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Framing a Narrative of Discrimination Under the Eighth Amendment in the Context of Transgender Prisoner Health Care

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FRAMING A NARRATIVE OF DISCRIMINATION UNDER THE EIGHTH AMENDMENT IN THE CONTEXT OF TRANSGENDER PRISONER HEALTH CARE

Sarah Halbach*

This Comment looks closely at the reasoning behind two recent federal court opinions granting transgender prisoners access to hormone therapy and sex-reassignment surgery. Although both opinions were decided under the Eighth Amendment's ban on cruel and unusual punishment, which does not expressly prohibit discrimination based on gender identity, a careful look at the courts' reasoning suggests that they were influenced by the apparent discrimination against the transgender plaintiffs. This Comment argues that future transgender prisoners may be able to develop an antidiscrimination doctrine within the Eighth Amendment by framing their Eighth Amendment medical claims in terms of discrimination based on their transgender status.

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TABLE OF CONTENTS

INTRODUCTION.....	464
I. THE TRADITIONAL STRATEGY FOR LITIGATING DISCRIMINATION:	
EQUAL PROTECTION.....	469
A. The Equal Protection Framework.....	470
B. Equal Protection Is a Losing Strategy for Transgender Prisoners.....	471
II. THE CURRENT STRATEGY: LITIGATING TRANSGENDER PRISONER	
MEDICAL NEEDS UNDER THE EIGHTH AMENDMENT.....	474
A. The Eighth Amendment Framework.....	474
B. Criticisms of the Eighth Amendment Medical Model.....	479
III. FINDING DISCRIMINATION WITHIN THE EIGHTH AMENDMENT.....	482
A. Hidden Equal Protection Analysis: <i>Fields v. Smith</i>	482
B. The Eighth Amendment and Political Controversy: <i>Kosilek v.</i> <i>Spencer</i>	485
C. <i>Fields</i> and <i>Kosilek II</i> Compared and in the Broader Context....	493
IV. GOING FORWARD: FRAMING A NARRATIVE OF DISCRIMINATION	
UNDER THE EIGHTH AMENDMENT.....	496
CONCLUSION.....	497

INTRODUCTION

“I am Chelsea Manning.”¹ With those words, Army Private Bradley Manning announced to the world that she would be transitioning from male to female. Going forward, Manning indicated that she would like to be known as “Chelsea” and referred to by female pronouns.² Manning’s public statement on August 22, 2013, came one day after she was sentenced to thirty-five years in prison for leaking classified government documents to WikiLeaks.³ Manning has been in the media spotlight since her arrest in May 2010, and her recent transition has called national attention to some of the problems facing transgender prisoners in America.⁴

¹ Lenny Bernstein & Julie Tate, *Manning to Live as Woman in Prison*, WASH. POST, Aug. 23, 2013, at A1 (internal quotation marks omitted).

² *Id.* at A6.

³ Charlie Savage & Emmarie Huetteman, *Manning Sentenced to 35 Years for a Pivotal Leak of U.S. Files*, N.Y. TIMES, Aug. 22, 2013, at A1.

⁴ Transgender prisoner health care has received increased attention in the media. For example, it was featured on an episode of the popular Netflix series *Orange Is the New Black* in July 2013. *Orange Is the New Black: Lesbian Request Denied*, NETFLIX (July 11, 2013),

There is limited data on the number of transgender⁵ people in the nation's various prisons and jails,⁶ but transgender people are incarcerated at a disproportionately high rate.⁷ Transgender individuals face harsh and

<http://www.netflix.com> (Netflix web series). In the show, transgender actress Laverne Cox portrays a male-to-female prisoner housed in a female prison, whose hormone therapy was cut off due to budget cuts. *Id.*

⁵ In this Comment, "sex" refers to "the anatomical and physiological distinctions between men and women." Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 399 n.1 (2012) (internal quotation marks omitted). "[G]ender-nonconforming" refers to the "failure of an individual to behave in conformity with the cultural expectations associated with that individual's sex (or the sex that others assume applies to that individual)." *Id.* (internal quotation marks omitted). The term "transgender" is used to describe the "broad range of people whose gender identity or expression does not conform to the social expectations for their assigned sex at birth." *Id.* (internal quotation marks omitted). "Transgender" is used as an "umbrella term" to describe "many different ways of being." *Id.* (internal quotation marks omitted). "Thus, someone who is gender-nonconforming could be considered transgender, but someone who is transgender may not necessarily be considered gender-nonconforming." *Id.* For a discussion of the use of qualifying footnotes on terminology related to sex and gender—such as this one—in legal scholarship, in "which the author circumscribes the individuals whose protection the article addresses," see Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1062 (2012).

⁶ A 2009 study by researchers at the University of California, Irvine, identified 332 transgender inmates out of about 155,000 inmates housed in California men's prisons, which is roughly 0.2%. LORI SEXTON ET AL., WHERE THE MARGINS MEET: A DEMOGRAPHIC ASSESSMENT OF TRANSGENDER INMATES IN MEN'S PRISONS 8–9 & 34 n.7 (June 10, 2009), available at <http://ucicorrections.seweb.uci.edu/files/2013/06/A-Demographic-Assessment-of-Transgender-Inmates-in-Mens-Prisons.pdf> (citing the California Department of Corrections and Rehabilitation monthly population report from April 30, 2008, which identified 155,416 incarcerated men. DATA ANALYSIS UNIT, DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT APRIL 30, 2008, at 1 (2008), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOPIA/TPOPIAd0804.pdf, archived at <http://perma.cc/M4GP-9GP3>), archived at <http://perma.cc/T94Y-MZTL>). However, the study acknowledges that "there were possibly transgender inmates who were not" included in the study. *Id.* at 9.

⁷ See Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 713–15 (2005). According to the National Transgender Discrimination Survey, a self-reported survey of transgender individuals across the country conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, the incarceration rate for transgender individuals is 16%. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf, archived at <http://perma.cc/M64N-SAEP>. The rate was even higher for transgender respondents of color: 47% for African American respondents and 30% for American Indian respondents. *Id.* Moreover, male-to-female respondents reported a higher incarceration rate (21%) than female-to-male respondents (10%). *Id.* By comparison, the Department of Justice reports that among the general American population in 2001, 4.9% of males and 0.5% of females had been incarcerated at some point in their lives. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS

pervasive discrimination in almost all aspects of social life—education, employment, housing, public accommodations, health care, and law enforcement.⁸ As a result of this harassment, many transgender people live in poverty.⁹ The combination of high poverty rates and employment discrimination has led to a greater proportion of transgender people participating in criminalized economies compared to the general population, and thus, a disproportionate representation of transgender people in the criminal justice system and in prisons.¹⁰

One of the biggest obstacles transgender people face in prison is obtaining access to gender-confirming health care, which may include hormone therapy or sex-reassignment surgery.¹¹ Not all transgender prisoners request or require such medical treatment, but for some prisoners, denial of hormone therapy or sex-reassignment surgery can lead to serious mental health problems, such as depression or anxiety, and even attempts at suicide and self-castration.¹² Writer and activist Janet Mock explains on her website that for some people “[t]hese surgeries and care are vitally necessary (whether you exist in or outside of prison walls), and it is a discussion between a patient and their doctor, not between anyone else.”¹³

SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>, archived at <http://perma.cc/P2U2-4ZQC>. However, the Department of Justice survey includes only prisons, not jails, so the actual incarceration rate of the overall population is somewhat higher. See GRANT ET AL., *supra*, at 163.

⁸ GRANT ET AL., *supra* note 7, at 3–6; Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37–38 (2000); Romeo, *supra* note 7, at 713–14.

⁹ See GRANT ET AL., *supra* note 7, at 2; Romeo, *supra* note 7, at 713–14.

¹⁰ See *supra* note 7.

¹¹ “[G]ender-confirming healthcare is an individualized treatment that differs according to the needs and pre-existing conditions of individual transgender people.” Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497, 497 (2010). Depending on the individual, gender-confirming health care may include hormone therapy treatment or any of a number of surgical procedures. *Id.* at 498. Some transgender people may undergo no medical treatment at all in relation to their expression of gender identity. *Id.* at 497–98.

¹² See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 755 (2008) (“Depression, anxiety, and suicidality are conditions commonly tied to the unmet need for gender-confirming medical care.”); see also *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 197 (D. Mass. 2012) (discussing transgender plaintiff’s attempts at self-castration and suicide while incarcerated); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 244–45 (D. Mass. 2012) (discussing transgender plaintiff’s history of suicidality and one attempt at self-castration while in custody).

¹³ Janet Mock, *Chelsea Manning & the Battle for Trans Inclusive Healthcare Without Bias*, JANET MOCK (Aug. 22, 2013), <http://janetmock.com/2013/08/22/chelsea-manning-transgender-healthcare/>, archived at <http://perma.cc/4DLK-39M8>.

In many states, laws and prison policies pose serious barriers for prisoners seeking hormone therapy or sex-reassignment surgery.¹⁴ First, a prison doctor must diagnose the prisoner with a medical condition under the *Diagnostic and Statistical Manual of Mental Disorders*. In addition to providing a medical diagnosis, the doctor must also deem hormone therapy or sex-reassignment surgery a necessary treatment for that condition and assert that there are no adequate alternatives.¹⁵

Under the Fourth Edition of the *Manual*, this condition was called “gender identity disorder” (GID).¹⁶ In 2013, the editors published the Fifth Edition of the *Manual* in which they relabeled GID as “gender dysphoria” and removed the condition from the chapter on sexual dysfunctions, placing it in its own chapter.¹⁷ Unlike the criteria for GID, which emphasized gender cross-identification, gender dysphoria emphasizes gender incongruence.¹⁸ Gender dysphoria is defined, in part, as a “marked incongruence” between a person’s experienced or expressed gender and that person’s assigned gender at birth.¹⁹ Because most of the cases and literature discussed in this Comment refer to GID, this Comment will use the phrase GID when discussing the medical diagnosis, except where the newer definition is relevant.

As part of Manning’s announcement that she would be transitioning from male to female, Manning publicly stated her intention to seek hormone therapy while imprisoned.²⁰ Her request created a new dilemma for the United States Department of Defense, which is caught between providing her with adequate medical care for a diagnosed disorder and adhering to the military’s longstanding policy banning transgender people from serving in the military.²¹ When Manning filed her request for hormone therapy and

¹⁴ Tracy Clark-Flory, *America’s Prisons Fail Transgender Inmates*, SALON (Aug. 23, 2013, 11:11 AM), http://www.salon.com/2013/08/23/americas_prisons_fail_transgender_inmates/, archived at <http://perma.cc/QM9G-EU3U>.

¹⁵ To succeed on an Eighth Amendment claim, the plaintiff must show that the desired course of treatment is medically necessary, which requires showing that no adequate alternatives exist. *Kosilek v. Spencer*, 774 F.3d. 63, 86 (1st Cir. 2014).

¹⁶ AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 493 (4th ed. rev. 2000) [hereinafter DSM-IV].

¹⁷ Mark Moran, *New Gender Dysphoria Criteria Replace GID*, PSYCHIATRIC NEWS (Apr. 5, 2013), <http://psychnews.psychiatryonline.org/doi/full/10.1176%2Fappi.pn.2013.4a19>, archived at <http://perma.cc/M525-PB44>.

¹⁸ *Id.*

¹⁹ See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 451–59 (5th ed. 2013) [hereinafter DSM-5].

²⁰ Bernstein & Tate, *supra* note 1, at A1.

²¹ See Helene Cooper, *Pentagon Weighs Transfer of Chelsea Manning to Civilian Facility*, N.Y. TIMES (May 14, 2014), <http://www.nytimes.com/2014/05/15/us/pentagon-weighs-transfer-of-chelsea-manning-to-civilian-facility.html>, archived at <http://perma.cc/2S7W->

permission to live as a woman, the Army attempted to transfer her to a civilian prison that could better provide the requested treatment.²² In July 2014, the Federal Bureau of Prisons rejected the Army's transfer request.²³ Subsequently, the Department of Defense approved the Army's recommendation that Manning begin "a rudimentary level of gender treatment," which could include allowing Manning to dress in female clothing and receive hormone treatments.²⁴ In February 2015, the commandant of the Fort Leavenworth military prison where Manning is held approved adding hormone treatments to Manning's treatment plan.²⁵

The Department of Defense is not the first agency to confront the issue of how to provide adequate care for transgender prisoners; many state departments of corrections have had to address this question, as well. In fact, several federal courts have recently ruled in favor of transgender inmates seeking access to gender-confirming health care from state departments of corrections, holding that prison officials' denial of such treatment for those who need it violates the Eighth Amendment's ban on cruel and unusual punishments.²⁶ Although these decisions provide medical relief for the individual plaintiffs who suffer from severe gender dysphoria, they do not address the underlying discriminatory nature of such policies. In Manning's case, for example, the military's ban on hormone therapy stems from its

3MFG ("In the American military, transgender service members can be summarily dismissed, as Defense Department guidelines describe transgender people as sexual deviants and their condition as 'paraphilia,' with its connotations of the atypical and extreme.").

²² *Id.*

²³ Associated Press, *Manning's Gender Treatments to Be Begun by the Military*, N.Y. TIMES, July 18, 2014, at A15.

²⁴ Associated Press, *Chelsea Manning to Begin Gender Treatment in Military Custody*, N.Y. POST (July 17, 2014, 5:08 PM), <http://nypost.com/2014/07/17/chelsea-manning-to-begin-gender-treatment-in-military-custody/>, archived at <http://perma.cc/5L42-8JZF>. Bernstein & Tate, *supra* note 1, at A6.

²⁵ Tom Vanden Brook, *Army Will Pay for Manning to Become a Woman*, USA TODAY, Feb. 13, 2015, at A1 (quoting a February 5 memorandum from Colonel Erica Nelson, commandant of the Fort Leavenworth Disciplinary Barracks in Kansas, as stating "After carefully considering the recommendation that (hormone therapy) is medically appropriate and necessary, and weighing all associated safety and security risks presented, I approve adding (hormone treatment) to Inmate Manning's treatment plan." (internal quotation marks omitted)).

²⁶ U.S. CONST. amend. VIII; see, e.g., *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011); *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011); *De'lonta v. Clarke*, No. 7:11-cv-00257, 2013 WL 4584684, at *1 (W.D. Va. Aug. 28, 2013); *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 198 (D. Mass. 2012); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252 (D. Mass. 2012); *Brugliera v. Comm'r of Mass. Dep't of Corr.*, No. 07-40323-JLT, 2009 U.S. Dist. LEXIS 131002 at *1 (D. Mass. Dec. 16, 2009).

broader discriminatory policy forbidding transgender prisoners from serving in the military.²⁷

Typically, claims of discrimination against a class of people are litigated under the Equal Protection Clause of the Fourteenth Amendment. However, federal courts have been generally unwilling to rule in favor of transgender prisoners seeking gender-confirming health care under the Equal Protection Clause. This Comment argues that transgender prisoners may be able to develop a doctrine within the Eighth Amendment to litigate their discrimination claims in the context of prison health care. This Comment looks closely at the reasoning in two recent transgender prisoner health care opinions: *Fields v. Smith*²⁸ and *Kosilek v. Spencer (Kosilek II)*.²⁹ The courts' Eighth Amendment analyses in these cases were seemingly influenced by concerns about equal protection and discrimination against transgender prisoners. This Comment suggests that transgender prisoners should use the analyses in these opinions as examples of how to frame future Eighth Amendment claims around facts that show discrimination.

Part I briefly explains the traditional strategy for litigating discrimination claims—the Equal Protection Clause—and discusses why it is not likely to be a successful strategy for transgender prisoners seeking gender-confirming health care. Part II describes the most common litigation strategy used in transgender prisoner health care cases—the Eighth Amendment—and discusses some of the criticisms of this doctrine. Part III analyzes the opinions in *Fields* and *Kosilek II* to show how the courts' decisions under the Eighth Amendment were influenced by equal protection principles. Part IV argues that transgender plaintiffs have an opportunity to develop a new discrimination doctrine within the Eighth Amendment.

I. THE TRADITIONAL STRATEGY FOR LITIGATING DISCRIMINATION: EQUAL PROTECTION

Claims of discrimination are typically litigated under the Equal Protection Clause. Although this may be a losing strategy for transgender prisoners seeking access to gender-confirming health care, the underlying principles of equal protection analysis may be useful.

²⁷ See Cooper, *supra* note 21; Lisa Leff, *Transgender Military Troop Ban Faces Scrutiny*, HUFFINGTON POST (Mar. 13, 2014, 10:23 AM), http://www.huffingtonpost.com/2014/03/13/transgender-troop-ban_n_4956528.html, archived at <http://perma.cc/REL2-BRUF>.

²⁸ 653 F.3d 550 (7th Cir. 2011).

²⁹ 889 F. Supp. 2d 190 (D. Mass. 2012).

A. THE EQUAL PROTECTION FRAMEWORK

The Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”³⁰ The essential thrust of this clause is “that all persons similarly situated should be treated alike.”³¹ The Equal Protection Clause applies to all state and federal government actions,³² including the informal policies of state departments of corrections.³³ The Supreme Court has developed different tiers of judicial scrutiny for discriminatory laws or governmental acts that single out a class of people for differential treatment based on the nature of that classification. The Court applies the highest level of scrutiny to those laws that burden a fundamental right or target a suspect class.³⁴

If the law neither burdens a fundamental right nor targets a suspect class, then the Court applies the more deferential “rational basis” standard of review.³⁵ Most laws withstand rational basis review because a court will uphold the law so long as it is rationally related to a legitimate governmental

³⁰ U.S. CONST. amend. XIV, § 1.

³¹ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (internal quotation marks omitted)).

³² *See Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (extending the requirements of the Equal Protection Clause of the Fourteenth Amendment to the federal government through the Fifth Amendment Due Process Clause); *see also DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (holding that only affirmative state acts can constitute violations of the Fourteenth Amendment Substantive Due Process Clause, not the state’s failure to act).

³³ *Johnson v. California*, 543 U.S. 499, 502, 515 (2005) (holding that equal protection challenges to the California Department of Corrections’ unwritten policy of racially segregating prisoners should be reviewed with strict scrutiny under the Equal Protection Clause).

³⁴ Laws that burden a fundamental right or target a “suspect class,” such as classifications based on race, receive “strict scrutiny.” *See Johnson*, 543 U.S. at 505 (“[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (internal quotation marks omitted)). Such laws must be narrowly tailored to a compelling governmental interest in order to pass strict scrutiny. *Id.* (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”) *Id.* (quoting *Adarand*, 515 U.S. at 227). Classifications based on gender receive a lower level of scrutiny, called “intermediate scrutiny.” *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (stating that the majority applies “an elevated or ‘intermediate’ level scrutiny”). In order to meet the intermediate scrutiny standard, such laws must be substantially related to an important governmental interest. *Id.* at 197 (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

³⁵ *See, e.g., F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

interest.³⁶ Under rational basis review, courts will generally not consider whether the actual purpose of the law is the same as the stated governmental interest.³⁷ However, the Supreme Court has consistently held that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³⁸ The Court further held in *Romer v. Evans* that animus alone does not justify singling out a group of people for discriminatory treatment.³⁹ Courts apply “a more searching form of rational basis review” to such laws that exhibit a desire to harm a politically unpopular group.⁴⁰ Some scholars refer to this more rigorous standard of rational basis review as “rational basis with bite.”⁴¹

B. EQUAL PROTECTION IS A LOSING STRATEGY FOR TRANSGENDER PRISONERS

Courts have consistently applied the rational basis standard of review to equal protection claims brought by transgender prisoners.⁴² At this time, there

³⁶ *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); *see also* *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (“Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster . . .”).

³⁷ *See Beach Commc’ns*, 508 U.S. at 315 (“[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (stating that equal protection “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification”); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (“In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they ‘could not have been a goal of the legislation.’” (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975))).

³⁸ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis omitted); *see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (holding that “irrational prejudice” against the mentally disabled is not a legitimate governmental purpose).

³⁹ *Romer*, 517 U.S. at 632 (The Colorado state constitutional amendment permitting discrimination on the basis of sexual orientation “seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

⁴⁰ *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

⁴¹ *See, e.g.*, Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 *DRAKE L. REV.* 923, 928 (2010) (citing ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 680 (3d ed. 2006)).

⁴² *See, e.g.*, *Fields v. Smith*, 712 F. Supp. 2d 830, 867–68 (E.D. Wis. 2010) (applying rational basis review to plaintiff’s challenge of a state law preventing treatment of gender identity disorder to inmates because there was no suspect classification at issue); *Battista v.*

is no indication that courts are willing to extend heightened scrutiny to classifications based on gender identity, either by recognizing transgender people as a suspect class or by squeezing transgender people into classifications based on sex.

Transgender people do not constitute a suspect class, and it is not likely the Supreme Court will recognize them as such anytime soon.⁴³ The Court currently recognizes five suspect classifications that receive heightened scrutiny: race,⁴⁴ national origin,⁴⁵ alienage,⁴⁶ sex,⁴⁷ and nonmarital parentage.⁴⁸ The Court has not added any new classifications to the list since adding nonmarital parentage in 1977. Moreover, the Court has refused to apply heightened scrutiny to other classifications, including age,⁴⁹

Dennehy, No. 05-11456-DPW, 2006 U.S. Dist. WL 1581528, at *6 (D. Mass. Mar. 22, 2006) (“The underlying equal protection inquiry, . . . is whether different treatment of two separately classified groups is at least marginally *reasonable*.” (citation and internal quotation marks omitted)).

⁴³ For further discussion, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011). Yoshino argues that “pluralism anxiety” has caused the Supreme Court to systematically deny heightened scrutiny to new groups. *Id.* at 755. Pluralism anxiety is an apprehension about the country’s growing diversity that stems from the increased visibility of “‘new’ kinds of people,” including immigrants, and “‘newly visible people,’” including groups introduced to the country by social movements, such as the transgender community. *Id.* at 747. Yoshino argues that the Supreme Court has all but closed the possibility of creating a new suspect class. *Id.* at 757.

⁴⁴ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting a state law prohibiting marriage between a white person and a person of another race to strict scrutiny).

⁴⁵ See *Oyama v. California*, 332 U.S. 633, 645–46 (1948) (subjecting a state land transfer statute that discriminated on the basis of national origin to strict scrutiny); *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944) (applying the “most rigid scrutiny” to legislation and an executive order that excluded individuals of Japanese ancestry from the U.S. West Coast during World War II).

⁴⁶ See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (subjecting a state law that conditioned welfare benefits on citizenship to heightened scrutiny). *But see* *Foley v. Connelie*, 435 U.S. 291, 297, 299–300 (1978) (applying rational basis review to a New York state law requirement that police be citizens because the law pertained to a core governmental function); *Mathews v. Diaz*, 426 U.S. 67, 81–83, 87 (1976) (holding that congressional use of the alienage classification requires only rational basis review because the Constitution grants Congress authority over alienage issues).

⁴⁷ See *United States v. Virginia*, 518 U.S. 515, 530–31 (1996) (applying intermediate scrutiny to gender-based discrimination in education); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (applying intermediate scrutiny to gender-based discrimination in a state statute regulating the sale of alcohol).

⁴⁸ See *Trimble v. Gordon*, 430 U.S. 762, 765–67, 769 (1977) (applying heightened scrutiny to a state statute permitting children born in wedlock, but not children born out of wedlock, to inherit from their intestate fathers).

⁴⁹ See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (*per curiam*) (subjecting the state mandatory retirement age of fifty for police officers to rational basis review because

disability,⁵⁰ and sexual orientation.⁵¹ With the Court reluctant to expand heightened scrutiny to new classifications, arguing for a suspect class based on gender nonconformity seems untenable.

Historically, courts have been unwilling to include discrimination against transgender people in the definition of discrimination “based on sex” or sex stereotyping,⁵² although this may be changing in the context of employment discrimination. Both the Sixth and the Eleventh Circuits have held that discrimination against transgender employees may constitute discrimination “because of sex” and sex stereotyping under Title VII and the Equal Protection Clause. Accordingly, those circuits have applied an intermediate level of scrutiny to the claims of transgender employees.⁵³

it implicated neither a fundamental right nor a suspect class).

⁵⁰ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (applying rational basis review to a city zoning ordinance that prevented homes for the mentally disabled to be built in certain areas).

⁵¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) (“The [majority opinion invalidating the Defense of Marriage Act] does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (avoiding the question of whether a classification based on sexual orientation merits heightened scrutiny by finding that a Colorado constitutional amendment repealing ordinances prohibiting discrimination based on sexual orientation violated equal protection “in the most literal sense”); *but see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (interpreting *Windsor* as applying heightened scrutiny to classifications based on sexual orientation).

⁵² See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 32 & n.48 (2003) (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, . . . a person born with a female body who believes herself to be a male . . .”)); *see also Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that “discrimination based on one’s transsexualism does not fall within the protective purview of” Title VII’s protections against discrimination based on sex); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977) (refusing to extend protection of Title VII to transgender employees because discrimination against transgender individuals is on the basis of “gender” rather than “sex”), *overruled by Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (recognizing that the approach in *Holloway* was overruled by the Supreme Court’s opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

⁵³ *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (affirming the district court’s holding that discrimination against a transgender employee constituted discrimination based on sex in violation of the Equal Protection Clause where the government failed to supply a “sufficiently important governmental interest”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that transgender plaintiff stated a claim for sex discrimination “by alleging discrimination . . . for his failure to conform to sex stereotypes”); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”); *see also Schroer v. Billington*, 557 F. Supp. 2d 293, 308 (D.D.C. 2008) (“In

However, courts have shown no sign of extending intermediate scrutiny to discrimination against transgender people in the prison context. Courts have been consistent in applying rational basis review to the equal protection claims of transgender prisoners seeking gender-confirming health care, and few have found in favor of the prisoner on equal protection grounds.⁵⁴ Whether or not equal protection will prove a viable litigation strategy in the future, it is not likely to be a successful strategy at this time.

II. THE CURRENT STRATEGY: LITIGATING TRANSGENDER PRISONER MEDICAL NEEDS UNDER THE EIGHTH AMENDMENT

In light of the unlikelihood of successful litigation under the Equal Protection Clause, transgender prisoner plaintiffs have turned to the Eighth Amendment to argue that a deprivation of hormone therapy and sex-reassignment surgery constitutes cruel and unusual punishment.

A. THE EIGHTH AMENDMENT FRAMEWORK

The Eighth Amendment proscribes “cruel and unusual punishments.”⁵⁵ Cruel and unusual punishment is that which is “incompatible with the evolving standards of decency that mark the progress of a maturing society,”⁵⁶ or that which involves “unnecessary and wanton infliction of pain.”⁵⁷ In the context of prison medical care, “unnecessary and wanton

refusing to hire [plaintiff] because her appearance and background did not comport with the decisionmaker’s sex stereotypes about how men and women should act and appear, and in response to [plaintiff’s] decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII’s prohibition on sex discrimination.”)

⁵⁴ Some courts have dismissed equal protection claims because they found—with only a brief discussion—that the plaintiffs failed to show they were treated differently than similarly situated individuals. *See, e.g.*, *Jackson v. Sampson*, 536 F. App’x 356, 358 (4th Cir. 2013); *Smith v. Hayman*, 489 F. App’x 544, 547 (3d Cir. 2012); *Battista v. Dennehy*, No. 05-11456-DPW, 2006 U.S. Dist. WL 1581528, at *6–7 (D. Mass. Mar. 22, 2006). At least one court avoided addressing the equal protection issue by deciding the case on Eighth Amendment grounds. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (“Having determined that the district court properly held that Act 105 violates the Eighth Amendment, both on its face and as applied to plaintiffs, we need not address the district court’s alternate holding that the law violates the Equal Protection Clause.”). Others did not address the Equal Protection Clause at all because it was not raised in the pleadings. *See, e.g.*, *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 197 (D. Mass. 2012) (“Kosilek alleges that his rights under the Eighth Amendment are being violated by the DOC’s refusal to provide him with . . . sex reassignment surgery . . .”).

⁵⁵ U.S. CONST. amend. VIII.

⁵⁶ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (internal quotation marks omitted)).

⁵⁷ *Id.* at 103 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

infliction of pain” is denial of medical care where such denial would serve no penological purpose.⁵⁸ While imprisoned, “[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”⁵⁹ An Eighth Amendment violation occurs where prison officials have shown “deliberate indifference to [the] serious medical needs of prisoners.”⁶⁰ This test has both an objective and subjective prong.⁶¹ Whether a prisoner’s particular medical needs constitute a “serious medical need” is an objective inquiry,⁶² whether the prison officials acted with “deliberate indifference” is a subjective inquiry.⁶³

The Supreme Court has provided little guidance on what constitutes a serious medical need.⁶⁴ The First Circuit defines a serious medical need as 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.”⁶⁵ The Ninth Circuit defines a serious medical need as “one that involves a substantial risk of serious harm if not adequately treated.”⁶⁶

The Supreme Court has never addressed the question of whether GID or gender dysphoria constitutes a serious medical need protected by the Eighth Amendment, and most circuit courts have avoided expressly ruling on the issue. Some circuit courts have found that GID can constitute a serious medical need in certain situations.⁶⁷ Other courts have avoided the question

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 104.

⁶¹ *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 206 (D. Mass. 2012).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1817 (2012) (“The ‘objective’ prong purports to measure the ‘seriousness’ of the challenged condition, but close scrutiny of court decisions reveals that there is no organized methodology to determine what makes a condition ‘sufficiently’ serious.”).

⁶⁵ *Mahan v. Plymouth Cnty. House of Corr.*, 64 F.3d 14, 18 (1st Cir. 1995) (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (internal quotation marks omitted)).

⁶⁶ *Kosilek*, 889 F. Supp. 2d at 207 (citing *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)) (“A serious medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.” (internal quotation marks omitted)).

⁶⁷ In 1988, the Eighth Circuit found that “transsexualism” is a serious medical need for which some type of treatment is required, although not necessarily hormone therapy. *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988). Seven years later, in *Long v. Nix*, the Southern District of Iowa interpreted the definition of “transsexualism” narrowly, to exclude GID. 877 F. Supp. 1358, 1365 (S.D. Iowa 1995). In 1986, the Tenth Circuit held that some form of

by assuming, without holding, that GID is a serious medical need under the Eighth Amendment.⁶⁸

As for the subjective prong, a prison official is deliberately indifferent if he disregards a substantial risk of serious harm to an inmate's health or safety.⁶⁹ However, the official is only deliberately indifferent if he both knew of facts from which he could infer that risk, and he did in fact draw the inference.⁷⁰

Even if prison officials know that their decisions pose risks to inmates, they may not be adjudged deliberately indifferent if they determine that safety concerns outweigh the harm to any individual prisoner. The "realities of prison administration,"⁷¹ including the need for prison officials to "take reasonable measures to guarantee the safety of the inmates,"⁷² are relevant to whether officials acted with deliberate indifference, and the court must usually give deference to the prison officials' "judgment concerning what is necessary to discharge their duty to maintain institutional security."⁷³ In *Whitley v. Albers*, the Supreme Court held that, in deciding whether to use force to quell a prison riot, prison officials must weigh the risk of harm to the inmate against "competing institutional concerns for the safety of prison staff

therapy was needed after the plaintiff mutilated her genitals so severely that they had to be removed by a doctor. *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986). Nine years later, the Tenth Circuit interpreted its holding in *Supre* more broadly to stand for the rule that "prison officials must provide treatment to address the medical needs of transsexual prisoners." *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995). As in *Supre*, the Fourth Circuit in *De'Lonta v. Angelone* found that the plaintiff's "uncontrollable urge to mutilate her genitals" was a serious medical need, without addressing whether GID itself was a serious medical need. 330 F.3d 630, 632, 634 (4th Cir. 2003). In *Praylor v. Texas*, the Fifth Circuit initially held that the plaintiff was not constitutionally entitled to hormone therapy, even though transsexualism does constitute a serious medical need. 423 F.3d 524, 525 (5th Cir. 2005). The court later withdrew its opinion and issued a new holding in which it refused to decide whether transsexualism constitutes a serious medical need. *Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005); see *Young v. Adams*, 693 F. Supp. 2d 635, 640 (W.D. Tex. 2010) (explaining the procedural history in *Praylor*). For further discussion of whether GID should be considered a serious medical need, see Laura R. Givens, Note, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER RACE & JUST. 579, 587-93 (2013).

⁶⁸ *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (on appeal, the appellant, Wisconsin Department of Justice, did not challenge the district court's holding that GID constitutes a serious medical need).

⁶⁹ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁷⁰ *Id.*

⁷¹ *Helling v. McKinney*, 509 U.S. 25, 36-37 (1993).

⁷² *Farmer*, 511 U.S. at 832 (citation and internal quotation marks omitted).

⁷³ *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 210 (D. Mass. 2012) (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)); see *Fields*, 653 F.3d at 557-58.

or other inmates.”⁷⁴ The Court noted that while such a balancing of prisoner and institutional concerns is appropriate in the context of a prison riot, it is not usually necessary when attending to prisoners’ medical needs. The Court observed that “the state’s responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities.”⁷⁵

Although most medical needs cases do not raise concerns about prison security,⁷⁶ prison officials often rely on institutional security as a justification for refusing to provide hormone therapy or sex-reassignment surgery for prisoners diagnosed with GID or gender dysphoria.⁷⁷ In *Fields v. Smith*, the Wisconsin Department of Justice defended a state law that prohibited prisons from providing hormone therapy to inmates on the grounds that “hormone therapy alters a person’s secondary sex characteristics such as breast size and body hair” and “that hormones feminize inmates and make them more susceptible to inciting prison violence.”⁷⁸

Acknowledging the unique security concern that may be implicated by allowing a male-to-female prisoner to present herself as a female in a male prison,⁷⁹ courts have extended the rule in *Whitley* to these medical needs

⁷⁴ *Whitley*, 475 U.S. at 320. In *Whitley*, the prisoner brought a claim under 42 U.S.C. § 1983 for deprivation of his civil rights after he was shot in the leg by a prison guard during the quelling of a prison riot. *Id.* at 316–17. The Court held that during a prison riot, “prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike” in deciding whether or not to use force against the inmates. *Id.* at 320. Noting that the balancing test should be applied with “due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged,” the Court distinguished prison riots from medical treatment. *Id.*

⁷⁵ *Id.* (noting that deliberate indifference to a serious medical need could “typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates”).

⁷⁶ *See id.*

⁷⁷ *See, e.g., Fields*, 653 F.3d at 557 (“Because hormone therapy alters a person’s secondary sex characteristics such as breast size and body hair, defendants argue that hormones feminize inmates and make them more susceptible to inciting prison violence.”); *Battista v. Clarke*, 645 F.3d 449, 451 (1st Cir. 2011) (“Its security evaluation is at the core of the Department’s substantive objection to hormone therapy for Battista.”); *Koselik II*, 889 F. Supp. 2d at 197–98 (holding that the prison officials’ stated concern that providing sex-reassignment surgery “would create insurmountable security problems” was pretextual); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 240, 247–48 (D. Mass. 2012) (invalidating the Department of Corrections’ formal policy which states that “[g]enital sex reassignment surgery is prohibited as it presents overwhelming safety and security concerns in a correctional environment”).

⁷⁸ *Fields*, 653 F.3d at 557.

⁷⁹ A 2007 study of California men’s prisons found that 59% of transgender women had been sexually assaulted while in prison, as compared to 4% of a random sample of the general prison population. VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 3 (2007), available at <http://>

cases. They cite to *Whitley* for the proposition that a denial of hormone therapy or sex-reassignment surgery may not be overly harsh “in light of the realities of prison administration”⁸⁰ and that “[p]rison administrators are usually entitled to deference by the courts in their judgment concerning what is necessary to discharge their duty to maintain institutional security.”⁸¹ However, “deference does not extend to actions taken in bad faith and for no legitimate purpose.”⁸² Thus, courts analyze the government’s stated security concern to determine whether it is pretextual.⁸³

Although prison security may be a permissible reason for denying adequate care for a serious medical need, many federal courts have found that the cost of the treatment is never a legitimate reason for denying adequate medical care.⁸⁴ In the context of GID, courts have rejected cost as a legitimate

www.wcl.american.edu/endsilence/documents/ViolenceinCaliforniaCorrectionalFacilities.pdf, archived at <http://perma.cc/A3R4-UD5K>. See generally Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 517 (2009) (discussing the causes and nature of violence against transgender, intersex, and gender nonconforming people in prisons).

⁸⁰ *Soneeya*, 851 F. Supp. 2d at 243 (citing *Whitley*, 475 U.S. at 319).

⁸¹ *Kosilek II*, 889 F. Supp. 2d at 210 (citing *Whitley*, 475 U.S. at 321–22); see *Fields*, 653 F.3d at 557–58.

⁸² *Fields*, 653 F.3d at 558 (citing *Whitley*, 475 U.S. at 322 (internal quotation marks omitted)).

⁸³ *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) (“[D]efendants’ reliance on their administrative discretion in invoking and dealing with security concerns has been undercut by a collection of pretexts, delays, and misrepresentations”); *Kosilek II*, 889 F. Supp. 2d at 210 (“[P]rison officials forfeit their right to deference when their stated, legitimate grounds for refusing treatment are proven to be pretextual, and the plaintiff establishes that the ‘balancing judgments’ were not ‘within the realm of reason and made in good faith.’” (quoting *Battista*, 645 F.3d at 454–55)).

⁸⁴ *Wilson v. Seiter*, 501 U.S. 294, 301–02 (1991) (finding no “indication that other [prison] officials have sought to use [a cost defense] to avoid the holding of *Estelle v. Gamble*”); *Fields*, 653 F.3d at 556 (“[A]t oral argument . . . [the state] disclaimed any argument that [the statute prohibiting hormone therapy or sex reassignment surgery] is justified by cost savings.”); *Chance v. Armstrong*, 143 F.3d 698, 704 (2d Cir. 1998) (holding that plaintiff’s claim that doctors “recommended extraction [of tooth] not on the basis of their medical views, but because of monetary incentives,” if proven, would contribute to a showing of deliberate indifference by the defendants); *Durmer v. O’Carroll*, 991 F.2d 64, 68 (3d Cir. 1993) (holding that the fact that evidence that prison doctor avoided providing physical therapy to an inmate because it “would have placed a considerable burden and expense on the prison and was therefore frowned upon throughout the prison health system” might contribute to a showing of deliberate indifference); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (“We do not agree that ‘financial considerations must be considered in determining the reasonableness’ of inmates’ medical care to the extent that such a rationale could ever be used by so-called ‘poor states’ to deny a prisoner the minimally adequate care to which he or she is entitled.” (quoting district court opinion)); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (“We find no other explanation in the record than the budget concerns for denying Jones’s surgery.

justification for denying hormone therapy or sex-reassignment surgery.⁸⁵

B. CRITICISMS OF THE EIGHTH AMENDMENT MEDICAL MODEL

The problem with litigating under the Eighth Amendment rather than the Equal Protection Clause is that the Eighth Amendment relies more heavily on a medical definition of gender nonconformity. Under the Equal Protection Clause, the class of people who identify as gender nonconforming is not necessarily based on a medical definition. Unlike the Eighth Amendment, the Equal Protection Clause has not been interpreted to have a specific requirement that each individual plaintiff prove that he or she has a serious medical need for which hormone therapy or sex-reassignment surgery is a necessary treatment. Some transgender activists have harshly criticized the medical approach as being at odds with the view in the transgender community that self-identification, not a medical diagnosis, should be the determining factor of a person's membership in a gender category.⁸⁶ Most of the published criticisms of the medical model are based on the DSM-IV definition of GID, rather than the new DSM-5 definition of gender dysphoria.⁸⁷ These include four main criticisms.⁸⁸

First, scholars have argued that “the medical model pathologizes and thus stigmatizes trans people.”⁸⁹ A medical diagnosis of GID implies that

Budgetary constraints, however, do not justify cruel and unusual punishment.”); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (“Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates.” (internal citation omitted)).

⁸⁵ See, e.g., *Fields*, 653 F.3d at 556 (“[A]t oral argument . . . [the state] disclaimed any argument that [the statute prohibiting hormone therapy or sex-reassignment surgery] is justified by cost savings.”); *Kosilek II*, 889 F. Supp. 2d at 210 (“the cost of adequate medical care is not a legitimate reason for not providing such care to a prisoner”); *Soneeya*, 851 F. Supp. 2d at 243 (“Cost of treatment . . . may not be used as a reason to deny an inmate medically necessary care.”); *Koselik v. Maloney (Kosilek I)*, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (if “concerns about cost or controversy prompt [the DOC Commissioner] to deny *Kosilek* adequate care for his serious medical need, [the DOC Commissioner] will have violated the Eighth Amendment”).

⁸⁶ See Judith Butler, *Undiagnosing Gender*, in *TRANSGENDER RIGHTS* 274, 275 (Paisley Currah et al. eds., 2006); Spade, *supra* note 52, at 29.

⁸⁷ See *supra* notes 16–19 and accompanying text.

⁸⁸ See Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 *HARV. J.L. & GENDER* 447, 457 (2008) (discussing the criticisms of the Eighth Amendment medical model).

⁸⁹ *Id.* See also Butler, *supra* note 86, at 275 (“To be diagnosed with gender identity disorder is to . . . suffer a certain stigmatization as a consequence of the diagnosis being given at all.”); Jerry L. Dasti, Note, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 *N.Y.U. L. REV.* 1738, 1738 (2002) (calling for a “broader conception of medical necessity” that “does not . . . stigmatiz[e] gender variance as

transgender individuals “are somehow flawed people”⁹⁰ and that they are “in some way . . . ill, sick, wrong, out of order [or] abnormal.”⁹¹ Second, critics have argued that the medical model disadvantages low-income transgender people who cannot afford the level of health care needed to diagnose and treat GID.⁹²

The third criticism of the medical model based on a diagnosis of GID is that it is underinclusive.⁹³ Critics have argued that gender nonconforming people who do not fit neatly into the DSM-IV definition would be foreclosed from a diagnosis of GID.⁹⁴ Furthermore, in most jurisdictions, even a diagnosis of GID alone is insufficient to prove that a prisoner suffers from a serious medical need under the Eighth Amendment; most courts additionally require the prisoner to prove that the denial of treatment will result in serious physical or mental harm. Courts often look for extreme evidence of harm such as attempted suicide or self-castration,⁹⁵ overlooking prisoners suffering from other real, but less extreme, harms. Finally, critics of the medical model based on GID have argued that it reinforces a coercive gender binary.⁹⁶ The diagnostic criteria for GID are based on the idea of “two discrete gender categories that normally contain everyone but occasionally are wrongly assigned.”⁹⁷ This narrow conception of gender excludes some transgender and genderless individuals who do not fit into one of the stereotypical gender categories. Thus, relying on a diagnosis of GID leaves behind those individuals who do not “inhabit and perform the new gender category successfully.”⁹⁸

In drafting the DSM-5, the editors responded to these criticisms by replacing GID with a new category called “gender dysphoria.”⁹⁹ The editors sought to create a whole new conception of the condition that would minimize the stigma of a medical diagnosis without eliminating the condition

a ‘disease’ that must be ‘cured’”).

⁹⁰ Spade, *supra* note 52, at 34.

⁹¹ Butler, *supra* note 86, at 275.

⁹² Lee, *supra* note 88, at 458; Spade, *supra* note 52, at 35.

⁹³ Lee, *supra* note 88, at 458–59.

⁹⁴ *Id.* at 459; Romeo, *supra* note 7, at 731 (“Because the experiences of many gender nonconforming people do not match the diagnostic criteria of GID, and because, for all except the most privileged few, accessing trans-friendly health care is extraordinarily difficult, the medical model of gender does not serve the vast majority of gender non-conforming people.”).

⁹⁵ See *De’Lonta v. Angelone*, 330 F.3d 630, 632 (4th Cir. 2003); *Supre v. Ricketts*, 792 F.2d 958, 960, 963 (10th Cir. 1986).

⁹⁶ Lee, *supra* note 88, at 459; see Spade, *supra* note 52, at 35.

⁹⁷ Spade, *supra* note 52, at 26.

⁹⁸ *Id.* (internal quotation marks omitted).

⁹⁹ Moran, *supra* note 17.

completely.¹⁰⁰ They were concerned with maintaining access to a medical diagnosis for those people who rely on the diagnosis to obtain medical care.¹⁰¹ This is especially important for prisoners seeking gender-confirming medical treatment under the Eighth Amendment, who have to prove that they have a serious medical need. Instead of eliminating the condition, the editors removed it from the chapter on sexual dysfunctions, placing it in its own chapter called gender dysphoria. In addition to removing the word “disorder” from the title, the editors changed the diagnostic criteria to reflect an emphasis on gender incongruence rather than cross-gender identification.¹⁰² This new conceptualization moves away from the gender binary, making the condition more inclusive for those people who do not fit neatly into one gender category.

Although the new diagnostic criteria in the DSM-5 addressed many of the criticisms of the medical model, it could not change the fact that requiring a medical diagnosis in the first place disadvantages low income transgender people who do not have access to health care. This is especially a problem in the prison context, because some state departments of correction apply a “freeze frame” policy to hormone therapy, which conditions access to hormone therapy on whether or not the prisoner was receiving treatment before entering the prison system.¹⁰³ Treatment is “frozen” at the level of hormones the prisoner was receiving at the time he or she entered the prison system.¹⁰⁴ However, prisons may be moving away from this “freeze frame” model. In 2011, the Federal Bureau of Prisons agreed to end its “freeze frame” policy for hormone therapy as part of the settlement in a lawsuit brought by a transgender prisoner in a federal prison in Massachusetts.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See, e.g., ALA. DEP'T OF CORR., ADMIN. REGULATION 637(V)(E)(2) (2005), available at <http://www.doc.state.al.us/docs/AdminRegs/AR637.pdf>, archived at <http://perma.cc/9AQ6-87U4>.

¹⁰⁴ See Press Release, Gay & Lesbian Advocates & Defenders, Federal Bureau of Prisons Makes Major Change in Transgender Medical Policy (Sept. 30, 2011), available at <http://www.glad.org/uploads/docs/press-releases/2011-09-29-adams-victory.pdf> (describing the federal “freeze frame” policy prior to 2011), archived at <http://perma.cc/3XG8-GDWT>.

¹⁰⁵ Stipulation for Compromise Settlement and Release Ex. A, *Adams v. Fed. Bureau of Prisons*, No. 09-10272-JLT (D. Mass. Sept. 29, 2011), available at <http://www.clearinghouse.net/detail.php?id=14130&search=source%7Cgeneral%3BdocketSimpleYear%7C2009%3BdocketSimpleText%7C10272%3BtrialCourt%7C38%3Borderby%7CfilingYear%3B>, archived at <http://perma.cc/AEQ4-CURV>; see *Case Summary & History: Adams v. Federal Bureau of Prisons et al.*, NAT'L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/cases-and-policy/cases-and-advocacy/adams-v-federal-bureau-of-prisons-et-al/> (last visited Jan. 23, 2015), archived at <http://perma.cc/G86G-UZFF>; see also *Adams v. Fed. Bureau of Prisons*,

The medical model of the Eighth Amendment will always be somewhat in conflict with a conception of gender identity based only on self-identification. However, where the treatment sought is of a medical nature, like hormone therapy and sex-reassignment surgery, prisons are realistically always going to require a medical diagnosis.

III. FINDING DISCRIMINATION WITHIN THE EIGHTH AMENDMENT

Neither the Eighth Amendment nor the Equal Protection Clause is a perfect litigation strategy for challenging discriminatory prison policies banning hormone therapy and sex-reassignment surgery. Although litigants have had considerably more success obtaining access to gender-confirming health care under the Eighth Amendment than the Equal Protection Clause, the Eighth Amendment has not traditionally been used as a tool for fighting discrimination. However, two recent federal court opinions suggest that discrimination may in fact be relevant to Eighth Amendment analysis.

In *Fields v. Smith*, the Seventh Circuit struck down a state law banning hormone therapy and sex-reassignment surgery for all prisoners in the state.¹⁰⁶ In *Kosilek v. Spencer*, the District of Massachusetts granted an injunction requiring prison officials to provide the plaintiff with sex-reassignment surgery.¹⁰⁷ Both courts relied on the Eighth Amendment, holding that prison officials had been deliberately indifferent to the plaintiffs' serious medical needs. Although neither court's holding relied on the Equal Protection Clause, their Eighth Amendment analyses were laced with concerns about discrimination against and the equal protection of transgender prisoners. Subparts III(A) and III(B) look closely at the courts' reasoning in these two opinions for signs of equal protection influence, and subpart III(C) discusses these two cases in the broader context of transgender prisoner health care litigation.

A. HIDDEN EQUAL PROTECTION ANALYSIS: *FIELDS V. SMITH*

In *Fields v. Smith*, the Seventh Circuit affirmed the district court's decision to strike down a Wisconsin state law (Act 105) prohibiting the Wisconsin Department of Corrections (WDOC) from providing transgender inmates with hormone therapy or sex-reassignment surgery.¹⁰⁸ The district

716 F. Supp. 2d 107 (D. Mass. 2010) (order denying the Federal Bureau of Prisons' motion to dismiss the complaint).

¹⁰⁶ *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011).

¹⁰⁷ *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 204 (D. Mass. 2012), *rev'd*, 774 F.3d 63 (1st Cir. 2014). For a discussion of the subsequent history of this case, see *infra* text accompanying notes 132–140, 171–175.

¹⁰⁸ *Fields*, 653 F.3d at 559.

court held that the blanket prohibition on access to certain types of treatment for GID violated the Eighth Amendment's ban on cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁹ The district court denied class certification "on behalf of all current and future [W]DOC inmates with 'strong, persistent cross-gender identification,'" but allowed three individual plaintiffs to proceed.¹¹⁰ The plaintiffs—Andrea Fields, Matthew Davison (also known as Jessica Davison), and Vankemah Moaton—were male-to-female transgender prisoners.¹¹¹ Before Act 105 was passed, WDOC physicians had diagnosed each of them with GID and prescribed hormone therapy.¹¹²

The district court held that Act 105 violated the Eighth Amendment facially¹¹³ and as applied to these three plaintiffs.¹¹⁴ The court found that GID is a serious medical need and that by enforcing the blanket ban on hormone therapy and sex-reassignment surgery, prison officials were deliberately indifferent to that need.¹¹⁵

The district court also held that Act 105 violates the Equal Protection Clause of the Fourteenth Amendment. The court found that no fundamental right or suspect classification was at issue, so the rational basis standard of review was appropriate.¹¹⁶ To prevail under rational basis review, a plaintiff must prove: (1) the defendant intentionally treated him differently from similarly situated individuals; (2) the differential treatment was because of his membership in a class; and (3) the differential treatment was not rationally related to a legitimate governmental interest.¹¹⁷

On appeal, the Seventh Circuit affirmed the district court's holding that Act 105 violates the Eighth Amendment, "both on its face and as applied to plaintiffs," and thus found it unnecessary to "address the district court's alternate holding that the law violates the Equal Protection Clause."¹¹⁸ Although the Seventh Circuit expressly said that it would not address the

¹⁰⁹ *Id.* at 553.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Fields v. Smith*, 712 F. Supp. 2d 830, 866 (E.D. Wis. 2010) ("[T]he controlling class for a facial challenge to a statute is 'the group for whom the law is a restriction, not the group for whom the law is irrelevant.'" (internal citation omitted)).

¹¹⁴ *Id.* at 863. The court held that as applied to the plaintiffs in *Fields*, enforcement of Act 105 prevents WDOC doctors from providing treatment that they have deemed necessary to treat the plaintiffs' serious medical conditions. *Id.*

¹¹⁵ *Id.* at 862, 866.

¹¹⁶ *Id.* at 867.

¹¹⁷ *Id.* (citing *Smith v. City of Chicago*, 457 F.3d 643, 650–51 (7th Cir. 2006)).

¹¹⁸ *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011).

equal protection claim, it affirmed the district court's reasoning under each step of the rational basis test, essentially engaging in a covert equal protection analysis.

First, the Seventh Circuit's analysis appeared to adopt the district court's analysis under the first step of the rational basis test. The Seventh Circuit echoed the district court's equal protection language by making two clear references to similarly situated individuals. In the first reference, the court relied on the same medical testimony as the district court in finding that "no other state law or policy, besides Act 105, . . . prohibits prison doctors from providing inmates with medically necessary treatment."¹¹⁹

In the second reference, the Seventh Circuit referred to similarly situated prisoners in its discussion of the costs of hormone therapy and sex-reassignment surgery. The court analyzed the costs of these treatments to undermine the empirical assumption that such treatments are expensive.¹²⁰ The defendants conceded in oral argument that cost savings do not justify Act 105.¹²¹ The court relied on the record to show that the costs of hormone therapy and sex-reassignment surgery are no more than the costs of medical treatments for other prisoners:

In 2004, DOC paid a total of \$2,300 for hormones for two inmates. That same year, DOC paid \$2.5 million to provide inmates with quetiapine, an antipsychotic drug which costs more than \$2,500 per inmate per year. Sex reassignment surgery is significantly more expensive, costing approximately \$20,000. However, other significant surgeries may be more expensive. In 2005, DOC paid \$37,244 for one coronary bypass surgery and \$32,897 for one kidney transplant surgery.¹²²

Second, the Seventh Circuit appeared to affirm the district court's finding under the second step of the rational basis test that those in the class of "persons who need hormonal therapy to treat GID"¹²³ were singled out for different treatment because of their membership in that class. The Seventh

¹¹⁹ *Id.* at 554. In finding that Act 105 "intentionally treated [the plaintiffs] differently from others similarly situated," *Fields*, 712 F. Supp. 2d at 867 (internal citation omitted), the district court reasoned that "GID is the only medically necessary condition for which mental health treatments are barred by law or regulation within the DOC." *Id.* It also noted that "there is no evidence of any other Wisconsin laws banning medical treatment for inmates or any DOC policies that ban necessary medical treatment for inmates." *Id.*

¹²⁰ Fourteen years earlier, in *Maggert v. Hanks*, the Seventh Circuit upheld summary judgment in favor of the defendants in a similar deliberate indifference case, relying on the empirical assumption that hormone therapy and sex-reassignment surgery are "protracted and expensive" and not necessarily available to those who are not affluent. *Maggert v. Hanks*, 131 F.3d 670, 671–72 (7th Cir. 1997). The court in *Fields* analyzed the costs to undermine this dicta from *Maggert*. *Fields*, 653 F.3d at 555–56.

¹²¹ *Fields*, 653 F.3d at 556.

¹²² *Id.* at 555.

¹²³ *Fields*, 712 F. Supp. 2d at 867.

Circuit stated that “[s]urely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional.”¹²⁴ By replacing the more controversial medical need, GID, with one that most people accept as a serious medical need, cancer, the court implied that this group of prisoners was singled out because of the nature of its members’ medical needs.

Finally, the Seventh Circuit affirmed the district court’s reasoning under the third step of the rational basis review test, in which the district court held that Act 105 was not rationally related to prison officials’ stated security concerns.¹²⁵ Although the district court analyzed prison security under the Equal Protection Clause,¹²⁶ not the Eighth Amendment, the Seventh Circuit simply adopted the district court’s security findings into its Eighth Amendment analysis. The Seventh Circuit held that “[t]he district court did not abuse its discretion in concluding that defendants’ evidence failed to establish any security benefits associated with a ban on hormone therapy.”¹²⁷

Although the Seventh Circuit explicitly said it would not evaluate Act 105 under the Equal Protection Clause, it did just that. The court affirmed the reasoning of the district court on each of the three steps of the rational basis review test.

B. THE EIGHTH AMENDMENT AND POLITICAL CONTROVERSY:

KOSILEK V. SPENCER

In *Kosilek v. Spencer (Kosilek II)*, the United States District Court for the District of Massachusetts granted an injunction in favor of the plaintiff Michelle Kosilek, a male-to-female transgender prisoner, requiring the Massachusetts Department of Corrections (MDOC) to provide her with sex-reassignment surgery.¹²⁸ The court’s order was the first in United States

¹²⁴ *Fields*, 653 F.3d at 556.

¹²⁵ *Fields*, 712 F. Supp. 2d at 868.

¹²⁶ The district court found that “[p]rison safety and security are legitimate penological interests,” but that Act 105 is not rationally related to “the DOC’s interests in protecting effeminate-appearing inmates from harm and maintaining the safety and security of other inmates, staff, and the institution.” *Fields*, 712 F. Supp. 2d at 867–68. The district court focused on testimony from the state’s security expert, who conceded that it would be an “incredible stretch” to say that prohibiting hormone therapy would prevent sexual assaults in prison. *Id.* at 868. The district court found no evidence that banning hormone therapy would decrease the risk that plaintiffs would become targets of sexual assault, and thus, the Act is not rationally related to the government’s stated interest in maintaining prison security. *Id.*

¹²⁷ *Fields*, 653 F.3d at 558.

¹²⁸ *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 197, 251 (D. Mass. 2012), *rev’d*, 774 F.3d 63 (1st Cir. 2014).

history to require a department of corrections to provide sex-reassignment surgery for a prisoner.¹²⁹ The district court held that the MDOC Commissioner's decision to deny Kosilek the surgery violated her Eighth Amendment right to be free from cruel and unusual punishment.¹³⁰ Specifically, the district court found that Kosilek had a serious medical need, GID, for which sex-reassignment surgery was the only adequate treatment, and that the MDOC Commissioner was deliberately indifferent to that need in refusing to provide the surgery.¹³¹

In January 2014, a three-judge panel of the First Circuit affirmed the district court's order.¹³² The panel held that the district court did not clearly err in finding that the MDOC's failure to provide surgery to Kosilek constituted inadequate medical care under the Eighth Amendment.¹³³ The panel also held that the district court did not err in finding that the MDOC had no valid penological reason for denying the surgery.¹³⁴ However, one month later, the First Circuit withdrew this opinion and granted a rehearing en banc.¹³⁵ On December 16, 2014, three of the five judges on the en banc panel voted to reverse the district court's order.¹³⁶ The two judges in the majority of the three-judge panel dissented from the en banc majority opinion.¹³⁷ The en banc majority examined *de novo* whether the treatment the MDOC offered Kosilek was constitutionally adequate, and determined that it was.¹³⁸

Although the district court's opinion has no precedential authority, its reasoning may still be instructive for future transgender litigants. The court's analysis shows signs that it was influenced by concerns about prejudice against transgender people. Importantly, the First Circuit agreed with the district court that political pressure and prejudice are not valid penological reasons for denying necessary medical treatment.¹³⁹ Rather, the First Circuit

¹²⁹ Associated Press, *Trans Inmate Asks US Supreme Court to Allow Sex-Reassignment Surgery*, GUARDIAN (Mar. 16, 2015, 17:18 EDT), <http://www.theguardian.com/us-news/2015/mar/16/prison-inmate-supreme-court-ruling-sex-resassignment-surgery>, archived at <http://perma.cc/5N6S-HTLR>.

¹³⁰ *Kosilek II*, 889 F. Supp. 2d at 247.

¹³¹ *Id.*

¹³² *Kosilek v. Spencer*, 740 F.3d 733, 736 (1st Cir. 2014), *withdrawn* Feb. 12, 2014.

¹³³ *Id.* at 772–73.

¹³⁴ *Id.*

¹³⁵ *Kosilek v. Spencer*, No. 12-2194, 2014 U.S. App. LEXIS 2660, at *3 (1st Cir. Feb. 12, 2014).

¹³⁶ *Kosilek v. Spencer*, 774 F.3d 63, 68 (1st Cir. 2014).

¹³⁷ *Id.* at 96 (Thompson, J., dissenting); *id.* at 113 (Kayatta, J., dissenting).

¹³⁸ *Id.* at 86, 89.

¹³⁹ *Id.* at 94–96.

held that the district court should have given more deference to the MDOC's medical and security experts in assessing whether the MDOC's motives were improper.¹⁴⁰ A careful reading of the district court's analysis may still be useful to future transgender litigants in determining under what set of facts a judge may be convinced of prison officials' deliberate indifference.

The district court's decision in *Kosilek II* was predicated on its decision in *Kosilek v. Maloney (Kosilek I)* ten years earlier.¹⁴¹ In that case, Kosilek sought an injunction to require the MDOC to provide her with hormone therapy.¹⁴² The court denied the injunction.¹⁴³ Although it found that she had a serious medical need, GID, for which she had not been adequately treated, the court held that the MDOC Commissioner had not been deliberately indifferent to her needs because he did not have actual knowledge of her suffering.¹⁴⁴ Going forward, the court said that security concerns might justify denial of hormone therapy if there was no possible way to reconcile the Commissioner's duty to protect inmates' safety with his duty to provide adequate medical care.¹⁴⁵ The court ruled that if the Commissioner were to decide in the future that safety concerns outweigh Kosilek's medical need, then a court would have to determine whether the Eighth Amendment was violated.¹⁴⁶ The court warned, however, that if the MDOC Commissioner were to base his decision on concerns about cost or political controversy, he would violate the Eighth Amendment.¹⁴⁷

In light of its decision in *Kosilek I*, the district court in *Kosilek II* analyzed the MDOC's stated security justification for denying Kosilek sex-reassignment surgery. The court found that Kosilek had a serious medical need for which the only adequate treatment was sex-reassignment surgery.¹⁴⁸ The court determined that, unlike in *Kosilek I*, the current MDOC Commissioner was deliberately indifferent to Kosilek's serious medical need because she had actual knowledge of Kosilek's suffering and her stated

¹⁴⁰ *Id.* at 86–89 (disagreeing with the district court's finding that the MDOC's medical expert was imprudent because of his belief that sex-reassignment surgery was not medically necessary); *id.* at 91–92 (holding that the MDOC's reliance on medical experts was reasonable and negates a finding of deliberate indifference); *id.* at 93–94 (holding that the district court should have given more deference to the MDOC's security experts).

¹⁴¹ *Kosilek v. Maloney (Kosilek I)*, 221 F. Supp. 2d 156 (D. Mass. 2002).

¹⁴² *Id.* at 159.

¹⁴³ *Id.* at 195.

¹⁴⁴ *Id.* at 161–62.

¹⁴⁵ *Id.* at 162.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 229–30 (D. Mass. 2012).

security concern was pretextual.¹⁴⁹ The court found that the real motive for prohibiting the surgery was the Commissioner's concerns about public and political criticism—a rationale which the court in *Kosilek I* said violates the Eighth Amendment.¹⁵⁰

Although *Kosilek* did not raise an equal protection claim in her complaint,¹⁵¹ and the district court did not mention the Fourteenth Amendment in its opinion, the district court's Eighth Amendment analysis was seemingly influenced by two equal protection principles. First, the court invoked the equal protection principle of similarly situated individuals, stressing that *Kosilek* was treated differently from similarly situated prisoners with more familiar medical needs because of the unpopular nature of her medical need. Second, in analyzing whether the prison officials' stated security justification was made in bad faith, the court applied a similar pretext analysis to that applied in equal protection cases in which the courts use "rational basis with bite" review.¹⁵² The court in *Kosilek II* did not clandestinely engage in equal protection analysis as the Seventh Circuit did in *Fields*,¹⁵³ but it introduced concepts that are not usually part of Eighth Amendment analysis.

The first influence of equal protection in the court's analysis is its references to similarly situated prisoners, a principle not typically present in Eighth Amendment analysis. For example, the district court cited to a portion of the Seventh Circuit's opinion in *Fields* that compared prisoners seeking hormone therapy to prisoners in need of cancer treatment: "[s]urely, had the [] legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional."¹⁵⁴ By including this quotation, the court demonstrated that *Kosilek* was treated differently than similarly situated prisoners with a more familiar medical need, and that the differential treatment was because of the unconventional nature of that need.

The court also suggested that the treatment of *Kosilek* was cruel and unusual because it was discriminatory, stating that "[i]t is unusual to treat a prisoner suffering severely from a gender identity disorder differently than the numerous inmates suffering from more familiar forms of mental

¹⁴⁹ *Id.* at 237–40.

¹⁵⁰ *Id.* at 240.

¹⁵¹ Second Amended Complaint at 13–14, *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012) (No. 00-12455-MLW).

¹⁵² See *supra* notes 36–41 and accompanying text.

¹⁵³ See *supra* Part III.A.

¹⁵⁴ *Kosilek II*, 889 F. Supp. 2d at 208 (quoting *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) (internal quotation marks omitted)).

illness.”¹⁵⁵ This quote suggests that the court, in determining that the prison officials acted with deliberate indifference, was persuaded, at least in part, by the fact that the officials were discriminating against her because of Kosilek’s GID.

Finally, the court compared Kosilek to non-transgender similarly situated prisoners, stating that “Kosilek shares with every other inmate in the DOC’s custody the right to have decisions concerning [her]¹⁵⁶ made by prison officials reasonably and in good faith in order to assure that [she] is not again subject to the cruel and unusual punishment that the Eighth Amendment prohibits.”¹⁵⁷ This statement suggests that prison officials did not simply violate Kosilek’s right to be free from cruel and unusual treatment; by violating her Eighth Amendment right *because* of her transgender status, they may have also violated her right to equal protection, as well.

The second apparent influence of equal protection principles on the district court’s decision in *Kosilek II* appears in its analysis of whether the MDOC had a legitimate penological reason to deny Kosilek’s treatment. Without explicitly invoking “rational basis with bite,”¹⁵⁸ the district court used similar language in drawing the line for legitimate penological interests under the Eighth Amendment. The “rational basis with bite” test comes from *United States Department of Agriculture v. Moreno*, in which the Supreme Court held “that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹⁵⁹ The district court’s analysis in *Kosilek II* mirrors the language in the “rational basis with bite” test. In *Kosilek II*, the court held that concerns about political or public criticism surrounding Kosilek’s status as both a convicted murderer and a transgender woman cannot constitute a legitimate penological interest under the Eighth Amendment.¹⁶⁰

Commissioner Dennehy claimed that Kosilek’s request for surgery was denied because of the risk it posed to prison security.¹⁶¹ Although the court held that prison security is a valid penological interest, it concluded that

¹⁵⁵ *Id.* at 205.

¹⁵⁶ The district court used a male pronoun to refer to Kosilek. *Id.* at 198.

¹⁵⁷ *Id.* at 205.

¹⁵⁸ See *supra* notes 38–41 and accompanying text (discussing “rational basis with bite”).

¹⁵⁹ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis omitted).

¹⁶⁰ *Kosilek II*, 889 F. Supp. 2d at 201 (“[S]ecurity is a legitimate consideration for Eighth Amendment purposes. A concern about political or public criticism for discharging a constitutional duty is not.” (quoting *Kosilek v. Maloney (Kosilek I)*, 221 F. Supp. 156, 162 (D. Mass. 2002) (internal quotation marks omitted))).

¹⁶¹ *Id.* at 240.

Dennehy's security concerns were pretextual¹⁶² and that her decision was instead based on a desire to avoid public and political criticism, which is not a permissible penological interest.¹⁶³ The court first grounded its reasoning in the Eighth Amendment:

Denying adequate medical care because of a fear of controversy or criticism from politicians, the press, and the public serves no legitimate penological purpose. It is precisely the type of conduct the Eighth Amendment prohibits . . . “[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹⁶⁴ Therefore, “[t]he right to be free of cruel and unusual punishments, like other guarantees of the Bill of Rights, may not be submitted to vote; it depends on the outcome of no elections.”¹⁶⁵

The court then went on to imply that the only reason Kosilek's request for surgery invited public criticism was that she was a convicted murderer:

Prisoners who have lost their liberty by murdering others may understandably be unsympathetic candidates for the humane treatment that they denied their victims. However, as future Supreme Court Justice Anthony Kennedy wrote in 1979: “[T]he whole point of the [Eighth] [A]mendment is to protect persons convicted of crimes. Eighth [A]mendment protections are not forfeited by one's prior acts.” It is despised criminals, like Kosilek, who are most likely to need the protection of the Eighth Amendment and its enforcement by the courts.¹⁶⁶

The court also cited a *Boston Globe* article that refers to Kosilek as a “certified wife killer,”¹⁶⁷ and another that states, “[t]he [Kosilek] trial

¹⁶² *Id.* at 239–40. The court made detailed findings of fact supporting this conclusion. The court found that Commissioner Dennehy “was determined not to be the first prison official to provide an inmate [with] sex reassignment surgery.” *Id.* at 201. Dennehy fired the prison doctor who had prescribed surgery and hired a doctor who she knew was opposed to prescribing the surgery to prisoners under any circumstance. *Id.* at 201–02. The court found that Dennehy departed from the department's established, written procedure for determining security risks, and she testified falsely about the risk. *Id.* at 240–41. The court detailed the specific pressure that Dennehy faced in the *Kosilek* case from both politicians and the media. Dennehy served under a lieutenant governor who openly opposed spending tax revenues on Kosilek's surgery. *Id.* at 203. Many members of the state legislature, including one representative who had a close relationship with Dennehy, opposed the same. *Id.* She coordinated a television appearance with that legislator to voice her opposition to the surgery. *Id.* at 223. The court also cited several *Boston Globe* articles, of which Dennehy was aware, ridiculing the idea that the state should spend money on a prisoner's sex-reassignment surgery. *Id.* at 225. The court concluded from this evidence that Dennehy's actual reason for denying Kosilek access to the surgery was because of fear of criticism and controversy. *Id.* at 198.

¹⁶³ *Id.* at 247.

¹⁶⁴ *Id.* at 203 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁶⁵ *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 268 (1972) (Brennan, J., concurring)).

¹⁶⁶ *Id.* at 203–04 (quoting *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979)).

¹⁶⁷ *Id.* at 214 (citing Brian McGrory, *A Test Case for Change*, BOSTON GLOBE, June 13, 2000, at B1).

underway in federal court in Boston is not about the rights of transsexuals. It's about the manipulations of a murderer."¹⁶⁸

If the court had stopped there, it might be said that the court was concerned only with the political and public criticism surrounding Kosilek based on her status as a "despised criminal" and "certified wife killer." However, a few paragraphs after the last excerpt, the court confirmed that it was concerned not only with discrimination based on her status as a murderer, but also on her status as a transgender woman. The court stated:

It has long been well-established that it is cruel for prison officials to permit an inmate to suffer unnecessarily from a serious medical need. It is unusual to treat a prisoner suffering severely from a gender identity disorder differently than the numerous inmates suffering from more familiar forms of mental illness. It is not permissible for prison officials to do so just because the fact that a gender identity disorder is a major mental illness is not understood by much of the public and the required treatment for it is unpopular.¹⁶⁹

Moreover, the court concluded that "the defendant has denied Kosilek sex reassignment surgery because of the belief that the idea of providing such treatment for a transsexual who murdered his wife is offensive to many members of the community, many of their elected representatives, and to the actively interested media as well."¹⁷⁰ Therefore, Kosilek's right to equal protection of her Eighth Amendment right seems to be driving the court's holding.

The district court did not expressly rule on whether the MDOC's decision to deny Kosilek's request for sex-reassignment surgery violated the Equal Protection Clause, and it is not obvious from the opinion that the court would have found a violation. It is clear, however, that the court's reasoning under the Eighth Amendment was influenced by its concerns about discrimination against transgender prisoners, as evidenced by its references to similarly situated prisoners and its concerns about political and public criticism based on Kosilek's status as a transgender woman.

On appeal, the en banc majority of the First Circuit agreed with the district court that "public and political criticism" could be grounds for a finding of deliberate indifference under the Eighth Amendment where the plaintiff is also able to show that the prison officials' security concerns were completely pretextual.¹⁷¹ The First Circuit disagreed, however, with the district court's findings that the MDOC was motivated only by public and

¹⁶⁸ *Id.* at 225 (citing Eileen McNamara, *When Gender Isn't Relevant*, BOSTON GLOBE, June 11, 2006, at B1).

¹⁶⁹ *Id.* at 205.

¹⁷⁰ *Id.* at 247.

¹⁷¹ See *Kosilek v. Spencer*, 774 F.3d 63, 94–96 (1st Cir. 2014).

political criticism and that the MDOC's safety and security concerns were pretextual.¹⁷² The First Circuit held that the district court should have given more deference to the prison officials on safety and security.¹⁷³ Moreover, the First Circuit held that even if Commissioner Dennehy were motivated by public and political criticism, her motivations were not enough to show that the MDOC continued to be motivated by public and political criticism after she left the position.¹⁷⁴

Unlike the district court's opinion, the First Circuit's opinion shows no apparent signs of equal protection influence or concerns about prejudice against transgender people. However, in her dissent, Judge Thompson directly addresses the issue of unfair prejudice against transgender people that the district court only hinted about. Comparing the majority's opinion to two of the most notorious equal protection cases in United States history, Judge Thompson speculates that the majority's decision will not stand the test of time:

I am confident that I would not need to pen this dissent, over twenty years after Kosilek's quest for constitutionally adequate medical care began, were she not seeking a treatment that many see as strange or immoral. Prejudice and fear of the unfamiliar have undoubtedly played a role in this matter's protraction. Whether today's decision brings this case to a close, I cannot say. But I am confident that this decision will not stand the test of time, ultimately being shelved with the likes of *Plessy v. Ferguson*, 163 U.S. 537 (1896), deeming constitutional state laws requiring racial segregation, and *Korematsu v. United States*, 323 U.S. 214 (1944), finding constitutional the internment of Japanese-Americans in camps during World War II. I only hope that day is not far in the future, for the precedent the majority creates is damaging. It paves the way for unprincipled grants of en banc relief, decimates the deference paid to a trial judge following a bench trial, aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.¹⁷⁵

The First Circuit's opinion leaves open the question of what set of facts would be sufficient to establish deliberate indifference to a prisoner's need for sex-reassignment surgery. The district court's opinion in *Kosilek II* and Judge Thompson's dissent to the First Circuit opinion suggest that some federal judges will be receptive to an argument framed in terms of discrimination and equal protection principles.

¹⁷² *Id.* at 92–96.

¹⁷³ *Id.* at 93–94.

¹⁷⁴ *Id.* at 95–96.

¹⁷⁵ *Id.* at 113 (Thompson, J., dissenting).

C. *FIELDS* AND *KOSILEK II* COMPARED AND IN THE BROADER CONTEXT

As in the Seventh Circuit's opinion in *Fields*, the district court's Eighth Amendment analysis in *Kosilek II* shows the influence of equal protection principles, albeit more subtly. In *Fields*, the Seventh Circuit essentially affirmed the district court's reasoning for finding an equal protection violation, without expressly addressing the claim. In *Kosilek II*, the court did not reason through all of the elements of an equal protection claim, but rather applied equal protection concepts like similarly situated individuals, pretext, and animus to the Eighth Amendment analysis.¹⁷⁶

There are two obvious differences between *Fields* and the district court's opinion in *Kosilek II* that account for the varying levels of equal protection influence. First, in *Fields*, the district court had previously held that the Wisconsin law violated the Eighth Amendment and the Equal Protection Clause.¹⁷⁷ The Seventh Circuit, in affirming the district court's Eighth Amendment holding, also affirmed much of the reasoning that supported the equal protection holding below. Unlike *Fields*, there was no earlier decision based on equal protection grounds in *Kosilek II*. The plaintiff in that case did not even raise an equal protection argument in the pleadings.¹⁷⁸

The second difference is that *Fields* dealt with a state law banning hormone therapy and sex-reassignment surgery for all prisoners. Such a broad state-wide law is more susceptible to an equal protection challenge because it openly classifies a group of people for different treatment. In *Kosilek II*, the decision to deny the surgery to Kosilek was individualized. One may, however, infer that the district court thought this individualized decision was part of a broader unwritten policy from the court's finding that Commissioner Dennehy was "determined not to be the first prison official to provide an inmate sex reassignment surgery."¹⁷⁹ Furthermore, the court was surely aware of two other recent lawsuits against the MDOC in the

¹⁷⁶ Prison health care is not the only area of transgender rights doctrine with examples of clandestine equal protection analysis. Professor Gabriel Arkles noted in his article on the segregation of transgender prisoners in solitary confinement that the district court in the unreported case *Tates v. Blanas*, "[w]ithout explicitly naming it as such, [] engaged in an Equal Protection analysis comparing the treatment of transgender detainees with the treatment of similarly situated non-transgender detainees." Arkles, *supra* note 79, at 554 (citing *Tates v. Blanas*, No. S-00-2539 OMP, 2003 WL 23864868, at *2 (E.D. Cal. Mar. 11, 2003)).

¹⁷⁷ *Fields v. United States*, 712 F. Supp. 2d 830, 862–63, 869 (E.D. Wis. 2010).

¹⁷⁸ Second Amended Complaint at 13–14, *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012) (No. 00-12455-MLW).

¹⁷⁹ *Kosilek II*, 889 F. Supp. 2d at 201.

Massachusetts district court filed by transgender prisoners who were denied access to hormone therapy¹⁸⁰ and sex-reassignment surgery.¹⁸¹

Fields and *Kosilek II* are not the only cases addressing the issue of whether prisoners are entitled to hormone therapy and sex-reassignment surgery. At least four other courts have recently granted injunctions or motions to compel in favor of the prisoners, requiring prison officials to administer hormones or allow the prisoner to be evaluated for sex-reassignment surgery.¹⁸² Many more have allowed prisoners to proceed on their Eighth Amendment claims by denying the prison officials' dispositive motions.¹⁸³

¹⁸⁰ *Battista v. Dennehy*, No. 05-11456-DPW, 2006 WL 1581528 (D. Mass. Mar. 22, 2006) (seeking hormone therapy), *aff'd*, *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011).

¹⁸¹ *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252 (D. Mass. 2012) (seeking screening for sex-reassignment surgery).

¹⁸² *See Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (affirming district court's decision to grant an injunction requiring prison officials to administer hormone therapy because the district court reasonably concluded that prison officials were deliberately indifferent); *De'lonta v. Clarke*, No. 7:11-cv-00257, 2013 WL 4584684 (W.D. Va. Aug. 28, 2013) (granting plaintiff's motion to compel prison officials to make her available to be evaluated for readiness for sex-reassignment surgery by her own expert, at her own expense); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252–53 (D. Mass. 2012) (holding that prison officials were deliberately indifferent, that the blanket ban on sex-reassignment surgery violates the Eighth Amendment, and ordering officials to provide medical evaluations and treatment based on an individualized assessment of plaintiff's needs, including readiness for sex-reassignment surgery); *Brugliera v. Comm'r of Mass. Dep't of Corr.*, No. 07-40323-JLT, 2009 U.S. Dist. LEXIS 131002 at 36 (D. Mass. Dec. 16, 2009) (granting plaintiff's Second Renewed Motion for Preliminary Injunction requiring prison officials to provide plaintiff with hormone therapy).

¹⁸³ *See, e.g., De'lonta v. Johnson*, 708 F.3d 520, 522, 525 (4th Cir. 2013) (holding that plaintiff has pled facts sufficient to state a claim under Eighth Amendment where prison officials have continued to deny consideration of sex-reassignment surgery); *De'lonta v. Angelone*, 330 F.3d 630, 631–32 (4th Cir. 2003) (holding that plaintiff has pled facts sufficient to state a claim under Eighth Amendment where prison officials abruptly cut off hormone therapy); *Allard v. Gomez*, 9 Fed. App'x 793, 795 (9th Cir. 2001) (reversing district court's grant of summary judgment for defendant because triable issues of fact exist as to whether hormone therapy was denied on the basis of an individualized medical evaluation or on the basis of blanket rule, which would constitute deliberate indifference); *Franklin v. Hardy*, No. 12 C 2970, 2013 WL 3147365 at *3–4 (N.D. Ill. June 19, 2013) (holding that plaintiff has stated a plausible claim under the Eighth Amendment for failure to treat her GID); *Konitzer v. Wall*, No. 12-cv-874-bbc, 2013 WL 2297059 at *1 (W.D. Wis. May 24, 2013) (same); *Alexander v. Weiner*, 841 F. Supp. 2d 486, 492 (D. Mass. 2012) (same); *Adams v. Fed. Bur. of Prisons*, 716 F. Supp. 2d 107, 112–13 (D. Mass. 2010) (denying defendants' motion to dismiss because even though prison officials have ceased denial of treatment, they have not proven that such denial is unlikely to recur); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) (holding plaintiff has alleged facts sufficient to show prison officials were deliberately indifferent to her serious medical need because they refused to evaluate her for GID); *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (holding that defendants

Although the district court's opinion in *Kosilek II* was eventually reversed and *Fields* alone does not establish a pattern of equal protection influence, they are still important opinions because they show how federal judges are thinking about the issue of transgender prisoner health care. *Fields* and *Kosilek II* are among only a few cases that have gone to trial, in which the district courts made lengthy findings of fact on the true motivations behind the prison officials' decisions.¹⁸⁴ Although the First Circuit ultimately held that more facts were needed to support the district court's finding of deliberate indifference in *Kosilek II*, reading the district court's opinion in conjunction with the First Circuit's opinion is instructive for future transgender litigants seeking to build a case of deliberate indifference. Moreover, *Fields* and *Kosilek II* are two of the most written-about cases in legal literature discussing what level of health care is constitutionally required for transgender prisoners.¹⁸⁵

have failed to show they were not deliberately indifferent as a matter of law because blanket policy providing no treatment for prisoners diagnosed with GID only after being incarcerated violates Eighth Amendment), *vacated*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (holding that the previous order was properly decided, but defendants made admissions of material fact in their Motion to Reconsider that necessitated vacation).

¹⁸⁴ *Fields* was decided after a one-day bench trial on March 31, 2010. *Fields v. Smith*, 712 F. Supp. 2d 830, 834 (E.D. Wis. 2010). *Kosilek II* was decided after a twenty-eight-day bench trial in the spring of 2006. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 212, 225 (D. Mass. 2012). The two other cases decided following bench trials were *Battista v. Clarke*, 645 F.3d at 451, and *Soneeya v. Spencer*, 851 F. Supp. 2d at 230.

¹⁸⁵ See generally David W. Austin, *Sexual Orientation and Gender Identity*, 47 INT'L LAW. 469 (2013) (discussing developments in gender identity law in 2012 including *Kosilek II*); Rena Lindevaldson, *A State's Obligation to Fund Hormonal Therapy and Sex-Reassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 LIBERTY U.L. REV. 15 (2012) (discussing *Fields* and *Kosilek II* in arguing that the Eighth Amendment does not require a state to pay for hormone therapy or sex-reassignment surgery); Givens, *supra* note 67 (arguing that the Seventh Circuit's opinion in *Fields* provides the clearest and most reasonable assessment of why GID should constitute a serious medical need under the Eighth Amendment); Lila Leonard, Note, *Gender Reassignment Surgery in Prisons: How the Eighth Amendment Guarantees Medical Treatments Not Covered by Private Insurance or Medicare for Law-Abiding Citizens*, 11 RUTGERS J. L. & PUB. POL'Y 626 (2014) (criticizing the decision in *Kosilek II* because it requires a higher level of care for prisoners than is typically covered by Medicare and private health insurance plans for law-abiding citizens); Silpa Maruri, Note, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807 (2011) (discussing *Fields* and *Kosilek I* in arguing for a new legal strategy for transgender prisoners based on quasi-fundamental rights established in *Plyler v. Doe*); Ethan Z. Tieger, Note, *Transsexual Prisoners and the Eighth Amendment: A Reconsideration of Kosilek v. Spencer and Why Prison Officials May Not Be Constitutionally Required to Provide Sex-Reassignment Surgery*, 47 SUFFOLK U. L. REV. 627 (2014) (arguing that the Court's opinion in *Kosilek II* failed to consider security concerns after the sex-reassignment surgery and ignored the distinction between "curative" and "adequate" care for gender dysphoria or GID).

IV. GOING FORWARD: FRAMING A NARRATIVE OF DISCRIMINATION UNDER THE EIGHTH AMENDMENT

The opinions in *Fields* and *Kosilek II* present transgender legal advocates with an opportunity to develop a doctrine based on discrimination within the Eighth Amendment. As demonstrated in those two cases, discrimination may be relevant to the subjective prong of Eighth Amendment analysis: refusing medically necessary treatment based on political animus towards transgender people is not a legitimate penological interest, and thus constitutes deliberate indifference. For transgender prisoners seeking gender-confirming health care, an Eighth Amendment doctrine based on discrimination may be the best way to fight discrimination and win cases.

The path forward does not require a change in legal claims, but rather a change in factual advocacy. Using concepts of similarly situated individuals, pretext, and political and public controversy, legal advocates should start framing plaintiffs' factual summaries around stories of discrimination. This concept, known as "story framing," is one of the most important advocacy tools a lawyer has to sway a fact-finder.¹⁸⁶

In particular, legal advocates should pay close attention to the facts the courts found persuasive in *Fields* and *Kosilek II*. Both courts focused on the fact that prisoners with GID were treated differently than other prisoners with more socially accepted medical needs (like cancer).¹⁸⁷ Furthermore, both courts relied on facts showing that denial of treatment was not related to any prison security benefits. In particular, the courts focused on concessions by the state's security expert that denying hormone therapy does not decrease the risk of sexual assault¹⁸⁸ and the fact that prison officials departed from the department's established, written procedure for determining security risks.¹⁸⁹ In *Kosilek II*, the court also focused on facts that showed that the MDOC Commissioner's actual reason for denying the surgery was a fear of

¹⁸⁶ Steven Lubet, *Story Framing*, 74 TEMP. L. REV. 59, 61 (2001) ("The story frame may well be the trial lawyer's most powerful rhetorical tool, because of its extraordinary effectiveness in the battle for the fact-finder's imagination.").

¹⁸⁷ *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011) (relying on medical testimony that "no other state law or policy, besides Act 105 . . . prohibits prison doctors from providing inmates with medically necessary treatment"); *Kosilek II*, 889 F. Supp. 2d at 199 ("[s]urely, had the [] legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional") (quoting *Fields*, 653 F.3d at 556).

¹⁸⁸ *Fields v. Smith*, 712 F. Supp. 2d 830, 868 (E.D. Wis. 2010) (relying on the state's security expert's concession that it would be an "incredible stretch" to say that prohibiting hormone therapy would prevent sexual assaults in prison) (internal citations omitted).

¹⁸⁹ *Kosilek II*, 889 F. Supp. 2d at 240–41 (finding that prison officials departed from the department's "established, written procedure" for determining security risks).

criticism and controversy.¹⁹⁰ Legal advocates should look for the existence of similar facts to highlight in their complaints.

As litigants frame their factual allegations around stories of discrimination, more courts will discuss discrimination in their opinions, and a set of persuasive case law will develop upon which future courts and litigants can rely as authority. The ultimate goal in developing this new Eighth Amendment doctrine would be to force prisons to change their policies on providing gender-confirming health care while also addressing the underlying discrimination against transgender people in prisons. If discrimination against transgender prisoners constitutes deliberate indifference in violation of the Eighth Amendment, prisons will have no choice but to start providing gender-confirming health care to those prisoners who need it.

CONCLUSION

Obtaining access to gender-confirming health care is a serious problem for many transgender prisoners. In bringing these suits, transgender litigants need a litigation strategy that is effective not only in obtaining the health care they seek, but also in addressing the underlying discrimination behind prison policies restricting gender-confirming health care.

The usual strategy for fighting discrimination, the Equal Protection Clause, is a losing strategy for transgender litigants as long as the Supreme Court remains unwilling to extend heightened scrutiny to new classes of people. Transgender prisoners have had more success litigating under the Eighth Amendment. Although the Eighth Amendment was not designed to address discrimination, the courts in *Fields* and *Kosilek II* used the Eighth Amendment's deliberate indifference prong to reject the prison policies because of their discriminatory nature. If transgender litigants can build off of these cases to create an antidiscrimination doctrine within the Eighth Amendment, they may be able to achieve the goal of obtaining the health care they need while fighting discrimination.

¹⁹⁰ See *supra* note 162 (discussing the evidence relied on by the court in *Kosilek II* to conclude that Dennehy's stated security justification was pretextual, and that the actual reason she denied Kosilek's request was a fear of public and political controversy).

