The policy further specifies that self-castration does not constitute "surgical reassignment therapy and will not qualify an" individual to be housed "in a facility for [persons] of the opposite sex from the inmate's birth sex." *Id.*

³⁹ CAL. CORR. HEALTH CARE SERVS., CAL. DEP'T OF CORR. AND REHAB., GUIDELINES FOR REVIEW OF REQUESTS FOR GENDER AFFIRMING SURGERY, *supra* note 16, at 1-4.

⁴⁰ *See id.* at 2.

⁴¹ This does not include any distress caused by confinement or other mental illness. *Id.* at 3.

⁴² *Id.*

Committee's recommendation is then sent to a final committee,⁴³ which can grant the SRS request, with or without conditions, or deny it.⁴⁴

California also recently changed its general policy relating to incarcerated persons with gender dysphoria. In May 2019, the state's Senate passed Senate Bill 132 by twenty-nine votes to eight.⁴⁵ The Bill addresses the "exceptionally high rates of sexual victimization" faced by incarcerated transgender individuals by outlining classification and housing guidelines for these individuals.⁴⁶ Per the Bill, upon initial intake, the CDCR will ask each individual about gender identity, sex assigned at birth, and preferred first name, gender pronoun, and honorific.⁴⁷ CDCR staff are required to use the individual's preferred gender pronoun and honorific, and an individual may change that preference at any time.⁴⁸

A more controversial aspect of the Bill deals with housing determinations for transgender incarcerated persons. Per the Bill, the CDCR is required to house the individual in "a correctional facility designated for men or women based on the individual's preference . . ." ⁴⁹ Because the Bill does not require a diagnosis of gender dysphoria or any other physical or mental health diagnosis, regardless of anatomy to apply,⁵⁰ conservative groups and anti-transgender feminist groups alike have raised concerns over the threat that a transgender female might pose if housed at a female prison.⁵¹ Still, the Bill does provide for the housing of an individual in a manner contrary to the person's perception of health and safety, so long as the CDCR outlines its "management or security concerns" related to the individual's housing assignment in writing.⁵² Prison policies relating to housing, property, and medical treatment have a profound impact on a transgender person's time while incarcerated. Where prison policies do not provide transgender individuals with adequate medical treatment for

⁴³ The recommendation is sent to the Statewide Medical Authorization Review Team. *Id.* at 1.

⁴⁴ *Id.* at 4.

⁴⁵ S.B. 132, 2019–20 Reg. Sess. (Cal. 2019).

⁴⁶ *Id.*

⁴⁷ *Id.* at 3. The Bill defines "honorific" as "a form of respectful address typically combined with an individual's surname." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 3–4.

⁵¹ See, e.g., Madeleine Kearns, *California's Transgender Prison Policy Is a Disaster for Women*, NAT'L REV. (June 26, 2019, 4:41 PM), <https://www.nationalreview.com/2019/06/californias-transgender-prison-policy-is-a-disaster-for-women/> [perma.cc/25UV-NP3G]. At the California assembly hearing on the Bill, Abigail Lunetta, a "Democrat, feminist, and . . . advocate for women's rights," raised concerns about the Bill's implications stating, "[r]ight now, Richard Masbruch, a trans-identified male, is currently housed with female inmates in Corona, even though he is serving time for targeting, raping, and torturing women. Under no circumstances is this morally justifiable." *Id.* (emphasis omitted).

⁵² S.B. 132 at 4.

gender dysphoria, the individual generally must sue for relief under the Eighth Amendment's proscription on cruel and unusual punishment.

II. DELIBERATE MEDICAL INDIFFERENCE AS "CRUEL AND UNUSUAL PUNISHMENT"

The history of the Eighth Amendment's prohibition on cruel and unusual punishments has been summarized at length by courts and scholars alike.⁵³ Nevertheless, briefly tracing the history of Eighth Amendment jurisprudence allows us to arrive at the current legal standard for a claim of deliberate medical indifference. In its earliest cases, the Supreme Court discussed "cruel" and "unusual" separately but focused its holdings on the punishment's degree of cruelty.⁵⁴ Decades later in 1958, however, the Court announced a new Eighth Amendment analysis.⁵⁵ In *Trop v. Dulles*, the Court noted that the words of the Eighth Amendment "are not precise," and that its "scope is not static."⁵⁶ Instead, the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵⁷

Since *Trop*, this "standards of decency" rule has been used by the Supreme Court on different occasions to invalidate the use of the death penalty against juveniles,⁵⁸ the mentally disabled,⁵⁹ and child rapists.⁶⁰ Even earlier, the rule was used to establish the Eighth Amendment claim of deliberate medical indifference against incarcerated persons.⁶¹ In *Estelle v. Gamble*, the Court heard a claim by J.W. Gamble, an individual incarcerated in the Texas Department of Corrections who injured his back while unloading cotton from a truck as a pris-

⁵³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976); *Furman v. Georgia*, 408 U.S. 238, 316–28 (1972) (Marshall, J., concurring); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 573–80 (2010). See generally Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

⁵⁴ Ryan, *supra* note 53, at 582–83.

⁵⁵ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

⁵⁶ *Id.*

⁵⁷ *Id.* at 101.

⁵⁸ *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.").

⁵⁹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citation omitted)).

⁶⁰ *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) ("The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application.").

⁶¹ See *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976).

on work assignment.⁶² Despite the fact that prison medical personnel had seen Gamble seventeen times during a three-month period following the incident, Gamble alleged that the staff could have done more for his back injury “by way of diagnosis and treatment.”⁶³ While explaining that mere negligent medical treatment would not violate the Eighth Amendment,⁶⁴ the Court held that “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment’s proscription against “unnecessary and wanton infliction of pain” and offends society’s “evolving standards of decency.”⁶⁵

The Supreme Court explained the deliberate indifference test in *Farmer v. Brennan*.⁶⁶ There, a transgender individual, Dee Farmer, sued the Federal Bureau of Prisons after she was transferred to a high-security prison where she was beaten and raped by another incarcerated person.⁶⁷ The Court rejected Farmer’s invitation to adopt an entirely objective deliberate indifference test.⁶⁸ Instead, the Court required subjective proof that a prison official “both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that] he must also draw the inference.”⁶⁹

Several circuit courts of appeals have applied this “*Farmer* framework” to deliberate medical indifference claims of incarcerated persons with a range of health conditions, including pregnancy,⁷⁰ HIV,⁷¹ diabetes,⁷² hepatitis C,⁷³ and cataracts.⁷⁴ A claim of deliberate medical indifference is also the vehicle by which an individual with gender dysphoria can challenge the adequacy of the medical treatment provided by the prison.⁷⁵ To prevail on a claim of deliberate medical indifference under *Farmer*, plaintiffs must satisfy a test comprising one objective prong and one subjective prong.⁷⁶ The plaintiff must first demon-

⁶² *Id.* at 98–99.

⁶³ *Id.* at 107. Gamble argued, and the Fifth Circuit agreed, that the medical staff ought to have ordered an x-ray to better diagnose the injury. *Id.* The Supreme Court ultimately rejected this argument. *Id.*

⁶⁴ *Id.* at 105–106 (“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”).

⁶⁵ *Id.* at 104, 106.

⁶⁶ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁶⁷ *Id.* at 829–30.

⁶⁸ *Id.* at 837.

⁶⁹ *Id.*

⁷⁰ *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 329 (3d Cir. 1987).

⁷¹ *Harris v. Thigpen*, 941 F.2d 1495, 1501 (11th Cir. 1991).

⁷² *Rouse v. Plantier*, 182 F.3d 192, 193 (3d Cir. 1999).

⁷³ *Roe v. Elyea*, 631 F.3d 843, 847 (7th Cir. 2011).

⁷⁴ *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014).

⁷⁵ See discussion *infra* Part III.

⁷⁶ See, e.g., *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (“The test for constitutional liability of prison officials ‘involves both an objective and a subjective component.’” (citation omitted)); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (“To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry.” (citations omitted)); *Hathaway v. Coughlin*, 37

strate the existence, objectively, of a serious medical need.⁷⁷ The plaintiff must then prove that a prison official both knew of and disregarded a serious risk to the individual's health or safety.⁷⁸ For individuals incarcerated in state facilities, deliberate medical indifference claims are generally brought under § 1983 of the U.S. Code, which enables the plaintiff to sue for damages or for an injunction.⁷⁹

III. THE SEX REASSIGNMENT SURGERY CASES

The First, Fifth, and Ninth Circuits have addressed whether prisons are required to provide incarcerated persons with SRS to adequately treat gender dysphoria under the Eighth Amendment.⁸⁰ The First and Ninth Circuit concluded that departments of correction are required to provide transgender persons with an individualized assessment for whether SRS is appropriate in each case.⁸¹ The Fifth Circuit, on the other hand, held that a blanket ban on SRS for incarcerated persons would not run afoul the Eighth Amendment.⁸² This Part summarizes each case in turn.

F.3d 63, 66 (2d Cir. 1994) (“The deliberate indifference standard embodies both an objective and a subjective prong.”).

⁷⁷ *Colwell*, 763 F.3d at 1066; see also *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In the deliberate medical indifference context, circuit courts of appeals agree that a “serious” medical need is “one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.” See, e.g., *Leite v. Bergeron*, 911 F.3d 47, 52 (1st Cir. 2018); *Richmond v. Huq*, 885 F.3d 928, 938 (6th Cir. 2018); *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017); *Kuhne v. Fla. Dep't of Corr.*, 745 F.3d 1091, 1096 (11th Cir. 2014); *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012); *Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005). The Third Circuit uses the same test nearly word-for-word, only substituting “requiring” for “mandating.” See, e.g., *Woloszyn v. Cnty. of Lawrence*, 396 F.3d 314, 320 (3d Cir. 2005).

⁷⁸ *Colwell*, 763 F.3d at 1066 (citation omitted); see also *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁷⁹ 42 U.S.C. § 1983 (“Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”). In each of the cases discussed below, the plaintiff sued for an injunction requiring a correctional department to provide the person with SRS. This Note does not discuss each court's preliminary injunction analysis but addresses only the merits of each person's Eighth Amendment claim.

⁸⁰ The Seventh Circuit addressed this issue in *Campbell v. Kallas*; however, that decision was a review of the district court's denying of the defendants' claim of qualified immunity. *Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019). The court concluded that there was not enough case law to establish a constitutional right to treatment of gender dysphoria beyond hormone therapy. *Id.* at 549. While the court did note that it was “doubtful” whether the plaintiff could prove deliberate medical indifference, *id.* at 538, its analysis did not reach the merits of her claim.

⁸¹ *Edmo v. Corizon, Inc.*, 935 F.3d 757, 794 (9th Cir. 2019) (“*Edmo II*”); *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) (“*Kosilek IV*”).

⁸² *Gibson v. Collier*, 920 F.3d 212, 216 (2019).

A. *Kosilek v. Spencer*

In the First Circuit, an incarcerated individual with gender dysphoria, Michelle Kosilek, had been denied SRS by the Massachusetts Department of Correction (“MDOC”) due to security concerns and disagreements over whether the procedure was medically necessary.⁸³ Kosilek, who was eventually convicted of strangling her then-wife before leaving the body in the backseat of a vehicle at a shopping mall, had made an attempt at self-castration and two attempts at suicide while awaiting her trial.⁸⁴ By the time Kosilek reached the First Circuit’s en banc review, the “litigation [had] spanned more than twenty years and [had] produced several opinions of significant length.”⁸⁵

In a sixty-plus page opinion that followed a twenty-eight-day trial, the district court applied the WPATH Standards of Care and noted that SRS was “widely recognized” as medically necessary for the treatment of gender dysphoria.⁸⁶ In conducting its Eighth Amendment analysis, the court found that Kosilek’s gender dysphoria was indeed a serious medical need.⁸⁷ Then, while explaining that an incarcerated individual is not entitled to “ideal care or the care of his [or her] choice,” the court found that SRS was the only adequate treatment for Kosilek’s gender dysphoria, crediting the testimony of her expert witnesses.⁸⁸

⁸³ *Kosilek IV*, 774 F.3d at 74–81.

⁸⁴ *Id.* at 68–69. The murder of Kosilek’s wife was precipitated by an argument over Kosilek wearing her wife’s clothing. *See Kosilek v. Spencer*, 889 F. Supp. 2d 190, 213 (D. Mass. 2012) (“*Kosilek I*”).

⁸⁵ *Kosilek IV*, 774 F.3d at 68. Kosilek’s odyssey in the federal courts commenced in 1992 with a lawsuit that spanned ten years. *Kosilek v. Maloney* 221 F. Supp. 2d 156 (D. Mass. 2002) (“*Kosilek I*”). While not discussed herein, this Note takes the First Circuit’s lead in designating *Kosilek v. Maloney* as “*Kosilek I*.” *See Kosilek IV*, 774 F.3d at 68. Thus, at the risk of confusing the reader, the first case discussed in depth in this Note (the District Court’s *Kosilek v. Spencer* decision) is designated herein as “*Kosilek II*.” The First Circuit’s first review of that decision is designated “*Kosilek III*.” And the First Circuit’s en banc opinion is designated “*Kosilek IV*.”

⁸⁶ *Kosilek II*, 889 F. Supp. 2d at 197 (2012). The “Harry Benjamin Standards of Care” that the court cites were the precursors to the WPATH Standards of Care. *See WPATH*, *supra* note 8, at 107. The United States Tax Court had recently held that hormonal treatments and SRS could be tax deductible for certain individuals as forms of necessary medical care, and the Seventh Circuit had recently struck down a Wisconsin state statute prohibiting hormonal treatments and SRS for incarcerated persons as a violation of the Eighth Amendment. *See O’Donnabhain v. Comm’r*, 134 T.C. 34, 77 (2010); *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011).

⁸⁷ *Kosilek II*, 889 F. Supp. 2d at 229–30.

⁸⁸ *Id.* at 199, 225–27. The court repudiated the defendant’s expert witness and deemed him “not a prudent professional for several reasons.” *Id.* at 235. Among the court’s reasons were Dr. Schmidt’s rejection of “certain fundamental features” of the Standards of Care, his belief that SRS is never medically necessary, and his belief that an incarcerated person cannot have a “real life experience” as required by the Standards of Care. *Id.*

Next, the court found that MDOC Commissioner Kathleen Dennehy actually knew that Kosilek had a serious medical need.⁸⁹ It deemed MDOC's contention that Kosilek was denied SRS because of security concerns as pretextual and found Dennehy's conduct to be wanton, in violation of the Eight Amendment.⁹⁰ In making this determination, the court pointed to Dennehy's participation in firing an MDOC doctor who had recommended SRS for Kosilek and her immediately halting the treatment of transgender persons upon becoming Acting Commissioner of MDOC (purportedly to review each individual case).⁹¹ The court also found that she had offered false testimony, claiming to have misunderstood that MDOC's medical consultants were recommending SRS for Kosilek.⁹² Throughout the opinion, the court offered scathing criticism of Dennehy, asserting that she was "determined not to be the first prison official in the United States to authorize [SRS] for an inmate," and that she opposed Kosilek's SRS only out of fear of facing political backlash from the media.⁹³ The court took particular offense to the fact that Dennehy had testified under oath that she would "retire rather than obey an order from the Supreme Court" to provide SRS for an individual incarcerated by MDOC.⁹⁴

The First Circuit's first review of *Kosilek II* was released approximately eighteen months after the district court's order.⁹⁵ After "setting forth the extensive backdrop of Kosilek's odyssey,"⁹⁶ the court held that the trial judge had neither erred in finding that Kosilek suffered from a serious medical need that

⁸⁹ *Id.* at 238.

⁹⁰ *Id.* at 238–47.

⁹¹ *Id.* at 240.

⁹² *Id.* ("The court finds that Dennehy was pretending not to understand UMass's treatment recommendations in order to delay having to announce that she would not allow Kosilek to receive [SRS].").

⁹³ *Id.* at 203, 220. The Massachusetts Lieutenant Governor had publicly opposed using tax revenues to provide incarcerated persons with SRS, *id.* at 225, and the Boston Globe had published a series of incendiary articles opposing Kosilek's petition. *See e.g.*, Brian McGrory, *A Test Case for a Change*, BOS. GLOBE (June 13, 2000), <https://www.bostonglobe.com/metro/2000/06/13/test-case-for-change/s9jYsy33HXfJ3ajRNZYpMO/story.html> [perma.cc/HK92-P22R] ("Now in prison . . . [Kosilek] says he pines every moment of every day to be the woman he was always meant to be. And he's demanding that the state, meaning you and me, pay the \$25,000 for a sex-change operation, which the more politically correct call a 'sexual reassignment.'"); Eileen McNamara, *When Gender Isn't Relevant*, BOS. GLOBE (June 11, 2006), http://archive.boston.com/news/local/articles/2006/06/11/when_gender_isnt_relevant/ [perma.cc/N8GZ-E3MG] ("The [Kosilek] trial underway in federal court in Boston is not about the rights of transsexuals. It's about the manipulations of a murderer."); Globe Editorial, *Set Limits on Sex Change*, BOS. GLOBE (June 15, 2006), http://archive.boston.com/news/globe/editorial_opinion/editorials/articles/2006/06/15/set_limits_on_sex_change/ [perma.cc/5JYF-LFVJ] ("Kosilek's case is not compelling for reasons even beyond the obvious distastefulness of a wife killer angling to serve out his sentence of life without parole in a women's prison.").

⁹⁴ *Kosilek II*, 889 F. Supp. 2d at 201, 220, 228.

⁹⁵ *Kosilek v. Spencer*, 740 F.3d 733 (1st Cir. 2014) (*"Kosilek III"*).

⁹⁶ *Id.* at 758. The court wrote an approximately twenty-two-page summary of the litigation.

could only be adequately treated by SRS, nor in finding that MDOC's security rationale for denying Kosilek the surgery was "largely false and greatly exaggerated."⁹⁷ While acknowledging that Kosilek's procedure may "strike[] some as odd or unorthodox," the First Circuit was ultimately unwilling to overturn the trial judge, who the court determined was "well-placed" to make the findings that he did.⁹⁸ In a dissent that foreshadowed the ultimate reversal of the district court's decision, Judge Torruella argued that the majority based its opinion on "several erroneous assumptions" and reached a result "beyond the limits of [the court's] established Eighth Amendment jurisprudence."⁹⁹

Judge Torruella also wrote the majority opinion for the First Circuit's reversal—and ultimate dismissal—of Kosilek's case en banc.¹⁰⁰ In first analyzing the objective prong of Kosilek's Eighth Amendment claim, the court acknowledged that gender dysphoria is a serious medical need and then focused on the district court's finding that MDOC's treatment of Kosilek's gender dysphoria was constitutionally inadequate.¹⁰¹ The court determined that MDOC's medical experts' views were within the range of medical prudence and cited "several erroneous determinations" made by the district court in finding the contrary.¹⁰² The court further held that MDOC's treatment plan for Kosilek was not sufficiently harmful so as to violate the Eighth Amendment and admonished the district court for "unduly minimiz[ing] the nature of [MDOC's] preferred treatment plan."¹⁰³ The court found no basis for accepting Kosilek's contention that denying her SRS would result in a de facto blanket ban against MDOC providing SRS for incarcerated individuals with gender dysphoria.¹⁰⁴ It did, however,

⁹⁷ *Id.* at 766, 772.

⁹⁸ *Id.* at 772–73 ("Here the trial judge had the opportunity to preside over two lawsuits involving the same players and similar allegations, to hear evidence in this case over the course of a twenty-eight day trial, to question witnesses, to assess credibility, to review a large volume of exhibits, and, in general, to live with this case for twelve years (twenty years if you count [Kosilek's initial litigation]). The judge was well-placed to make the factual findings he made, and there is certainly evidentiary support for those findings.").

⁹⁹ *Id.* at 773 (Torruella, J., dissenting).

¹⁰⁰ *Kosilek IV*, 774 F.3d at 68.

¹⁰¹ *Id.* at 85–90.

¹⁰² *Id.* at 87. These erroneous determinations included a misrepresentation of the flexibility of the WPATH Standards of Care, a mischaracterization of MDOC's medical experts' "refusal" to issue letters of recommendation for SRS, and an overstatement regarding consensus in the medical community as to the "real-life experience" required by the Standards of Care. *Id.* at 86–89.

¹⁰³ *Id.* at 89. The court took issue with the fact that the district court limited its ruling to find that "psychotherapy and antidepressants alone would not adequately treat Kosilek's [gender dysphoria]" while disregarding the fact that MDOC also provided Kosilek with hormone therapy, facial hair removal, regular mental health treatment, and feminine clothing and accessories, with (as conceded by Kosilek) much success. *Id.* at 89–90.

¹⁰⁴ *Id.* at 90–91. The dissent was less concerned about MDOC creating a blanket ban on SRS and more concerned that the majority's decision would "preclude inmates from ever being able to mount a successful Eighth Amendment claim for [SRS] in the courts." *Id.* at 106–07 (Thompson, J., dissenting).

warn that such a ban would “conflict with the requirement that medical care be individualized based on a particular prisoner’s serious medical needs.”¹⁰⁵

Proceeding to its analysis of the subjective prong of Kosilek’s claim (whether MDOC acted with deliberate indifference towards her), the First Circuit clarified that the focus lay not with the district court’s belief about what was medically necessary, but with the MDOC staff’s knowledge.¹⁰⁶ The court held that, in this case, MDOC had reasonably chosen between two alternative treatment paths accepted by medical professionals.¹⁰⁷ It further pointed out that even a later court ruling, in which a prison’s administrators erred in their estimation of a treatment’s reasonableness, does not amount to “the sort of obstinacy and disregard” required for a finding of deliberate indifference.¹⁰⁸

Finally, the court addressed the MDOC security concerns, which the district court had spurned.¹⁰⁹ Once more explaining the importance of whether MDOC’s security concerns had a “reasoned basis,” rather than the immateriality of the district court’s belief regarding the accuracy of those concerns, the court found MDOC’s security concerns to be reasonable.¹¹⁰ The court maintained that it took “no great stretch of the imagination” to recognize reasonable security concerns related to where the department might house a male-to-female transgender individual who had been convicted of “extreme violence against a female domestic partner.”¹¹¹ It also found that MDOC’s concerns, which involved future individuals using threats of suicide or self-harm as a means of extracting desired benefits from the department of corrections, constituted a reasonable security concern.¹¹² While the court gave deference to the district court’s rejection of Commissioner Dennehy as a credible witness, this was insufficient to affirm the district court’s ruling that MDOC’s security concerns were wholly pretextual—particularly because Dennehy had left her position years prior to the decision to deny Kosilek’s SRS being made.¹¹³ Over twenty years after originally suing for injunctive relief to obtain SRS, Kosilek’s request was denied.

B. *Gibson v. Collier*

Four years after *Kosilek IV*, in *Gibson v. Collier*,¹¹⁴ the Fifth Circuit held that the Texas Department of Criminal Justice (“TDCJ”) was not required to make individualized assessments for each individual requesting SRS and that

¹⁰⁵ *Id.* at 91 (citation omitted); see discussion *infra* Section IV.A.

¹⁰⁶ *Kosilek IV*, 774 F.3d at 91.

¹⁰⁷ *Id.* at 90.

¹⁰⁸ *Id.* at 92.

¹⁰⁹ *Id.* at 92–96.

¹¹⁰ *Id.* at 93–94.

¹¹¹ *Id.* at 93.

¹¹² *Id.* at 94.

¹¹³ *Id.* at 95–96.

¹¹⁴ *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019).

failing to provide SRS could not fall within the plain meaning of “cruel *and unusual*” punishment.¹¹⁵ Originally incarcerated on two counts of aggravated robbery, Vanessa Lynn Gibson subsequently committed aggravated assault, possession of a deadly weapon, and murder in prison.¹¹⁶ She had been diagnosed with gender dysphoria and had lived as a female since the age of fifteen.¹¹⁷ She had attempted self-castration and three times attempted suicide—although she admits that the suicide attempts were not solely because of her gender dysphoria.¹¹⁸

After having been repeatedly denied SRS by TDCJ, Gibson brought suit challenging TDCJ’s policy relating to the treatment of transgender individuals and seeking an injunction requiring TDCJ to evaluate her for SRS.¹¹⁹ While whether the policy was merely silent about SRS or proscribed it entirely was unclear on its face, the court noted that the policy was a “categorical policy judgment not to wade into the controversial world of [SRS].”¹²⁰ TDCJ’s Director moved for summary judgment based on qualified immunity and sovereign immunity.¹²¹ The district court rejected both defenses but nevertheless granted summary judgment, ruling *sua sponte* that Gibson’s Eighth Amendment claim failed on the merits.¹²² On appeal, despite “procedural defects” at the lower court, which “might very well” have been reason for remand, Gibson and her counsel requested that the court remand based solely on the merits.¹²³ The Fifth Circuit accepted her invitation to reach the merits of her claim.

Proceeding on a “sparse record” that included only the WPATH Standards of Care, the Fifth Circuit first noted (and indeed, TDCJ acknowledged) that Gibson’s gender dysphoria was, objectively, a serious medical need.¹²⁴ The court also noted, however, that disagreement over medical treatment would not be enough to state a claim of deliberate medical indifference.¹²⁵ According to the court, Gibson “seem[ed] to accept” that fact and had stated in her brief that to prevail, she must demonstrate “universal acceptance by the medical community” that SRS was required to treat gender dysphoria.¹²⁶ Ultimately, Gibson’s

¹¹⁵ *Id.* at 224–28.

¹¹⁶ *Id.* at 216–17.

¹¹⁷ *Id.* at 217. In a footnote, the court explains that the opinion would use male pronouns when referring to Gibson, citing TDCJ policy and Supreme Court precedent. *Id.* n.2.

¹¹⁸ *Id.* at 217.

¹¹⁹ *Id.* at 217–18.

¹²⁰ *Id.* at 218, 224.

¹²¹ *Id.* at 218.

¹²² *Id.*

¹²³ *Id.* at 218–19 (“Reasonable counsel might conclude that it would be a waste of time and resources for everyone involved (and give false hope to Gibson) to remand for procedural reasons.”).

¹²⁴ *Id.* at 219, 221.

¹²⁵ *Id.* at 220.

¹²⁶ *Id.*

inability to do so “doom[ed]” her claim.¹²⁷ Citing the *Kosilek IV* court’s “exhaustively detailed” summary of the expert testimony presented at trial in that case, the *Gibson* court noted that “respected doctors profoundly disagree about whether [SRS] is medically necessary to [adequately] treat gender dysphoria.”¹²⁸ Because Gibson would never be able to prove the medical community’s consensus regarding SRS, the court rejected Gibson’s assertion that she could present evidence on remand that would demonstrate her individual need for SRS.¹²⁹

The Fifth Circuit rejected the dissent’s contention that permitting a blanket ban on SRS would be unconstitutional under the Eighth Amendment.¹³⁰ It noted that Gibson had acknowledged in her brief, and her counsel had conceded at oral argument, that “if the logic of *Kosilek [IV]* is correct, it would allow a ‘blanket refusal to provide SRS.’”¹³¹ The court then proceeded to cite the *Kosilek IV* dissent as sister circuit precedent approving this blanket ban on SRS for incarcerated persons.¹³² It concluded this analysis by comparing how the Food and Drug Administration makes categorical judgments about which medical treatments may or may not be made available to American citizens without an individualized assessment in each case.¹³³

Having concluded that Gibson’s inability to prove medical consensus about SRS doomed her claim “as a matter of established precedent,” the court proceeded (almost as an aside) to address “an even more fundament flaw” with her claim.¹³⁴ Quoting various opinions of Justice Antonin Scalia, a Yale Law Journal article, and Webster’s Dictionary, the Fifth Circuit concluded that the Eighth Amendment prohibits only punishments that are both cruel *and unusual*.¹³⁵ If a practice to deny transgender individuals SRS is widely accepted, the argument went, then TDCJ doing so could not be tantamount to an “unusual”

¹²⁷ *Id.* at 221.

¹²⁸ *Id.* at 221–23. The *Gibson* dissent challenged the majority’s use of the *Kosilek* record to reach its conclusion. *Id.* at 232 (Barksdale, J., dissenting). While the majority conceded “it might have been better practice” to have had evidence from the TDCJ, it concluded that this was not grounds for reversal, as there was “no reason why—as a matter of either common sense or constitutional law—one state cannot rely on the universally shared experiences and policy determinations of other states.” *Id.* at 224.

¹²⁹ *Id.* at 223–24 (“Because Gibson does not dispute the expert testimony assembled by the First Circuit concerning the medical debate surrounding [SRS], [s]he cannot establish on remand that such surgery is universally accepted as an effective or necessary treatment for gender dysphoria. Nor can [s]he contend that TDCJ has been deliberately indifferent to [her] serious medical needs—particularly where TDCJ continues to treat [her] gender dysphoria through other means.” (citation omitted)).

¹³⁰ *Id.* at 224–25.

¹³¹ *Id.* at 225.

¹³² *Id.* Ironically, the *Kosilek IV* court specifically warned against such an interpretation. *Kosilek IV*, 774 F.3d at 90–91; see discussion *infra* Section IV.A.

¹³³ *Gibson*, 920 F.3d at 225.

¹³⁴ *Id.* at 226

¹³⁵ *Id.* at 226–28.

punishment.¹³⁶ The court noted that SRS had only been provided to an incarcerated individual once—and then as a part of a settlement agreement¹³⁷—and thus concluded that Gibson could not “state a claim for cruel *and unusual* punishment under the plain text and original meaning of the Eighth Amendment, regardless of any facts [she] might have presented in the event of remand.”¹³⁸

C. *Edmo v. Corizon, Inc.*

In a decision that signaled the direction the Ninth Circuit would take in cases involving incarcerated persons diagnosed with gender dysphoria, the district court in *Norsworthy v. Beard* granted a plaintiff’s motion for preliminary injunction and ordered the CDCR to provide her with SRS.¹³⁹ The case was initiated by Michelle-Lael Norsworthy shortly after the District of Massachusetts’ *Kosilek II* decision (later reversed, as discussed above), which required the Massachusetts Department of Correction to provide SRS to Ms. Kosilek.¹⁴⁰ Norsworthy had been diagnosed with gender dysphoria¹⁴¹ approximately twelve years prior to filing her complaint and had been denied SRS by CDCR on three levels of appeal.¹⁴²

The district court in *Norsworthy* outlined the WPATH Standards of Care, which CDCR did not dispute as the accepted standards of care for the treatment of patients diagnosed with gender dysphoria.¹⁴³ In analyzing Norsworthy’s deliberate medical indifference claim, the court applied WPATH’s SRS eligibility criteria to find that Norsworthy was likely to satisfy the “serious medical need” prong of the *Farmer* framework,¹⁴⁴ while soundly rejecting the opinions of CDCR’s expert witness.¹⁴⁵ The court further found that Norsworthy had provided compelling evidence showing that CDCR acted with deliberate indifference by failing to provide her with SRS, despite having access “to the relevant Standards of Care and evidence that SRS was medically necessary for Norsworthy.”¹⁴⁶ While the Ninth Circuit ultimately dismissed the injunction as

¹³⁶ *Id.* at 226–27.

¹³⁷ See *Quine v. Beard*, No. 14-CV-02726, 2017 WL 1540758, at *1 (N.D. Cal. Apr. 28, 2017).

¹³⁸ *Gibson*, 920 F.3d at 228.

¹³⁹ *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015).

¹⁴⁰ *Id.* at 1173–74; see also *Kosilek IV*, 744 F.3d 63.

¹⁴¹ Gender dysphoria was generally known as “gender identity disorder” at the time Norsworthy was diagnosed in January 2000. *Norsworthy*, 87 F. Supp. 3d at 1170.

¹⁴² *Id.* at 1174–76.

¹⁴³ *Id.* at 1170–71, 1186.

¹⁴⁴ *Id.* at 1187; see discussion *supra* Part II.

¹⁴⁵ *Norsworthy*, 87 F. Supp. 3d at 1188 (“The Court gives very little weight to the opinions of Levine, whose report misrepresents the Standards of Care; overwhelmingly relies on generalizations about gender dysphoric prisoners, rather than an individualized assessment of Norsworthy; contains illogical inferences; and admittedly includes references to a fabricated anecdote.”).

¹⁴⁶ *Id.* at 1189.

moot,¹⁴⁷ the district court's opinion has been echoed in subsequent cases within the Circuit.

While the *Norsworthy* litigation was progressing, Shiloh Quine, a transgender individual also housed by CDCR, brought an action seeking both "access to adequate medical care, including [SRS]," and "structural changes [to] CDCR's treatment of transgender [individuals]."¹⁴⁸ The parties eventually reached a settlement agreement, the terms of which were shared with the court during a settlement conference.¹⁴⁹ CDCR agreed to (and did) provide Quine with SRS.¹⁵⁰ CDCR further agreed to revise its policies concerning medically necessary treatment, including surgery for transgender individuals, as well as its policies concerning the gender-specific items that transgender individuals would be allowed to possess.¹⁵¹

In complying with the settlement agreement, CDCR revised its regulations to permit identified persons to possess clothing corresponding to their gender identities instead of clothing corresponding with their sex assigned at birth.¹⁵² CDCR also established the "Transgender Inmates Authorized Personal Property Schedule," which expanded the personal property, including hygiene items, that transgender individuals could possess.¹⁵³ Finally, pursuant to the settlement agreement, only CDCR medical or mental health staff were permitted to identify individuals as transgender or as suffering from gender dysphoria.¹⁵⁴

The most recent case from the Ninth Circuit involving a transgender incarcerated person's right to SRS commenced in the District of Idaho in December 2018.¹⁵⁵ Adree Edmo entered the custody of the Idaho Department of Corrections (IDOC) in 2012, where, shortly thereafter, an IDOC psychiatrist diag-

¹⁴⁷ See *Norsworthy v. Beard*, 802 F.3d 1090, 1091–93 (9th Cir. 2015) (dismissing CDCR's appeal because the action had been rendered moot by the fact that *Norsworthy* was released from prison one day prior to oral argument). This is not the only case where a transgender individual has suddenly been paroled after a correctional department was ordered to provide treatment for gender dysphoria. See Beth Schwartzapfel, *Were These Transgender Prisoners Paroled—Or Just Kicked Out?*, THE MARSHALL PROJECT (Oct. 8, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/10/08/were-these-transgender-prisoners-paroled-or-just-kicked-out> [perma.cc/H5DT-WKBN].

¹⁴⁸ *Quine v. Beard*, No. 14-CV-02726, 2017 WL 1540758, at *1 (N.D. Cal. Apr. 28, 2017).

¹⁴⁹ *Id.* While the details of the settlement agreement are provided in a different case, where CDCR's compliance with the agreement was challenged (litigation that proceeded to the Ninth Circuit), for the sake of remaining within the scope of this Note, I will only discuss the relevant portions of the settlement agreement, and not the subsequent litigation.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Quine v. Kernan*, 741 F. App'x 358, 360 (9th Cir. 2018); see also CAL. CODE REGS. tit. 15 § 3030(c) (West, Westlaw through 8/21/20 Register 2020, No. 34).

¹⁵³ *Quine*, 741 F. App'x at 360; see also CAL. CODE REGS. tit. 15 § 3190(d) (West, Westlaw through 8/21/20 Register 2020, No. 34).

¹⁵⁴ *Quine*, 741 F. App'x at 362.

¹⁵⁵ *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103 (D. Idaho 2018) ("*Edmo I*").

nosed her with gender dysphoria.¹⁵⁶ Despite achieving the maximum physical changes associated with the hormone therapy that IDOC provided, Edmo continued to experience “extreme gender dysphoria,” resulting in habitual cutting to relieve emotional pain and two attempts at self-castration.¹⁵⁷ IDOC refused to provide Edmo with SRS, contending that SRS was not medically necessary to adequately treat Edmo’s gender dysphoria.¹⁵⁸

After first pausing to place its decision in the context of confronting “the full breadth and meaning” of the “Rule of Law,”¹⁵⁹ the court outlined the WPATH Standards of Care and eligibility criteria for SRS.¹⁶⁰ Citing the Standards of Care as the only “evidence-based standards . . . accepted by . . . nationally or internationally recognized medical professional groups,”¹⁶¹ the court found that Edmo satisfied the necessary eligibility criteria to receive SRS and thus satisfied the “serious medical need” prong of her claim.¹⁶²

The district court gave “virtually no weight” to the opinions of IDOC’s experts (one of whom was the same expert chided by the *Norsworthy* court)¹⁶³ and refuted the experts’ claim that Edmo would be unable to satisfy WPATH’s criteria because she “[had] not presented as female outside of the prison setting.”¹⁶⁴ Rather, the court found that the Standards of Care explicitly apply “in their entirety,” irrespective of the patient being housed in “institutional environments such as prisons,” and that denial of SRS because of residence in a prison is not a reasonable accommodation.¹⁶⁵

Proceeding to the subjective prong of Edmo’s claim, the court held that IDOC had misapplied the “recognized standards of care” for treating transgender patients and had trained its staff “with materials that discourage referrals for [SRS] and represent the opinions of a single person who rejects the WPATH Standards of Care.”¹⁶⁶ The court further found that IDOC had ignored Edmo’s medical needs by failing to provide her with SRS “despite her actual harm and ongoing risk of future harm, including self-castration attempts, cutting, and suicidal ideation.”¹⁶⁷ The court found that IDOC and its medical provider, Corizon, Inc., had implemented a virtual blanket policy of denying SRS

¹⁵⁶ *Id.* at 1109. Edmo’s diagnosis was thereafter confirmed by an IDOC psychologist. *Id.*

¹⁵⁷ *Id.* at 1109–10.

¹⁵⁸ *Id.* at 1118–19.

¹⁵⁹ *Id.* at 1109.

¹⁶⁰ *Id.* at 1111–13.

¹⁶¹ *Id.* at 1125.

¹⁶² *Id.* at 1124–27.

¹⁶³ *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188 (N.D. Cal. 2015); *see also supra* note 145.

¹⁶⁴ *Edmo I*, 358 F. Supp. 3d at 1125–26.

¹⁶⁵ *Id.* at 1125; *see also* WPATH, *supra* note 8, at 67–68.

¹⁶⁶ *Edmo I*, 358 F. Supp. 3d at 1126.

¹⁶⁷ *Id.* at 1126–27.

to transgender persons for “reasons unrelated to her medical need.”¹⁶⁸ As such, the district court determined that Edmo was likely to prove that IDOC had treated her with deliberate indifference.¹⁶⁹ The court ordered IDOC to provide Edmo with adequate medical care, including providing her with SRS within six months of the decision.¹⁷⁰

In August 2019, the Ninth Circuit became the first circuit court to rule in favor of an incarcerated person requesting SRS.¹⁷¹ Noting the judiciary’s responsibility to remedy violations of the Eighth Amendment, the court reviewed Adree Edmo’s situation giving deference to the district court’s factual findings.¹⁷² The court noted that IDOC did not dispute that SRS may be medically necessary in certain situations, and that the parties’ dispute was based on whether SRS was medically necessary *for Edmo*.¹⁷³ The Ninth Circuit held that the district court’s factual findings were “amply supported” by the evidence and testimony produced during “four months of intensive discovery and a three-day evidentiary hearing.”¹⁷⁴ Framing the appeal as a disagreement over the implications of the district court’s factual findings, the court proceeded to analyze Edmo’s deliberate medical indifference claim using the *Farmer* framework.¹⁷⁵

IDOC did not dispute that Edmo’s gender dysphoria triggered its Eighth Amendment obligations.¹⁷⁶ Additionally, multiple courts had previously held that gender dysphoria constitutes a “serious medical need” under the Eighth Amendment.¹⁷⁷ These courts included the Ninth Circuit (previously),¹⁷⁸ the First Circuit,¹⁷⁹ the Eighth Circuit,¹⁸⁰ and the Seventh Circuit.¹⁸¹ Edmo still had the burden of showing that the treatment plan that IDOC used in her case was “medically unacceptable under the circumstances.”¹⁸² Consequently, “[t]he

¹⁶⁸ *Id.* at 1127 (citing *Norsworthy*, 87 F. Supp. 3d at 1192). The *Norsworthy* court had also found that CDCR effectuated a blanket policy barring transgender individuals from receiving SRS because CDCR’s guidelines for treatment of transgender individuals “did not [include] SRS as a treatment option,” and because CDCR provided a training to its staff, “indicat[ing] that SRS should never be provided to incarcerated [individuals].” See *Norsworthy*, 87 F. Supp. 3d at 1191.

¹⁶⁹ *Edmo I*, 358 F. Supp. 3d at 1127.

¹⁷⁰ *Id.* at 1129.

¹⁷¹ *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (“*Edmo II*”).

¹⁷² *Id.* at 766–67.

¹⁷³ *Id.* at 767.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 767–68.

¹⁷⁶ *Id.* at 785.

¹⁷⁷ *Id.*

¹⁷⁸ *Rosati v. Igbino*, 791 F.3d 1037, 1039–40 (9th Cir. 2015).

¹⁷⁹ *Kosilek IV*, 774 F.3d 63, 86 (1st Cir. 2014).

¹⁸⁰ *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988).

¹⁸¹ *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

¹⁸² *Edmo II*, 935 F.3d at 786.

crux” of IDOC’s appeal was that it had provided Edmo with adequate and medically acceptable care.¹⁸³

Quoting the Fifth Circuit’s *Gibson* opinion to acknowledge that a difference of opinion between an incarcerated individual and a physician is insufficient to prove deliberate medical indifference,¹⁸⁴ the Ninth Circuit explained that this is only the case where both “opinions are medically acceptable under the circumstances.”¹⁸⁵ Considering the circumstances of Edmo’s case, the court held that Edmo had established that the treatment plan that IDOC’s medical staff provided was not medically acceptable.¹⁸⁶ This conclusion was based on the district court’s findings, which the Ninth Circuit held were not made in clear error.¹⁸⁷ Rather, the district court had permissibly credited the testimony of Edmo’s medical experts, who “logically and persuasively” applied the WPATH Standards of Care.¹⁸⁸ The district court had also permissibly *discredited* the testimony of IDOC’s medical experts, who “lacked expertise” and misapplied (or did not attempt to apply) the WPATH Standards of Care.¹⁸⁹

Turning to deliberate indifference, the Ninth Circuit disagreed with IDOC’s contention that its staff had not acted with “conscious disregard of an excessive risk” to Edmo’s health.¹⁹⁰ Dr. Scott Eliason, the Corizon psychiatrist responsible for Edmo’s treatment, had continued with Edmo’s ineffective treatment plan after Edmo’s first self-castration attempt, despite acknowledging that the incident indicated that her gender dysphoria “had risen to another level.”¹⁹¹ Dr. Eliason had again refused to reevaluate Edmo’s treatment plan after her second self-castration attempt.¹⁹²

IDOC raised two arguments against a finding of deliberate medical indifference. First, no defendant, including Dr. Eliason, intended to inflict pain upon Edmo; and second, because IDOC had provided Edmo with some care, no defendant could have acted with deliberate indifference.¹⁹³ The court rejected both of these arguments.¹⁹⁴ Under Ninth Circuit precedent, prevailing on an Eighth Amendment claim does not require a showing of malice or intent to harm the

¹⁸³ *Id.*

¹⁸⁴ *Id.*; see also *Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019).

¹⁸⁵ *Edmo II*, 935 F.3d at 786.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 787–92.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 792–93.

¹⁹¹ *Id.* at 793.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

plaintiff;¹⁹⁵ and “even extensive treatment over a period of years” does not immunize prison administrators from Eighth Amendment claims.¹⁹⁶

The Ninth Circuit, unlike the Fifth Circuit, limited its decision to the facts of Edmo’s case.¹⁹⁷ The court refused to speculate as to whether a future plaintiff might be able to meet the threshold necessary to prove an Eighth Amendment violation.¹⁹⁸ The forty-six-page *Edmo II* opinion concludes by remarking that the Ninth Circuit is not the first court, “nor will [it] be the last,” to weigh in on “an area of increased social awareness: transgender health care.”¹⁹⁹ The court noted that Eighth Amendment inquiries take into account developing understanding of issues in light of the medical community’s ongoing information, research, and experience.²⁰⁰ The Ninth Circuit held that prison officials violate the Eighth Amendment’s prohibition on cruel and unusual punishment where they deny a person SRS with full awareness of the medical necessity of SRS as treatment for gender dysphoria.²⁰¹

IV. *GIBSON V. COLLIER*: A (CRUEL AND) UNUSUAL DECISION

Despite reaching opposite results for the respective plaintiffs, the First and Ninth Circuits came to the same conclusion regarding whether a prison may be required to provide SRS for a transgender individual: the decision must be made on a case-by-case basis after an individualized inquiry has been completed.²⁰² In contrast, the Fifth Circuit held that a prison policy banning SRS for incarcerated persons altogether does not violate the Eighth Amendment.²⁰³ This decision largely flies in the face of established case law related to deliberate medical indifference,²⁰⁴ raising questions concerning how these claims might be decided in the Fifth Circuit moving forward.

In hopes of providing some context for the *Gibson* court’s deviation from established precedent, it is worth briefly speculating about the underlying issues that might have factored into the Fifth Circuit’s conclusion. One could obviously posit, as Gibson’s attorney did, that this conclusion was an example of

¹⁹⁵ *Id.*; see also *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013).

¹⁹⁶ *Edmo II*, 935 F.3d at 793.

¹⁹⁷ *Id.* at 767.

¹⁹⁸ *Id.* at 803.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Kosilek IV*, 774 F.3d 63, 90–91 (noting that a blanket ban on SRS would “conflict with the requirement that medical care be individualized based on a particular prisoner’s serious medical needs” (citation omitted)); *Edmo II*, 935 F.3d at 796 (emphasizing “Eighth Amendment precedent requiring a case-by-case determination of the medical necessity of a particular treatment”).

²⁰³ *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019) (“A state does not inflict cruel and unusual punishment by declining to provide [SRS] to a transgender inmate.”).

²⁰⁴ See discussion *infra* Section IV.A.

“the very worst sort of result-driven judicial activism.”²⁰⁵ After all, Judge Ho was appointed by President Donald Trump, whose administration rolled back policies favoring transgender individuals implemented by his predecessor.²⁰⁶ Judge Ho insisted on misgendering Gibson throughout the opinion.²⁰⁷ And his conclusion was based, arguably, on an exaggeration of the medical debate surrounding SRS at a time of backlash against the transgender rights movement.²⁰⁸ However, beyond mere bias, a number of factors may influence any health care claim made by an incarcerated individual.

Estimates show that 11 percent of annual prison spending nationally goes toward healthcare, with some states spending over 20 percent of annual budgets on healthcare for incarcerated persons.²⁰⁹ This spending comes out to over twelve billion dollars of public funding per year.²¹⁰ So, a court might be wary of approving extra spending for healthcare which might not be medically necessary for an incarcerated person. And, as exposed by Kosilek’s case, this inclination likely increases when controversial figures or procedures are involved.²¹¹ Another explanation for the court’s decision might be the tendency to

²⁰⁵ David Artavia, *Supreme Court Rejects Inmate’s Case for Gender Confirmation Surgery*, ADVOCATE (Dec. 10, 2019, 4:10 PM), <https://www.advocate.com/transgender/2019/12/10/supreme-court-rejects-inmates-case-gender-confirmation-surgery> [perma.cc/3VDN-XFKJ].

²⁰⁶ *Id.*; see Lola Fadulu, *Trump’s Rollback of Transgender Rights Extends Through Entire Government*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2019/12/06/us/politics/trump-transgender-rights.html> [perma.cc/E2UJ-KD47] (summarizing the steps President Trump has taken to roll back policies favoring transgender individuals).

²⁰⁷ Harvard Law Review, *Recent Case: Gibson v. Collier*, HARV. L. REV.: BLOG (Apr. 12, 2019), https://blog.harvardlawreview.org/recent-case-_gibson-v-collier [perma.cc/3VMF-F3PW].

²⁰⁸ *Id.*; see also Katelyn Burns, *The Internet Made Trans People Visible. It Also Left Them More Vulnerable.*, VOX (Dec. 27, 2019, 8:00 AM), <https://www.vox.com/identities/2019/12/27/21028342/trans-visibility-backlash-internet-2010> [perma.cc/HK3P-T55L] (chronicling the transgender rights movement and the backlash against it).

²⁰⁹ CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015, at 9 (2017), <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf> [perma.cc/GC6Q-DNSW].

²¹⁰ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [perma.cc/V4NG-8CXC].

²¹¹ See *supra* note 93. Policy related to transgender persons behind bars does not appear to have become any less polarizing or political in the years since the Boston Globe’s editorials. See e.g., Justine Coleman, *Conservatives Slam Warren’s Call to Put Transgender Women in Women’s Prisons*, HILL (Jan. 13, 2020, 5:12 PM), <https://thehill.com/homenews/campaign/478054-conservatives-slam-warrens-call-to-put-trans-women-in-female-prisons> [perma.cc/6VGB-5M7R] (summarizing the conservative response to Sen. Elizabeth Warren calling for male-to-female transgender individuals to be housed in women’s prisons); Ryan Saavedra, *Warren: Inmates Are ‘Entitled’ To Taxpayer-Funded Transgender Surgery*, DAILY WIRE (Oct. 11, 2019), <https://www.dailywire.com/news/warren-inmates-are-entitled-to-taxpayer-fu>

be suspicious, generally, that individuals might fake a disability to abuse disability laws and obtain a selfish advantage.²¹² This might be particularly concerning where there is the possibility of a predator faking gender dysphoria to gain access to more victims.²¹³

Additionally, the *Gibson* decision, as it relates to legal precedent, was perhaps less unusual when considering only Fifth Circuit case law and disregarding its sister circuits. While the Fifth Circuit has indeed generally used *Farmer*'s two-prong deliberate medical indifference test in the past,²¹⁴ the court had never previously addressed a blanket ban on a medical treatment for incarcerated persons. And while the court had never treated the phrase "cruel and unusual punishment" as a conjunctive test, Justice Scalia's plurality opinion in *Harmelin v. Michigan* could provide Supreme Court precedent for this position.²¹⁵ So, *Gibson*, while unusual, might not have been such a radical break from precedent.

Regardless of whether there were underlying reasons for coming to its decision or not, and whatever those reasons might have been, the *Gibson* decision raises questions for Eighth Amendment jurisprudence in the Fifth Circuit moving forward. Do other procedures exist that might be subject to a blanket ban for incarcerated persons in the future? Has the Fifth Circuit chosen to abandon the *Farmer* framework for analyzing deliberate medical indifference altogether? Must a plaintiff now prove that her lack of treatment was both cruel *and* unusual? An affirmative answer to any of these questions is likely untenable under the weight of history and legal precedent.

ned-transgender-surgery [perma.cc/F86K-BGYQ] (characterizing an event where presidential candidate Elizabeth Warren expressed support for SRS for incarcerated individuals with gender dysphoria who need it as "far-left" and calling Warren a "sexist").

²¹² Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1066 (2019) ("public suspicion of abuse of disability laws and rights is indeed identifiable in public opinion").

²¹³ See, e.g., Kearns, *supra* note 51.

²¹⁴ See, e.g., *Gobert v. Caldwell*, 463 F.3d 339, 345–46 (5th Cir. 2006) ("Finding a violation of the Eighth Amendment's prohibition against cruel and unusual punishment also requires a twofold analysis. [The plaintiff] must first prove objective exposure to a substantial risk of serious harm. Additionally, he must show that prison officials acted or failed to act with deliberate indifference to that risk."); *Lawson v. Dallas Cnty.*, 286 F.3d 257, 262 (5th Cir. 2002) ("The plaintiff must prove objectively that he was exposed to a substantial risk of serious harm. . . . Additionally, the plaintiff must show that jail officials acted or failed to act with deliberate indifference to that risk. . . . The deliberate indifference standard is a subjective inquiry; the plaintiff must establish that the jail officials were actually aware of the risk, yet consciously disregarded it." (internal citations omitted)).

²¹⁵ *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (plurality opinion) ("According to its terms, then, by forbidding 'cruel and unusual punishments,' . . . the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." (internal citations and emphasis omitted)).

A. *A Blanket Ban in Lieu of an Individualized Inquiry*

Circuit courts of appeals have widely held that a prison violates the Eighth Amendment if it fails to conduct an individualized assessment of a person's medical condition prior to prescribing a treatment plan. Courts are particularly wary where a prison has imposed a blanket ban on medical procedures. The Third, Seventh, and Ninth Circuits have addressed blanket bans on elective abortions,²¹⁶ treatment for hepatitis C,²¹⁷ and surgeries for cataracts.²¹⁸ In each case, the court held the blanket ban to violate the Eighth Amendment.

In *Monmouth County Correctional Institutional Inmates v. Lanzaro*, the Third Circuit heard a challenge to a jail policy requiring pregnant women to obtain court-ordered releases and their own financing to have an abortion absent a medical emergency.²¹⁹ Two individuals in the county's custody sued for injunctive relief after having been denied access to and funding for abortions.²²⁰ After losing in the district court, the county argued on appeal that it bore no financial responsibility for provision of non-medically necessary treatments, likening elective abortions to facelifts.²²¹ The Third Circuit disagreed, instead holding pregnancy to be a serious medical need.²²² The court held that the jail's blanket ban on elective abortions "deni[ed] to a class of inmates the type of *individualized* treatment normally associated with . . . adequate medical care" in violation of the Eighth Amendment.²²³

The Seventh Circuit reviewed a similar blanket ban in *Roe v. Elyea*.²²⁴ The Illinois Department of Corrections had implemented a policy where it would not begin treating an incarcerated person for hepatitis C if the person had less than eighteen months left to serve.²²⁵ Prison officials said the policy was necessary to give the prison's health care vendor time for six months of pre-treatment, followed by a year-long treatment plan.²²⁶ The court held that categorically denying treatment for hepatitis C based on the expected length of an person's incarceration instead of considering each individual person's condition was "precisely the kind of conduct that constitutes a 'substantial departure from accepted professional judgment'" and thus deliberate medical indifference.²²⁷

²¹⁶ *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

²¹⁷ *Roe v. Elyea*, 631 F.3d 843 (7th Cir. 2011).

²¹⁸ *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014).

²¹⁹ *Lanzaro*, 834 F.2d at 328–29.

²²⁰ *Id.*

²²¹ *Id.* at 344–45.

²²² *Id.* at 348.

²²³ *Id.* at 347 (emphasis added).

²²⁴ *Roe v. Elyea*, 631 F.3d 843, 850 (7th Cir. 2011).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 862–63 (citation omitted).

Most recently, the Ninth Circuit heard a challenge to the Nevada Department of Corrections' "one eye policy" in *Colwell v. Bannister*.²²⁸ While the policy provided for a case-by-case analysis of whether an individual with cataracts was able to "perform the required tasks of daily living in [prison]," prison medical staff would deny cataract removal surgery where the individual had "one good eye."²²⁹ The sixty-seven-year-old who challenged the policy had been blind in one eye due to cataracts for twelve years by the time the Ninth Circuit heard his appeal.²³⁰ The court held that blindness in one eye, unlike "a bump or scrape or tummy ache," was a serious medical need for the purposes of the *Farmer* deliberate medical indifference analysis.²³¹ It further held that the blanket denial "of a medically indicated surgery solely on the basis of an administrative policy" was "the paradigm" of deliberate medical indifference.²³²

Circuit courts have similarly required case-by-case analyses where transgender persons with gender dysphoria request SRS. Four years prior to *Gibson*, in *Rosati v. Igbinoso*, the Ninth Circuit heard allegations presented by Mia Rosati, an individual incarcerated in California, that prison officials had enacted a blanket policy against SRS.²³³ Prison officials had denied Rosati SRS despite her multiple attempts at self-castration under hormonal treatment.²³⁴ The court held that Rosati's allegations constituted a cognizable Eighth Amendment claim.²³⁵ And in *Fields v. Smith*, the Seventh Circuit struck down, under the Eighth Amendment, a Wisconsin law that prohibited the use of state or federal funding for hormonal therapy or SRS for transgender persons behind bars.²³⁶ Finally, in *De'lonta v. Johnson*, the Fourth Circuit held that a transgender individual serving a seventy-three-year sentence for bank robbery had "sufficiently alleged" the Virginia Department of Corrections' deliberate indifference in denying her SRS.²³⁷

In *Edmo II*, the Ninth Circuit noted that its holding "cleave[d] to settled Eighth Amendment jurisprudence" requiring a fact-specific analysis of individual circumstances.²³⁸ The court cited the *Kosilek IV* decision as sister-circuit precedent for a fact-specific analysis.²³⁹ The First Circuit based its decision on the facts of *Kosilek*'s case, including conflicting expert testimony regarding the

²²⁸ *Colwell v. Bannister*, 763 F.3d 1060, 1063–64 (9th Cir. 2014).

²²⁹ *Id.* at 1064–65.

²³⁰ *Id.* at 1063.

²³¹ *Id.* at 1066.

²³² *Id.* at 1063.

²³³ *Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015).

²³⁴ *Id.* at 1040.

²³⁵ *Id.* at 1039–40.

²³⁶ *Fields v. Smith*, 653 F.3d 550, 552–53, 558–59 (7th Cir. 2011).

²³⁷ *De'lonta v. Johnson*, 708 F.3d 520, 522, 525 (4th Cir. 2013). After the court ordered the Virginia Department of Corrections to evaluate *De'lonta* for SRS, she was paroled within months. See Schwartzapfel, *supra* note 147.

²³⁸ *Edmo II*, 935 F.3d 757, 794.

²³⁹ *Id.*

medical necessity of SRS; a treatment plan for Kosilek, which was successful despite not including SRS; and credible security concerns presented by MDOC.²⁴⁰ The Ninth Circuit determined that the “factual differences” between Kosilek’s case and Edmo’s necessitated the different outcomes.²⁴¹ IDOC had “not so much as allude[d]” to any security concerns, and the district court had found that there was no reasonable disagreement as to the necessity of SRS for Edmo.²⁴² Despite resulting in opposite outcomes for the respective plaintiffs, the Ninth Circuit explained, the two cases nevertheless mirrored one another because each court had based its decision on individualized assessments.²⁴³

Ironically, the Fifth Circuit also cited *Kosilek IV*, but used it as precedent for a circuit court “allow[ing] a blanket ban on [SRS].”²⁴⁴ The Fifth Circuit did this despite the *Kosilek IV* court expressly warning that its decision should not be interpreted as creating a de facto ban on SRS, as “any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner’s serious medical needs.”²⁴⁵ In the face of decades of Eighth Amendment jurisprudence requiring individualized analyses for medical claims made by incarcerated persons—including for SRS—the Fifth Circuit held exactly the opposite.

B. “Universal Acceptance by the Medical Community”

The *Gibson* court decided not to diverge from other courts in holding that gender dysphoria constitutes a serious medical need—perhaps because the TDCJ did not dispute that fact.²⁴⁶ As to whether TDCJ officials acted with deliberate indifference, however, the court found no genuine dispute of material fact.²⁴⁷ The court made this determination because Gibson had failed to prove “universal acceptance by the medical community” that SRS can be required to treat gender dysphoria.²⁴⁸ A citation to any case law referencing this “universal acceptance” standard is conspicuously missing from the opinion. Rather, the court appears to have taken this standard from Gibson’s own brief.²⁴⁹ The dissent hypothesized that Gibson’s brief simply quoted the universal acceptance standard as used by the district court.²⁵⁰ Nevertheless, the Fifth Circuit used this

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019) (emphasis added).

²⁴⁵ *Kosilek IV*, 774 F.3d 63, 90–91.

²⁴⁶ *Gibson*, 920 F.3d at 219.

²⁴⁷ *Id.* at 220.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 235 (Barksdale, J., dissenting). The dissent also notes that the district court provided no case law to support this standard, and that Judge Barksdale was unable to locate any case law to support it. *Id.*

universal acceptance standard instead of the “knowledge and disregard of substantial risk” standard outlined by the Supreme Court in *Farmer*.²⁵¹ Instead of reviewing whether the TDCJ knew of the risks associated with Gibson’s gender dysphoria and disregarded those risks by denying her SRS, the *Gibson* court simply held that Gibson’s claim was “doom[ed]” by her failure to prove universal medical consensus regarding SRS.²⁵²

Even applying the universal medical acceptance standard, the Fifth Circuit overstated the degree to which the medical community disagrees regarding the use of SRS to treat gender dysphoria in some cases. As evidence of the medical community’s ongoing debate, the *Gibson* court relied on the expert testimony presented in *Kosilek IV* four years prior, noting simply that it “might have been better practice” if TDCJ had provided its own evidence.²⁵³ The *Gibson* court conceded that a single dissenting expert would not be enough to defeat universal medical consensus; rather, proof of a “robust and substantial good faith disagreement dividing respected members of the expert medical community” would be needed.²⁵⁴ While that may describe the disagreement over the need for SRS in *Kosilek*’s case (four years prior), it does not appear to represent the discourse regarding SRS in the medical community as a whole.

As evidence of precisely how much the conversation regarding SRS has changed over that time, the Ninth Circuit rejected the claim of ongoing medical debate, citing to a laundry list of organizations and academics that have formed a consensus as to the medical necessity of SRS in certain circumstances.²⁵⁵ The list included organizations that have endorsed the WPATH Standards of Care, including the American Medical Association (“AMA”) and the American Psychiatric Association.²⁵⁶ The AMA specifically supports the right of transgender persons behind bars to have access to SRS and filed an amicus brief, joined by other medical associations, in support of *Edmo*.²⁵⁷ Additionally, federal district courts have applied the WPATH Standards of Care to cases in a variety of contexts, including the denial of a passport,²⁵⁸ the denial of medical treatments under insurance,²⁵⁹ and a “bathroom ban.”²⁶⁰

²⁵¹ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

²⁵² *Gibson*, 920 F.3d at 221.

²⁵³ *Id.* at 224.

²⁵⁴ *Id.* at 220.

²⁵⁵ *Edmo II*, 935 F.3d 757, 795.

²⁵⁶ *Id.*

²⁵⁷ Staff News Writer, *Transgender Prisoners Have Fundamental Right to Appropriate Care*, AMA (May 17, 2019), <https://www.ama-assn.org/delivering-care/population-care/transgender-prisoners-have-fundamental-right-appropriate-care> [perma.cc/H684-HPJF].

²⁵⁸ *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1258 (D. Colo. 2018) (“The Department defers to the medical ‘standards and recommendations for the [WPATH], recognized as the authority in this field by the American Medical Association’ . . .”).

²⁵⁹ *Boyden v. Conlin*, 341 F. Supp. 3d 979, 987 (W.D. Wis. 2018) (“Plaintiffs also point to the WPATH Standards of Care (“SOC”) for treatment of gender dysphoria, which are widely

When the Fifth Circuit may require a plaintiff to meet *Gibson*'s "universal acceptance" standard is unclear. In the deliberate medical indifference cases since *Gibson*, the court has not cited this standard but has rather continued to use the *Farmer* framework to analyze the individuals' claims.²⁶¹ Perhaps, *Gibson*'s universal acceptance standard is only required where the treatment the plaintiff seeks is new or emerging.²⁶² While such a precedent may delay better treatments for incarcerated individuals within the Circuit for longer, the decision can be justified by a desire to not expose the individuals to unproven treatments. Or, the court might only use differing standards when the plaintiff

recognized guidelines for the management of transgender individuals with gender dysphoria . . .").

²⁶⁰ *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 367 (E.D. Pa. 2017) ("The WPATH Standards of Care are widely used and accepted in the field by clinicians dealing with youth with gender identity issues."). Legislators in numerous jurisdictions have attempted to pass some form of a bathroom bill—legislation aimed at restricting access to bathrooms or locker rooms based on sex assigned at birth. See Joellen Kralik, "Bathroom Bill" Legislative Tracking, NCSL (Oct. 24, 2019), <https://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/RSY5-EVL8>]. North Carolina remains the only state to have successfully passed a bathroom bill (now repealed). *Id.*

²⁶¹ *Petzold v. Rostollan*, 946 F.3d 242, 249 (5th Cir. 2019) ("The prisoner 'must first prove objective exposure to a substantial risk of serious harm'—in other words, the prisoner must prove a serious medical need. Second, the prisoner must prove the officials' subjective knowledge of this substantial risk. Third, the prisoner must prove that the officials, despite their actual knowledge of the substantial risk, denied or delayed the prisoner's medical treatment." (footnotes omitted)); *Taylor v. Stevens*, 946 F.3d 211, 217 (5th Cir. 2019) ("First, [the plaintiff] must show that the relevant official denied him 'the minimal civilized measure of life's necessities' and exposed him 'to a substantial risk of serious harm.' . . . Second, the prisoner must show 'that the official possessed a subjectively culpable state of mind in that he exhibited deliberate indifference' to the risk of harm." (internal citations omitted)); *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) ("To establish a constitutional violation, a plaintiff must show that the defendant: (1) was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists'; (2) subjectively 'dr[e]w the inference' that the risk existed; and (3) disregarded the risk." (citation omitted)); *Baughman v. Hickman*, 935 F.3d 302, 309 (5th Cir. 2019) ("[The plaintiff] can show deliberate indifference by demonstrating that an official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" (citation omitted)); *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019) ("To prevail on an Eighth Amendment claim, an inmate must establish two elements. First, he must demonstrate that the alleged deprivation was objectively serious, exposing him 'to a substantial risk of serious harm' and resulting 'in the denial of the minimal civilized measure of life's necessities.' Second, an inmate must prove that the official possessed 'a subjectively culpable state of mind' in that he exhibited 'deliberate indifference to serious medical needs.'" (footnotes omitted)).

²⁶² This still would not explain the *Gibson* court's use of the standard. SRS can hardly be labelled new or emerging, considering its existence in America dating back to 1952. See Farah Naz Khan, *A History of Transgender Health Care*, SCI. AM.: GUEST BLOG (Nov. 16, 2016), <https://blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/> [<https://perma.cc/4ZCZ-3XGZ>] ("The first American to undergo a sex change operation was Christine Jorgensen, who brought significant attention to the transgender revolution in America when her story hit *New York Times* headlines in 1952.").

provides it with one, as Gibson did in acknowledging the need for “universal acceptance by the medical community” in her brief. It is doubtful that litigants provide courts with new legal standards very often. Although that very fact, if true, might be a way for both litigants and the court to distinguish *Gibson* away in the future.

C. Cruel and Unusual Punishment

“Lest we lose the forest for the trees,” the *Gibson* court declared, “a prison violates the Eighth Amendment only if it inflicts punishment that is *both* ‘cruel and unusual.’”²⁶³ Thus, the court continued, a prison policy that is “widely practiced . . . across the country” cannot, “under the plain meaning of the word,” be “unusual.”²⁶⁴ Because only one state had ever provided SRS for an incarcerated person, Gibson could not state a claim for cruel and unusual punishment.²⁶⁵ As precedent for this holding, the Fifth Circuit cited to a book on the interpretation of legal texts by Justice Antonin Scalia,²⁶⁶ a Yale Law Journal article, Justice Scalia’s plurality opinions in *Harmelin v. Michigan* and *Stanford v. Kentucky*, and Justice Stephen Breyer’s dissent in *Glossip v. Gross*.²⁶⁷ The court largely ignored, however, decades of case law where “cruel and unusual” is used as a term-of-art, rather than a conjunctive test, and decades more of case law analyzing deliberate medical indifference claims under the *Farmer* framework.²⁶⁸

As noted above, this idea has been the subject of much discussion.²⁶⁹ The *Trop* court questioned whether “the word ‘unusual’ ha[d] any qualitative meaning different from ‘cruel’” when the two words are used together as a phrase.²⁷⁰ Scholars are split on that issue. Some argue that the phrase should be interpreted as a two-part conjunctive test,²⁷¹ while others suggest the phrase is simply an example of hendiadys.²⁷² The degree of the framers’ intent has even been called into question, with one scholar suggesting that the phrase might have been little more than “constitutional ‘boilerplate.’”²⁷³ Justice Scalia was obvi-

²⁶³ *Gibson v. Collier*, 920 F.3d 212, 226 (5th Cir. 2019) (quoting U.S. CONST. amend. VIII).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 227–28.

²⁶⁶ *Id.* at 226. Justice Scalia was not discussing the merits of this argument, rather providing an example of the way one ought to interpret a conjunctive list. See ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* 116 (2012).

²⁶⁷ *Gibson*, 920 F.3d at 226–27.

²⁶⁸ See *supra* Part II.

²⁶⁹ See *supra* note 53 and accompanying text.

²⁷⁰ *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958).

²⁷¹ See Ryan, *supra* note 53, at 573–80.

²⁷² Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687, 706–20 (2016). “Hendiadys” refers to a phrase in which “two terms separated by a conjunction work together as a single complex expression.” *Id.* at 688.

²⁷³ Granucci, *supra* note 53, at 839–40.

ously a proponent of the “plain meaning” analysis that the *Gibson* court adopted.²⁷⁴ And Justice Breyer adopted a similar line of reasoning in his recent dissent to *Glossip v. Gross*.²⁷⁵

Regardless of this debate, the Supreme Court’s Eighth Amendment jurisprudence has had little to do with the Constitution’s text and more to do with its interpretation of the clause’s intent.²⁷⁶ Or, as the Ninth Circuit aptly noted in *Edmo II*, this originalist argument does not control the plaintiffs’ claims—*Estelle v. Gamble* does.²⁷⁷ The *Gibson* court concluding that Gibson’s claim failed “as a matter of established precedent” and then proceeding with its plain meaning analysis after the fact is telling.²⁷⁸ Indeed “as a matter of established precedent,” and as discussed above, *Estelle*, and then *Farmer*, established the framework for analyzing deliberate medical indifference.²⁷⁹ Circuit courts have applied *Farmer*’s “knowledge and disregard of substantial risk” test in reviewing a variety of medical indifference claims brought by incarcerated persons.²⁸⁰ If the plain meaning analysis the *Gibson* court used had been supported by case law and history, deliberate medical indifference jurisprudence would likely not have evolved in the way that it has. Unfortunately for Gibson, the Fifth Circuit circumvented *Estelle* and *Farmer* in using its “universal medical acceptance” test and its plain meaning analysis. Had the court been willing to apply Supreme Court precedent, as it has in other deliberate indifference cases,²⁸¹ perhaps Gibson would have been granted relief.

The need to analyze whether a “punishment” is both cruel *and* unusual rarely arrives. This is the first case in which the Fifth Circuit decided to establish that analysis, and how often the question will resurface is unclear. For claims of deliberate medical indifference, there will likely be some sort of trend for prisons to either provide or to deny a specific medical treatment. *Gibson*

²⁷⁴ See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (plurality opinion) (“by forbidding ‘cruel and unusual punishments,’ the Clause disables the Legislature from authorizing . . . cruel methods of punishment that are not regularly or customarily employed.” (internal citations omitted)); *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005). Justice Scalia authored both opinions.

²⁷⁵ *Glossip v. Gross*, 576 U.S. 863, 938–39 (2015) (Breyer, J., dissenting) (“The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.”).

²⁷⁶ *Bray*, *supra* note 272, at 708 (“It is true that the U.S. Supreme Court has not structured its recent decisions on the Clause in terms of two requirements. But those decisions have only a tenuous connection to the constitutional text; they rest primarily on other modalities of constitutional interpretation.” (footnotes omitted)); see also David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 864 (2009) (“Probably the most overt adoption of the modernization approach has occurred in cases interpreting the Cruel and Unusual Punishment Clause of the Eighth Amendment.”).

²⁷⁷ *Edmo II*, 935 F.3d 757, 797 n.21.

²⁷⁸ *Gibson v. Collier*, 920 F.3d 212, 226 (5th Cir. 2019).

²⁷⁹ See discussion *supra* Part II.

²⁸⁰ See discussion *supra* Section IV.A.

²⁸¹ See *supra* note 214.

certainly calls into question new medical procedures. As discussed above, a new or emerging medical procedure will be *per se* unusual until a certain percentage of prisons provide it for incarcerated persons.²⁸² In these cases, perhaps the Fifth Circuit is not concerned with depriving, however briefly, the incarcerated persons housed in its jurisdiction with the latest medical treatments. More likely, perhaps, the court will simply leave out this plain meaning analysis from its deliberate medical indifference cases moving forward, as it has in the past.

CONCLUSION

The Fifth Circuit's *Gibson v. Collier* decision was indeed unusual. And the decision was also cruel, in the fact that it denied a person suffering from gender dysphoria the treatment that may have provided her with relief from her pain. In reaching its decision, the Fifth Circuit largely ignored established precedent relating to deliberate medical indifference. The court eschewed sister circuit decisions directly on point with Gibson's claim in favor of an approach that has already been ignored in subsequent Fifth Circuit cases and that will likely be found to be unworkable moving forward.

The Supreme Court denied Gibson's petition for writ of certiorari.²⁸³ Her opportunity for relief has likely passed. And the *Gibson* decision may foreclose the claims of other individuals seeking relief in a variety of contexts moving forward. The Fifth Circuit has now established precedent for permitting prisons to impose blanket bans on medical procedures, for ignoring the *Farmer* framework for analyzing deliberate medical indifference claims, and for finding punishments to be constitutional no matter how cruel—provided they are not also unusual. To the extent the Fifth Circuit is willing to distinguish away *Gibson*, this unusual decision's harm may be limited to Gibson's own case. For incarcerated persons—particularly those who suffer with gender dysphoria—within its jurisdiction, however, there are now fewer reasons to hope that the Fifth Circuit will serve justice when prisons fail to provide adequate medical treatment.

²⁸² See *supra* note 262 and accompanying text.

²⁸³ *Gibson v. Collier*, 140 S. Ct. 653 (2019) (mem).