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ADREE EDMO, THE EIGHTH AMENDMENT, AND
ABOLITION: EVALUATING THE FIGHT FOR GENDER-
AFFIRMING CARE IN PRISONS

MIKE GREENE*

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This Comment includes brief but frank discussions about traumatic themes including self-harm, domestic violence, and sexual abuse. These discussions are included to fully and honestly render this Comment's subjects and their cases.

INTRODUCTION: QUEER AND TRANS LEADERSHIP IN
EMERGING ABOLITIONIST MOVEMENTS

George Floyd's murder at the hands of the Minneapolis police in May 2020 ignited a nationwide uprising against the carceral state that challenged the legitimacy of policing and called into question many of the basic notions that underpin the criminal punishment system.¹ The uprising's ideology is rooted in grassroots abolitionist thought and abolitionist demands like "defund the police" that, if adopted, would dramatically reduce the size and scope of the criminal punishment system.² Abolition is inextricably tied to movements for queer and trans³ liberation.⁴ Police and the prison industrial complex (PIC) target queer and transgender people and subject them to shockingly high rates of police violence, incarceration, and brutal treatment while incarcerated.⁵ Ever since the Stonewall uprising in 1969, when thousands of queer and trans people of color rioted to free themselves from extreme police surveillance and violence, queer and trans organizers, thinkers, artists, and activists have led the fight against prisons, police, and police violence.⁶ Trans abolitionists, especially Black and Indigenous trans women, continue to constitute the vanguard of movements to dismantle the carceral state and build transformative solutions to state and interpersonal violence.⁷

1. See, e.g., Derrick B. Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/79PB-YL7V>] (explaining the timeline of events and the hundreds of protests that followed the death of George Floyd).

2. See, e.g., Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/ZXG7-BSNA>] (arguing for abolition rather than reform as the most effective means to "diminish police violence").

3. To avoid acronyms or lengthy explanations, this Comment will use the terms "trans" and "transgender" as blanket adjectives that include all transgender, gender nonconforming, and intersex people. The World Professional Association of Transgender Health defines "Transgender" as an adjective describing "a diverse group of individuals who cross or transcend culturally defined categories of gender." ELI COLEMAN ET AL., WORLD PROFESSIONAL ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 97 (7th ed. 2012) [hereinafter WPATH STANDARDS].

4. See, e.g., *Trans Remembrance, Resilience, & Resistance*, CRITICAL RESISTANCE (Nov. 29, 2017) [hereinafter *Trans Remembrance*], <http://criticalresistance.org/trans-remembrance-resilience-resistance> [<https://perma.cc/M5QZ-SCCA>] (describing the trans abolition movement).

5. See, e.g., *id.* ("Transgender Black women and other women of color are primary targets of the prison industrial complex (PIC), facing extreme rates of police violence").

6. See Gem Nwanne, *Op-Ed: There Is No Queer Liberation Without Prison Abolition*, THEM (June 19, 2020), <https://www.them.us/story/no-queer-liberation-without-prison-abolition> [<https://perma.cc/2XP8-6KNT>]; see also Dean Spade, *The Queer and Trans Fight for Liberation—and Abolition*, LEVEL (Oct. 13, 2020), <https://level.medium.com/the-queer-and-trans-fight-for-liberation-and-abolition-caec82374018> [<https://perma.cc/EH4Q-HZDR>].

7. See, e.g., *Trans Remembrance*, *supra* note 4.

Abolition is both a long-term goal and a practical organizing tool.⁸ The abolitionist movement's long-term aim is to completely dismantle the criminal punishment system and reinvest in communities to build a society in which policing and imprisonment can no longer exist.⁹ The criminal punishment system will not be abolished overnight.¹⁰ Its constituent institutions, like police unions, thousands of state, local, and federal government agencies, and corporations that profit off of imprisonment, are entrenched and wield immense political and physical power.¹¹ The criminal punishment system inflicts immense harm.¹² Activists, organizers, and attorneys should fight for reforms that reduce that suffering. However, many popular and well-intentioned reforms meant to address the suffering caused by policing and imprisonment add to the criminal punishment system's power.¹³ Abolitionists must evaluate proposed incremental reforms and reject those that expand PIC and police power.¹⁴

In July 2020, while masses of people in cities across America were demonstrating against the carceral state, Adree Edmo, a Shoshone-Bannock citizen and transgender woman, became the first person in the United States to receive court-ordered gender confirmation surgery (GCS) while in prison.¹⁵ Edmo won the right to her gender-affirming care in February 2020, after the Ninth Circuit declined to rehear *en*

8. See *Our Communities, Our Solutions: An Organizer's Toolkit for Developing Campaigns to Abolish Policing*, CRITICAL RESISTANCE (Oct. 2020) [hereinafter *Our Communities, Our Solutions*], <http://criticalresistance.org/abolish-policing-toolkit> [https://perma.cc/R95J-2JFV] (explaining the rationale behind abolition).

9. See *id.* ("Because we seek to abolish the [Prison Industrial Complex], we cannot support any work that extends its life or scope.")

10. See Kaba, *supra* note 2 (summarizing the history of policing and the movement for police reform in the context of Defund the Police).

11. See, e.g., Malike Sidibe, Opinion, *To Hold Police Accountable, Ax the Arbitrators*, N.Y. TIMES (Oct. 3, 2020), <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-unions.html?searchResultPosition=30> [https://perma.cc/58JG-Z2ND] ("Police officers are not like other workers.")

12. For one example of the harm inflicted by the criminal punishment system, see UNITED STATES DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE HAMPTON ROADS REGIONAL JAIL (PORTSMOUTH, VIRGINIA), 1–2 (2018) [hereinafter HAMPTON ROADS INVESTIGATION].

13. See, e.g., Sam Collings-Wells, *How Well-Intentioned Reforms Could Worsen Mass Incarceration*, WASH. POST (Nov. 5, 2019), <https://www.washingtonpost.com/outlook/2019/11/05/how-well-intentioned-reforms-could-worsen-mass-incarceration> [https://perma.cc/TU8S-RVQQ] (explaining how prior reforms "contributed to the rise of a carceral machinery").

14. See *Our Communities, Our Solutions*, *supra* note 8.

15. E.g., Andy Rose & Hollie Silverman, *A Transgender Female Inmate Received Her Gender Confirmation Surgery After A Three-Year Court Battle*, CNN (July 29, 2020, 3:32 AM), <https://www.cnn.com/2020/07/29/us/transgender-prisoner-gender-confirmation-surgery/index.html> [https://perma.cc/MM4R-RRXM]; Amanda Peacher, *In A First, Transgender Inmate Receives Court-Ordered Surgery*, INDIAN COUNTRY TODAY (Aug. 14, 2020), <https://indiancountrytoday.com/news/in-a-first-transgender-inmate-receives-court-ordered-surgery-vZ-dsBYYxk2-jsRrwnjUA> [https://perma.cc/W7SL-HTFW].

banc an earlier injunction which ordered the Idaho Department of Corrections (IDOC) and prison healthcare contractor Corizon, Inc. to provide GCS for Edmo on the grounds that denying her GCS violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁶ By ruling that an incarcerated person was entitled to state-provisioned GCS, the Ninth Circuit split from the First and the Fifth circuits;¹⁷ the circuit split remains unresolved because the Supreme Court denied IDOC and Corizon's petition for certiorari.¹⁸

Winning Edmo's procedure was an unqualified success for Edmo and the attorneys and activists who have, for years, pursued the Eighth Amendment litigation strategy to secure gender-affirming care, and GCS specifically, for transgender incarcerated individuals.¹⁹ However, the trans liberation movement demands more than delayed, difficult to access, and highly litigated care for individual transgender people in prison.²⁰ Activists and attorneys fighting for trans liberation must fight to abolish criminalization and imprisonment altogether.²¹

This Comment argues that the Eighth Amendment litigation strategy to secure GCS for incarcerated transgender people is a non-abolitionist "reformist" reform that expands the criminal punishment system that perpetuates state violence against transgender people.²² This Comment proposes an abolitionist framework as a transformative approach to evaluating criminal punishment system reforms and securing gender-affirming care for transgender people, incarcerated or otherwise.²³ This Comment then proposes two abolitionist steps towards trans justice, health, and liberation.

This Comment will first provide background on gender-affirming medical care, current medical standards for assessing gender-affirming care, and the standards that courts use to evaluate Eighth Amendment cruel and unusual punishment claims.²⁴ Next, this Comment will

16. *Edmo v. Corizon, Inc.*, 949 F.3d 489, 490 (9th Cir. 2020); *see also* Rose & Silverman, *supra* note 15.

17. *Edmo*, 949 F.3d at 490.

18. *Idaho Dep't of Correction v. Edmo*, 935 F.3d 757 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 610.

19. *See* discussion, *infra* Section I.D.

20. *See Trans Agenda for Liberation*, TRANSGENDER L. CTR., <https://transgenderlawcenter.org/trans-agenda-for-liberation> [<https://perma.cc/7XCB-E5A9>] (last visited Dec. 6, 2021).

21. *See, e.g.*, Alex Green, Opinion, *Trans Liberation Can't Happen Until We Abolish Prisons*, XTRAMAG. (July 27, 2020, 10:59 AM), <https://xtramagazine.com/power/prisons-abolition-trans-liberation-176557> [<https://perma.cc/BLA4-DLQ6>] ("Prison abolition is an urgent and necessary project for trans and queer liberation.").

22. *See* discussion, *infra* Part II.

23. *See* discussion, *infra* Section II.A.

24. *See* discussion, *infra* Sections I.B–C.

examine three cases to demonstrate the legal and political contours of the circuit split over the Eighth Amendment litigation strategy: Edmo's case against IDOC and Corizon, Inc., *Kosilek v. Spencer*, and *Gibson v. Collier*.²⁵ Finally, this Comment will establish a background for abolitionist thinking, propose an abolitionist framework to evaluate litigation strategies and reforms, evaluate the Eighth Amendment litigation strategy using this framework, and propose decriminalizing sex work and defunding the police as more substantial, abolitionist steps towards trans justice, health, safety, and liberation.²⁶

I. BACKGROUND: PRISON HEALTH CARE, GENDER-AFFIRMING CARE, AND THE EIGHTH AMENDMENT

This section will provide background on the Eighth Amendment litigation strategy's component parts.²⁷ First, this section will provide some background on the general inadequacy of prison health care.²⁸ This section will then introduce gender-affirming health care and the medical standards used to evaluate transgender people's medical needs.²⁹ Next, this section will describe the two-pronged test courts use to evaluate Eighth Amendment claims that arise out of prison conditions.³⁰ Finally, this section will examine three cases from the First, Fifth, and Ninth Circuits that have all reached different conclusions about Eighth Amendment claims made by incarcerated transgender people against prisons that have denied them GCS.³¹

A. Prison Health Care Is a National Scandal

Prisons and jails are constitutionally mandated to provide health care for the individuals incarcerated within them "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards."³² However, egregiously poor-quality health care in prisons and jails has been well documented for decades.³³ Chronic underfunding, lack of access to

25. See discussion, *infra* Section I.D.

26. See discussion, *infra* Part II.

27. See discussion, *infra* Part I.

28. See discussion, *infra* Section I.A.

29. See discussion, *infra* Section I.B.

30. See discussion, *infra* Section I.C.

31. See discussion, *infra* Section I.D.

32. United States v. DeColoero, 821 F.2d 39, 43 (1st Cir. 1987).

33. See, e.g., Blake Ellis & Melanie Hicken, *Investigation Exposes Preventable Deaths and Dangerous Care that Government Agencies Have Failed to Stop*, CNN (June 25, 2019), <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/#:~:text=A%20CNN%20investigation%20exposes%20preventable,agencies%20have%20failed%20to%20stop.&text=The%20pleas%20for%20help%20describe,and%20treatable%20conditions%20>

preventive care, prison populations' stigmatization, harsh and unsanitary living conditions, and chronic health conditions attributable to incarcerated people's pre-incarceration poverty result in shockingly poor health outcomes for individuals in prisons.³⁴ Mental health care available to individuals in prisons is also shockingly limited.³⁵ Despite years of increasing public awareness about the correlation between mental illness and incarceration, many prisons house individuals with mental health problems in restrictive housing—also known as solitary confinement—with minimal access to meaningful mental health care.³⁶

People who leave prisons experience a range of poor health outcomes, including elevated mortality rates and other physical and mental health problems.³⁷ Prison populations' explosion since the 1980s has only deepened the prison healthcare crisis.³⁸ In the United States, prison and jail health care is so bad and the prison population is so large that some public health experts have concluded that poor-quality prison health care contributes directly to population-wide increases in mortality and decreases in life expectancy in the United States compared to other wealthy democracies.³⁹

turning%20deadly.&text=He%20died%20after%20seeking%20medical,according%20to%20a%20federal%20investigation. [https://perma.cc/BR6U-LD2D]; Amy Petre Hill, Note, *Death through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 223–24 (2002); Corene Kendrick, *Arizona Prison Officials Found in Contempt for Massive Prison Health Care Scandal*, ACLU (June 25, 2018, 11:45 AM), <https://www.aclu.org/blog/prisoners-rights/medical-and-mental-health-care/arizona-prison-officials-found-contempt-massive> [https://perma.cc/9HHM-9RH2]; Steve Coll, *The Jail Health-Care Crisis: The Opioid Epidemic And Other Public-Health Emergencies Are Being Aggravated by Failings in the Criminal-Justice System*, NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [https://perma.cc/RK2L-R8RU]; see also HAMPTON ROADS INVESTIGATION, *supra* note 12, at 1–2.

34. See, e.g., Michael Massoglia & Brianna Remster, *Linkages Between Incarceration and Health*, 134 PUB. HEALTH REP. (Supp. 1) 8S, 10S (2019), <https://journals.sagepub.com/doi/pdf/10.1177/0033354919826563> [https://perma.cc/54BS-4YRD].

35. See Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, THE MARSHALL PROJECT (Nov. 21, 2018), <https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons> [https://perma.cc/SW9E-U29X].

36. See, e.g., Léon Digard, Sara Sullivan, & Elena Vanko, *Rethinking Restricting Housing: Lessons from Five U.S. Jail and Prison Systems*, VERA INT. JUST. (May 2018), <https://www.vera.org/rethinking-restrictive-housing> [https://perma.cc/J2LD-K6NW] (“[P]eople with mental health needs . . . were more likely to be held in restrictive housing than other incarcerated people.”).

37. See Massoglia & Remster, *supra* note 34, at 9S.

38. *Id.* at 8S.

39. Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies*, 54 CRIMINOLOGY 360, 373 (2016) (concluding that each 1 per 1,000 increase in incarceration is associated with a 0.29 year decrease in life expectancy for males and 0.37 year decrease in life expectancy for females).

Since the 1980s, the push to cut healthcare costs in prisons and jails has led to a wave of privatization and the creation of a prison healthcare industry.⁴⁰ One pernicious dimension of private health care in prisons is the near universal use of “capitation systems” under which healthcare contractors are paid a fixed rate for each incarcerated individual, regardless of the care provided.⁴¹ These systems incentivize providers to withhold care and ignore the sickest patients to increase their profits.⁴² Predictably, many have blamed the industry’s drive to cut costs at the expense of incarcerated people’s health for mistakes, injuries, and even deaths caused by untrained and underqualified medical staff, botched procedures, and questionable medical decisions.⁴³ For example, the U.S. District Court for the District of Arizona held Corizon, Inc., a private prison healthcare provider in Arizona—and a party to Edmo’s GCS case—in contempt for failing to address recurring problems that led to deaths “caused by or affected in a negative manner by healthcare personnel.”⁴⁴

The COVID-19 pandemic exposed state and federal prison health officials’ callousness and incompetence.⁴⁵ Across the United States, officials took little action to reduce the spread of COVID-19 in their facilities.⁴⁶ A state-by-state investigation into prison COVID-19 responses found that few states implemented universal testing, most states failed to meaningfully reduce their prison population, and most did not offer any transparency about which and how many incarcerated people the prisons tested or released.⁴⁷ Through June 2021, over

40. See David Royse, *Medical battle behind bars: Big prison healthcare firm Corizon struggles to win contracts*, MODERN HEALTHCARE (Apr. 11, 2015, 1:00 AM), <https://www.modernhealthcare.com/article/20150411/MAGAZINE/304119981/medical-battle-behind-bars-big-prison-healthcare-firm-corizon-struggles-to-win-contracts> [https://perma.cc/TCT4-YRXK] (explaining that the majority of states contract with “prison healthcare services”).

41. Molly Rothschild, Note, *Cruel and Unusual Prison Healthcare: A Look at the Arizona Class Action Litigation of Parsons v. Ryan and Systemic Deficiencies of Private Health Services in Prison*, 61 ARIZ. L. REV. 945, 975–76 (2019) (quoting *Prison Healthcare: Costs and Quality*, PEW CHARITABLE TR., at 4 (Oct. 2017)).

42. *Id.* at 976.

43. See, e.g., Royse, *supra* note 40.

44. Kendrick, *supra* note 33.

45. See Emily Widra & Dylan Hayre, *Failing Grades: State’s Responses to COVID-19 in Jails & Prisons*, PRISON POL’Y INITIATIVE (June 25, 2020), https://www.prisonpolicy.org/reports/failing_grades.html [https://perma.cc/8DH3-WPGU] (“[S]tate responses [to COVID-19] ranged from disorganized or ineffective, at best, to callously nonexistent at worst.”).

46. *Id.*

47. *Id.*

In some states, we observed significant jail population reductions. Yet no state had close to adequate prison population reductions, despite some governors issuing orders or guidance that, on their face, were intended to release more people quickly. Universal testing was also scarce. Finally, only a few

390,000 incarcerated people tested positive for COVID-19, and over 2,500 had died.⁴⁸ Prison health officials' failure to reduce the number of incarcerated people and take even rudimentary measures to curb the enormous COVID-19 caseload in prisons also exposed surrounding communities to outbreaks and excess death.⁴⁹ In another study, researchers determined that mass incarceration added more than half a million community cases nationwide over just three months of the pandemic.⁵⁰

B. Gender-Affirming Health Care

Given that courts have mandated prisons and jails to provide health care that is at least nominally "commensurate with modern medical science,"⁵¹ this Comment will next introduce the medical terms and standards for gender-affirming health care used by both prison healthcare providers and Eighth Amendment litigants.⁵² The World Professional Association for Transgender Health (WPATH), a leading authority on transgender health care, promulgates its Standards of Care to healthcare providers to help their transgender patients achieve "lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment."⁵³

1. Gender Nonconformity and Gender Dysphoria

The WPATH Standards of Care describe two interrelated concepts that impact transgender people's overall health: gender nonconformity

states offered any transparency into how many incarcerated people were being tested and released as part of the overall public health response.

Id.

48. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (July 1, 2021, 1:00 PM), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [<https://perma.cc/5DXJ-8Z87>].

49. Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POLICY INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covid-spread.html> [<https://perma.cc/BS8H-UV9Y>].

50. *See id.* ("mass incarceration led to 560,000 additional COVID-19 cases nationwide in just three months").

51. *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987).

52. The medicalization of transgender, gender non-binary, gender nonconforming, and intersex people's identities is a contentious topic. *See, e.g.*, Jodie M. Dewey & Melissa M. Gesbeck, *(Dys) Functional Diagnosing: Mental Health Diagnosis, Medicalization, and the Making of Transgender Patients*, HUMAN. & SOC'Y 41(1) 37, 38 (2017). This Comment explores this topic in greater detail in Section II.B. These terms are introduced here to contextualize the arguments presented in Eighth Amendment litigation.

53. WPATH STANDARDS, *supra* note 3, at 1.

and gender dysphoria.⁵⁴ Gender nonconformity, according to WPATH, “refers to the extent to which a person’s gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex.”⁵⁵ WPATH defines gender dysphoria as a medical condition caused by “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).”⁵⁶ Not all gender nonconforming people experience gender dysphoria, and those who do may experience varying levels of gender dysphoria throughout their lives.⁵⁷ However, some people experience gender dysphoria to such a degree that a medical diagnosis can be useful to secure medical care.⁵⁸ In the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-V), the American Psychiatric Association (APA) defined gender dysphoria as a “marked incongruence between ones experienced/expressed gender” which manifests as two of the following criteria for six months:

- (i) A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics . . . ;
- (ii) A strong desire to be rid of one’s . . . sex characteristics because of a marked incongruence with one’s experienced/expressed gender;
- (iii) A strong desire for the . . . sex characteristics of the other gender;
- (iv) A strong desire to be of the other gender . . . ;
- (v) A strong desire to be treated as a gender other than one’s assigned gender;
- (vi) A strong conviction that one has the typical reactions and feelings of the other gender.⁵⁹

The WPATH Standards of Care and the APA DSM-V both conceptualize gender nonconformity as a non-medical condition that, alone, requires no treatment at all.⁶⁰ However, an individual’s distress caused by gender nonconformity may be diagnosable as gender dysphoria to facilitate gender-affirming treatment options.⁶¹

54. *See id.* at 5.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 6.

59. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-V) 452 (5th ed. 2013) [hereinafter DSM-V].

60. *See* WPATH STANDARDS, *supra* note 3, at 5–6 (“transgender[] and gender nonconforming individuals are not inherently disordered.”).

61. *See id.*; *see also* LAMBDALEGAL, *Assessing Coverage for Transition-Related Health*

2. Range of Treatment Options for Gender Dysphoria

The WPATH Standards of Care prescribe a range of treatments for individuals diagnosed with gender dysphoria.⁶² Many transgender people with gender dysphoria find successful treatment with social support, changes in their gender expression, and psychotherapy.⁶³ However, for many others these interventions do not adequately relieve their symptoms, and WPATH recommends hormone replacement therapy (HRT) and GCS to align transgender people's primary and secondary sex characteristics with their gender to further alleviate their gender dysphoria symptoms.⁶⁴ The WPATH Standards of Care do not recommend GCS to all transgender people; instead, the Standards provide the following criteria for determining eligibility for GCS:

- (I) Persistent, well-documented gender dysphoria;
- (ii) Capacity to make a fully informed decision and to consent for treatment;
- (iii) Age of majority in a given country;
- (iv) If significant medical or mental health concerns are present, they must be well controlled;
- (v) [Twelve] continuous months of hormone therapy as appropriate to the patient's gender goals⁶⁵

The WPATH Standards of Care apply to all transgender people regardless of whether they are incarcerated, and WPATH recommends the exact same assessments and treatment criteria for individuals regardless of their incarceration status.⁶⁶ The National Commission on Correctional Healthcare (NCCHC) endorsed the WPATH standards in its position statement on health care for incarcerated transgender people, which provides that “[e]valuations to determine the medical necessity of [GCS] will be performed on a case-by-case basis . . . [GCS] will be provided when determined to be medically necessary for a patient according to *accepted medical standards*.”⁶⁷

Care, <https://www.lambdalegal.org/know-your-rights/article/trans-health-care> [<https://perma.cc/GFX4-XFFP>] (last visited Dec. 6, 2021).

62. WPATH STANDARDS, *supra* note 3, at 8, 17–18, 23.

63. Among other treatment options. *See id.* at 9–10.

64. *Id.*

65. *Id.* at 60.

66. *Id.* at 67 (“The SOC in their entirety apply to all . . . transgender[] and gender nonconforming people, irrespective of their housing situation.”).

67. *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings*, NAT'L COMM'N ON CORR. HEALTH CARE, <https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care> [<https://perma.cc/TA6G-8EC2>] (last visited Dec. 6, 2021) (emphasis added).

C. Eighth Amendment Litigation

Transgender individuals seeking GCS while incarcerated initiate the Eighth Amendment litigation strategy by asserting claims against prisons and prison officials under 42 U.S.C. § 1983.⁶⁸ Eighth Amendment litigants contend that denial of gender-affirming health care, including GCS, violates the Eighth Amendment's prohibition against cruel and unusual punishment.⁶⁹ In *Estelle v. Gamble*, the Supreme Court held that the government has an obligation to provide medical care to incarcerated individuals, and a prison official's deliberate indifference to an inmate's serious medical need constituted an "unnecessary and wanton infliction of pain," in violation of the Eighth Amendment.⁷⁰ After *Estelle*, federal courts have developed a two-prong test to evaluate Eighth Amendment prison medical care claims, both of which present potential obstacles for transgender individuals seeking gender-affirming care.⁷¹ First, plaintiffs must make an objective showing of serious medical need.⁷² After demonstrating a serious medical need, plaintiffs must make a subjective showing that the prison or prison official who denied their care was deliberately indifferent to their serious medical need.⁷³

To establish a serious medical need, an individual must show that the state's failure to treat a medical condition will result in serious injury or unnecessary pain.⁷⁴ Plaintiffs seeking GCS and other gender-affirming care in prison generally attempt to satisfy this objective test by producing diagnoses from experienced medical practitioners alongside diagnostic and treatment protocols like those found in the DSM-V and WPATH Standards of Care.⁷⁵ Although a gender dysphoria diagnosis—or equivalent, outdated diagnoses—has been recognized as a serious medical need in many circuits for decades,⁷⁶ satisfying this prong in the future may depend on prevailing political views among judges, medical professionals, and in the community, over which transgender people may exert little control.⁷⁷

68. See, e.g., *Edmo v. Corizon, Inc.*, 935 F.3d 757, 775 (9th Cir. 2019).

69. *Id.*

70. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

71. See *Edmo*, 935 F.3d at 786; see also Rose & Silverman, *supra* note 15 (noting that *Edmo* is the first trans-litigant to receive court-ordered GCS).

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

73. *Estelle*, 429 U.S. at 104–05.

74. *Edmo*, 935 F.3d at 785.

75. See *id.* ("As *Edmo* testified, her gender dysphoria causes her to feel 'depressed,' 'disgusting,' 'tormented,' and 'hopeless[.]'").

76. See *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); see also *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995).

77. See, e.g., *Zavaras*, 63 F.3d at 971 (explaining that the Ninth Circuit has held that

Establishing the Eighth Amendment’s subjective “deliberate indifference” prong is more difficult than establishing a serious medical need.⁷⁸ In *Estelle*, the court held that “[m]edical malpractice does not become a constitutional violation merely because the victim is [incarcerated].”⁷⁹ To be “deliberately indifferent,” a prison official must know facts that would lead a reasonable official to infer that substantial risk of serious harm exists and then fail to mitigate that risk despite drawing this inference.⁸⁰ Applying that standard to deficient prison medical care cases, plaintiffs must show that the course of treatment provided was “medically unacceptable” given the circumstances, and that the prison official chose the course of treatment while consciously disregarding substantial risk to the plaintiff’s health.⁸¹ The subjective “deliberate indifference” prong is heavily contested in Eighth Amendment litigation.⁸² Plaintiffs often introduce evidence showing years and sometimes decades of serious gender dysphoria symptoms known to prison officials, which often include repeated and ongoing suicide and self-castration attempts.⁸³ To counter claims that prison officials disregarded substantial health risks when choosing—or denying—a course of treatment, states can seize on differences in medical opinion, and even introduce experts with medical opinions that conflict with prevailing treatments and diagnoses to show that their officials chose a treatment endorsed by one side of a serious medical debate.⁸⁴

D. The Circuit Split over GCS in Prisons

Federal circuits are currently split over whether prisons are required to provide GCS to transgender individuals in their custody.⁸⁵ The Ninth Circuit recently held that Adree Edmo was entitled to GCS, in a case that represents the best-case scenario for Eighth Amendment litigation.⁸⁶ However, both the First and the Fifth Circuits

“transsexuals are not a protected class[.]”); *Edmo*, 935 F.3d at 774 (describing how Edmo’s doctor did not think GCS was an appropriate treatment for Edmo despite Edmo’s dysphoria).

78. *See, e.g., Estelle*, 429 U.S. at 105 (Not “every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.”).

79. *Id.* at 106.

80. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 838 (1994) (“Eighth Amendment suits against prison officials must satisfy a ‘subjective’ requirement.”).

81. *Edmo*, 935 F.3d at 786 (quoting *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016)).

82. *See, e.g., id.* at 792–93.

83. *See, e.g., Cuoco v. Moritsugu*, 222 F.3d 99, 104 (2d Cir. 2000).

84. *See Kosilek v. Spencer*, 774 F.3d 63, 77–79 (1st Cir. 2014).

85. *See id.* at 96; *see also Gibson v. Collier*, 920 F.3d 212, 227 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

86. *Edmo*, 935 F.3d at 767; *see also* Lila Leonard, Note, *Gender Reassignment Surgery in Prisons: How the Eighth Amendment Guarantees Medical Treatments Not Covered by*

have held that transgender individuals in their custody are not entitled to GCS.⁸⁷ This subsection will describe these decisions, starting with *Edmo v. Corizon, Inc.*, in the Ninth Circuit.⁸⁸ Next, this subsection will examine a series of decisions in the First Circuit surrounding gender-affirming treatment for Michelle Kosilek, a transgender woman incarcerated in Massachusetts.⁸⁹ Finally, this subsection will describe *Gibson v. Collier*, a Fifth Circuit case widely viewed as a major setback for advocates of the Eighth Amendment litigation strategy.⁹⁰

1. *Edmo, the Best-Case Scenario for the Eighth Amendment Litigation Strategy*

Adree Edmo is currently incarcerated in IDOC, serving a conviction for sexually abusing a fifteen-year-old boy at a house party in 2012, when Edmo was twenty-one.⁹¹ Edmo has viewed herself as female since a young age and began living full time as a woman when she was twenty or twenty-one.⁹² Edmo experienced extreme symptoms of gender dysphoria while in IDOC custody, including major depression and severe distress that manifested in at least one self-castration attempt.⁹³ Edmo testified at the evidentiary hearing in her case that her male primary sex characteristics “embarrassed” and “disgusted” her.⁹⁴

Dr. Scott Eliason, a Corizon doctor who provides care to individuals incarcerated in IDOC facilities, attempted to treat Edmo with HRT and supportive therapy with limited success.⁹⁵ Dr. Eliason wrote in his notes that he felt Edmo’s gender dysphoria was under control because she “looked pleasant” and was in a “good mood” during one of her evaluations.⁹⁶ However, Dr. Eliason’s notes may not have adequately expressed the degree of Edmo’s dysphoria.⁹⁷ Edmo

Private Insurance or Medicare for Law-Abiding Citizens, RUTGERS J. L. & PUB. POL’Y 11:3 626, 628–29 (2014) (describing some alternatives to GCS).

87. See *Kosilek*, 774 F.3d at 96; see also *Gibson*, 920 F.3d at 227.

88. See *Edmo*, 935 F.3d at 757.

89. See *Kosilek*, 774 F.3d at 68.

90. *Gibson*, 920 F.3d at 212, 216; see also Maxwell S. Kennerly, *The Fifth Circuit Abandons the Rule of Law to Spite a Transgender Inmate*, LITIG. & TRIAL (Mar. 31, 2019), <https://www.litigationandtrial.com/2019/03/articles/attorney/transgender-inmate> [https://perma.cc/K3WF-LPPP] (last visited Dec. 6, 2021).

91. *Edmo*, 935 F.3d at 772.

92. *Id.*

93. *Id.* at 767.

94. *Id.* at 772.

95. *Id.* at 773.

96. *Id.*

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

testified that even though she was receiving HRT and supportive treatment, she avoided thoughts of self-castration by cutting her arms with a razor.⁹⁸

Dr. Eliason convened a group of Corizon medical staff, at least one of whom had never treated an individual with gender dysphoria, to discuss courses of treatment for Edmo, including the possibility of GCS.⁹⁹ This group determined that GCS was only necessary in three situations: where an individual has “congenital malformations or ambiguous genitalia,” when an individual has “severe and devastating dysphoria that is primarily due to genitals,” or when an individual has a “medical problem in which endogenous sexual hormones were causing severe physiological damage.”¹⁰⁰ Eliason’s group determined that Edmo was ineligible for GCS based on those criteria and resolved to continue her HRT and supportive therapy.¹⁰¹ At Edmo’s evidentiary hearing, Eliason testified that he also believed that GCS was not appropriate for Edmo because she did not qualify for GCS under the WPATH Standards of Care because she had mental health issues separate from gender dysphoria that were not adequately controlled and because she had not lived as her identified gender for twelve months “outside of prison.”¹⁰² After she was denied GCS, Edmo’s dysphoria worsened significantly.¹⁰³ Edmo attempted to self-castrate again as a way to stop her body from producing testosterone, and only stopped because there was too much blood to continue.¹⁰⁴

Edmo filed *pro se* for a preliminary injunction and appointment of counsel in April 2017.¹⁰⁵ After the court appointed counsel, Edmo filed a renewed motion for a preliminary injunction in June 2018 alleging, *inter alia*, that by denying her GCS, IDOC and Corizon violated her Eighth Amendment right to be free from cruel and unusual punishment.¹⁰⁶ In addition to testimony from Dr. Eliason and other members of Corizon’s IDOC medical staff, both sides introduced testimony from two expert witnesses.¹⁰⁷ Edmo’s experts were exceptionally well qualified; between the two of them, they had evaluated over 3,000 patients for GCS and recommended about 300 for the surgery, authored portions of the WPATH Standards of Care, led gender-affirming health care training, and at the time of the hearing, were

98. *Id.*

99. *Id.* at 773–74.

100. *Id.* at 773.

101. *Id.*

102. *Id.*

103. *Edmo*, 935 F.3d at 773–74.

104. *Id.* at 774.

105. *Id.* at 775.

106. *Id.*

107. *Id.*

treating dozens of patients with gender dysphoria.¹⁰⁸ Edmo’s experts testified that in their opinions, Edmo’s gender dysphoria and self-harm attempts were likely to worsen without GCS.¹⁰⁹ In contrast to Edmo’s experts’ years of experience treating individuals with gender dysphoria and evaluating them for GCS, the state’s experts’ credentials were unimpressive: a physician who had treated a “couple of patients” for gender dysphoria in the past, but none in recent years, and a doctor of social work.¹¹⁰ Both of the state’s experts testified that GCS was not medically necessary for Edmo; their main contention was that Edmo’s mental health was not adequately controlled and that she had not spent enough time living as female outside of prison to meet WPATH standards.¹¹¹

After the evidentiary hearing, the District Court issued an injunction ordering IDOC and Corizon to provide Edmo with GCS because Edmo had demonstrated that she had a serious medical need and that prison officials acted with deliberate indifference to that need when they failed to provide treatment that was generally accepted as safe and effective.¹¹² The court concluded that IDOC and Corizon appeared to have a “*de facto* policy” to deny GCS.¹¹³ Additionally, the court noted the stark difference in credibility between Edmo’s highly credentialed experts and the state’s, who had nearly no experience treating gender dysphoria or evaluating patients for GCS.¹¹⁴

The State appealed the District Court’s decision on multiple grounds, including that Edmo’s Eighth Amendment claim failed to show she will “be irreparably harmed absent an injunction.”¹¹⁵ The Ninth Circuit affirmed the District Court’s decision ruling that Edmo had satisfied both the medical necessity prong and the deliberate indifference prong of her Eighth Amendment claim.¹¹⁶ Evaluating the medical necessity prong, the Circuit Court ruled that the District Court was correct in giving very little weight to the state’s expert testimony.¹¹⁷ In addition, the Circuit Court held that the GCS evaluation Dr. Eliason performed for Edmo relied on “inexplicable criteria far afield from the recognized standards of care” provided in the WPATH Standards of Care.¹¹⁸ The Circuit Court also held that Dr.

108. *Id.* 776–79.

109. *See Edmo*, 935 F.3d at 775–78.

110. *Id.* at 778–79.

111. *Id.* at 779–80.

112. *Id.* at 781.

113. *Id.*

114. *Id.* at 780–81.

115. *Edmo*, 935 F.3d at 781–82.

116. *Id.* at 803.

117. *See id.* at 787 (“The State’s experts . . . lack meaningful experience directly treating people with gender dysphoria.”).

118. *Id.* at 792.

Eliason acted with deliberate indifference to Edmo's serious medical need because he knew about Edmo's severe gender dysphoria symptoms, described above, and nonetheless continued her ineffective treatment.¹¹⁹ The State contended that its officials had not been deliberately indifferent to Edmo's serious medical need because they lacked "malice" or "any intent to inflict pain" when they denied GCS to Edmo.¹²⁰ The Circuit Court rejected this argument, holding that plaintiffs do not need to show "a sinister" prison official to make a *prima facie* Eighth Amendment case, but only need to show that officials "knew of and disregarded an excessive risk" to their health.¹²¹ The Circuit Court held that Dr. Eliason had done just that by rejecting Edmo's request for GCS despite his knowledge of Edmo's severe gender dysphoria symptoms.¹²² Further, the court rejected the state's claim that its officials could not have been deliberately indifferent because they provided Edmo with other gender-affirming care, such as HRT and supportive therapy.¹²³ The Circuit Court analogized this argument to providing over-the-counter painkillers for a serious injury that required surgery and held that providing "some medical treatment, even extensive treatment over a number of years, does not immunize officials" from Eighth Amendment claims when further treatment is clearly necessary.¹²⁴

Edmo's success is a credit to the Eighth Amendment litigation strategy.¹²⁵ After *Edmo*, Eighth Amendment litigants in the Ninth Circuit can argue that prison officials who seriously deviate from the WPATH Standards of Care for individuals diagnosed with gender dysphoria are deliberately indifferent to those individuals' serious medical needs.¹²⁶ However, Edmo benefitted from District and Circuit Court panels who were receptive to her claims.¹²⁷ Ten judges on the Ninth Circuit wrote particularly scathing dissents to the Circuit's opinion denying a petition to rehear *Edmo en banc*,¹²⁸ and other circuits have reached different conclusions.¹²⁹

119. *Id.* at 793.

120. *Id.* at 793.

121. *Edmo*, 935 F.3d at 793.

122. *Id.*

123. *Id.*

124. *Id.*

125. The Ninth Circuit explains why related cases from other Circuits are "unpersuasive." *See id.* at 796.

126. *See id.* at 793.

127. *See Edmo v. Corizon, Inc.*, 949 F.3d 489, 496–97 (9th Cir. 2020).

128. *See id.* at 490 (arguing "the court creates a circuit split, substitutes the medical conclusions of federal judges for the clinical judgments of prisoners' treating physicians, redefines the familiar 'deliberate indifference' standard, and, in the end, constitutionally enshrines precise and partisan treatment criteria in what is a new, rapidly changing, and highly controversial area of medical practice").

129. *See id.* at 496–97.

2. Kosilek, *Early Litigation, Limited Success*

The First Circuit has also grappled with the question of whether states must provide GCS to incarcerated transgender people in a series of cases surrounding Michelle Kosilek’s gender-affirming health care.¹³⁰ In 2014, the First Circuit rejected Michelle Kosilek’s claim that the Eighth Amendment required the Massachusetts Department of Corrections (MDOC) to provide her with GCS.¹³¹ Kosilek is a transgender woman who has been serving life without parole in MDOC custody after she was convicted of murdering her wife in 1990.¹³² Unlike Adree Edmo, Kosilek had not attempted suicide or self-castration during her incarceration, but she had twice attempted suicide and once attempted self-castration before she was incarcerated.¹³³ Kosilek has been involved in litigation over her treatment since 1992.¹³⁴ In her first case, Kosilek challenged the adequacy of the “supportive therapy” MDOC provided as treatment for her gender identity disorder (GID).¹³⁵ In that case, the Circuit Court affirmed the District Court’s ruling that although Kosilek had demonstrated a serious medical need, she had failed to show that MDOC officials were deliberately indifferent when they denied more comprehensive treatment.¹³⁶ Instead, MDOC officials’ rejection of more comprehensive treatment was permissibly grounded in legitimate “security concerns.”¹³⁷ Although the court denied Kosilek’s request for injunctive relief, the Circuit Court put MDOC on notice that offering only “supportive therapy” to individuals with GID in its custody could expose it to liability in future Eighth Amendment cases.¹³⁸

In response to this case, MDOC abandoned its “freeze-frame” policy under which MDOC would “freeze” transgender individuals’ care and only provide care at the level transgender individuals had attained before being incarcerated.¹³⁹ MDOC revamped its treatment of transgender individuals in its custody, and in 2003, Kosilek began receiving gender-affirming care—then referred to as “ameliorative

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

131. *Id.*

132. *Id.* at 68–69.

133. *Id.*; *see also* *Edmo v. Corizon, Inc.*, 935 F.3d 757, 774 (9th Cir. 2019).

134. *Kosilek*, 774 F.3d at 69.

135. *Id.* The decision refers to “gender identity disorder,” a diagnosis that is no longer recognized in the most recent edition of DSM. *Compare* DSM-V, *supra* note 59, at 252, *with* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–33 (4th ed. 1994).

136. *Kosilek*, 774 F.3d at 69.

137. *Id.*

138. *Id.*

139. *Id.*

treatment”—including mental health treatment, gender-affirming clothing and personal property, permanent facial hair removal, and HRT.¹⁴⁰ Around the same time, Kosilek’s new health provider recommended she be evaluated for GCS using current standards.¹⁴¹ MDOC allowed the evaluation, and the evaluating doctors recommended GCS because, in spite of her gender-affirming care, Kosilek remained “significantly distressed” by having male primary sex characteristics.¹⁴² In 2005, in response to the recommendation from Kosilek’s doctors, MDOC informed the District Court that it would not provide GCS for Kosilek and would continue “ameliorative treatment.”¹⁴³ MDOC Commissioner Kathleen Dennehy provided the Court with a report focused on three safety and security issues surrounding Kosilek’s post-GCS housing.¹⁴⁴ In the report, Dennehy first expressed concern that Kosilek could be exposed to harm if she were housed in a male facility, noting that up to 25% of males incarcerated in Massachusetts were incarcerated for sex offenses.¹⁴⁵ Next, Dennehy contended that, in light of Kosilek’s underlying offense, placing Kosilek in a female facility might trigger emotional distress among incarcerated females who had “experienced domestic abuse and trauma at the hands of [their] male partners.”¹⁴⁶ Finally, Dennehy noted that Kosilek may have to be placed in long-term solitary confinement if she could not safely be housed in either a male or a female facility, a situation that could detrimentally impact Kosilek’s mental health.¹⁴⁷

Kosilek again filed suit in response to the report, this time seeking an injunction requiring that MDOC provide her GCS in accordance with her doctors’ recommendations.¹⁴⁸ Kosilek’s 2006 trial centered around the familiar Eighth Amendment framework: medical necessity and deliberate indifference.¹⁴⁹ Testifying to medical necessity on Kosilek’s behalf, multiple doctors testified that GCS was the appropriate treatment for Kosilek, noting the WPATH Standards of Care and that Kosilek’s current treatment was only temporarily successful because she held out hope of getting GCS in the future.¹⁵⁰ A court-appointed expert, Dr. Levine, who testified for the State,

140. *Id.* at 69–70.

141. *See, e.g., id.* at 69–70, 109–10.

142. *Kosilek*, 774 F.3d at 71.

143. *Id.* at 74.

144. *See id.* at 80 (describing concerns “arising from cross-gender housing”).

145. *Id.* at 74.

146. *Id.*

147. *Id.*

148. *Kosilek*, 774 F.3d at 75.

149. *See id.* at 74, 81–82.

150. *Id.* at 75.

cast doubt on the WPATH Standards of Care and claimed that they were not politically neutral and were not the product of rigorous research.¹⁵¹ Dr. Levine also noted that Kosilek's experience living as a woman in prison was not equivalent to the "real-life" experiences envisioned in the WPATH standards,¹⁵² one of the arguments presented by Dr. Eliason in *Edmo*.¹⁵³ MDOC argued that, even if Kosilek's condition was a serious medical need, its legitimate security concerns precluded the court from finding that its officials were deliberately indifferent when they denied Kosilek's GCS.¹⁵⁴ Commissioner Dennehy and other MDOC officials testified about the "obvious" security concerns raised by "cross-gender" housing.¹⁵⁵

Kosilek's second case stretched on for years and garnered an enormous amount of media attention, resulting in negative local and national news coverage.¹⁵⁶ Additionally Commissioner Dennehy, and her successor, Harold Clarke, had close relations with many state politicians, including the lieutenant governor who campaigned on his strong opposition to Kosilek's GCS.¹⁵⁷ Although he denied in any way being influenced by politics, Commissioner Clarke testified that he received many letters from state politicians arguing the procedure would be an "affront to [Massachusetts] taxpayers."¹⁵⁸ In 2012, after years of litigation, the District Court issued an injunction requiring that MDOC provide GCS for Kosilek, concluding that Kosilek had serious medical need and that DOC was deliberately indifferent because it had used security concerns as a pretext for denying GCS, and had, in fact, based its decision on public and political pressure.¹⁵⁹ MDOC appealed the decision.¹⁶⁰

In 2014, in an *en banc* review, the Circuit Court reversed the District Court's injunction and held that significant controversy

151. *See id.* at 77–78.

152. *Id.*

153. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 774 (9th Cir. 2019).

154. *See Kosilek*, 774 F.3d at 92–93.

155. *Id.* at 80.

156. *See, e.g., Convicted Killer Sues State for Free Sex Change*, NBC NEWS (May 31, 2006, 5:15 PM), <http://www.nbcnews.com/id/13068147> [<https://perma.cc/H8JA-WBR8>]; Kari Huus, *Sex-Change Surgery for Prison Inmate Granted by Judge*, NBC NEWS (Sept. 4, 2012, 1:34 PM), <https://www.nbcnews.com/news/us-news/sex-change-surgery-prison-inmate-granted-judge-f1na978383> [<https://perma.cc/6Z5E-NKDY>]; John R. Ellement, *Relative of Woman Killed by Michelle Kosilek Blasts Judge for Making State Pay for Sex-Change Operation*, BOS. GLOBE (Sept. 6, 2012), <https://www.boston.com/uncategorized/noprimary-tagmatch/2012/09/06/relative-of-woman-killed-by-michelle-kosilek-blasts-judge-for-making-state-pay-for-sex-change-operation> [<https://perma.cc/3WTL-MJDZ>].

157. *Kosilek*, 774 F.3d at 80.

158. *Id.* at 81.

159. *Id.* at 81–82.

160. *Id.* at 68.

around GCS existed in the medical community and that MDOC's security concerns were reasonable.¹⁶¹ The Circuit Court dismissed Kosilek's concerns about the political and media pressure motivating MDOC's security report and held that "security considerations inherent in the functioning of a penological institution" must be given "significant weight" when evaluating medical care and deliberate indifference.¹⁶²

The final holding in *Kosilek* demonstrates the ease with which prison officials can avoid liability when confronted with Eighth Amendment suits.¹⁶³ Despite decades of fact development, the First Circuit went out of its way to ensure that Kosilek's Eighth Amendment case did not succeed.¹⁶⁴ By rejecting the District Court's finding that the security report was a pretext for denying GCS, the court papered over obvious, significant political and media pressures that led to the report's creation.¹⁶⁵ Additionally, the Circuit Court's decision implicitly accepts MDOC's dangerous and irresponsible contention that it is unable to house any person who has had GCS anywhere in the state or through an interstate compact, except in solitary confinement.¹⁶⁶

3. Gibson, a *Serious Setback*

As dispiriting as the First Circuit's decision was in *Kosilek*, the Fifth Circuit's decision in *Gibson v. Collier* is likely the biggest threat to the Eighth Amendment litigation strategy's long-term viability.¹⁶⁷ Vanessa Lynn Gibson¹⁶⁸ is a transgender woman in the custody of the Texas Department of Criminal Justice (TDCJ).¹⁶⁹ Gibson filed a *pro se* suit against TDCJ Commissioner Brian Collier challenging a TDCJ policy for transgender inmates that does not designate GCS as part of the treatment protocol for gender dysphoria.¹⁷⁰ Gibson has lived as a woman since she was fifteen years old and doctors have

161. *Id.* at 89, 94.

162. *Id.* at 83, 94 (quoting *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011)).

163. *See, e.g., Kosilek*, 774 F.3d at 96.

164. *See, e.g., id.*

165. *See id.* at 112–13.

166. *See id.* at 74, 79, 91, 93–94. This contention likely violates PREA standards 115.42(c) and (e), and 115.43. *See* Prison Rape Elimination Act, 28 C.F.R. §§ 115.42(c), (e), 115.43 (2012).

167. *See* *Gibson v. Collier*, 920 F.3d 212, 227–28 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

168. *Id.* at 216–17. The Fifth Circuit decision insultingly refers to Gibson by her male name that she no longer uses and male pronouns with which she no longer identifies. This Comment refers to her by her correct pronouns and her correct name.

169. *Id.*

170. *Id.* at 218.

diagnosed her with gender dysphoria.¹⁷¹ Gibson has attempted self-castration in the past and has attempted suicide three times.¹⁷² Gibson testified at trial that if she did not receive GCS, she would attempt further self-harm.¹⁷³ In 2017, the District Court granted TDCJ's motion for summary judgement on the merits of Gibson's Eighth Amendment claim.¹⁷⁴

The Fifth Circuit's decision is light on facts because it declined to individually evaluate Gibson's medical needs because she could not show the "universal acceptance" of the necessity of GCS that would be required to prove deliberate indifference.¹⁷⁵ The court prefaced its analysis with lengthy dismissive observations about deficiencies in Gibson's *pro se* pleadings and the procedural posture of her case,¹⁷⁶ an unusual analytical step for federal judges with extensive legal experience.¹⁷⁷ After its lengthy critique of a *pro se* litigant's pleadings, the Fifth Circuit held that "[a]ny evidence of Gibson's personal medical need would not alter the fact that [GCS] is fiercely debated within the medical community."¹⁷⁸ The court did not hear much new testimony from doctors, and instead relied on testimony given by the State's expert in *Kosilek*, nearly a decade earlier in a different circuit, to reach its conclusion.¹⁷⁹ The court recounted Dr. Levine's testimony from 2006 that no medical consensus existed around the WPATH Standards of Care and reasoned that, absent medical consensus, Gibson could prove no facts that would establish deliberate indifference in light of that uncertainty.¹⁸⁰ The Court defended its decision to issue a ruling without new medical testimony on the grounds it was under no obligation to investigate its "common sense" conclusion that GCS is "one of the most hotly debated topics within the medical community today."¹⁸¹

If the *Gibson* analysis, issued in 2019, prevailed at the Supreme Court, it would be devastating for the Eighth Amendment litigation strategy's chances for success.¹⁸² The decision precludes Eighth

171. *Id.* at 216–17.

172. *Id.* at 217.

173. *Gibson*, 920 F.3d at 217.

174. *Id.* at 218.

175. *See id.* at 220.

176. *Id.* at 218–19.

177. *See, e.g., A Benchguide for Judicial Officers*, Judicial Council of California, 1–3 (April 2019) ("Judges must be aware that the 'choice' not to have a lawyer is generally not a choice that litigants wish to make, but that litigants are simply trying to take care of problems in their lives in the best way that they can.").

178. *Gibson*, 920 F.3d at 224.

179. *Id.* at 222–23.

180. *Id.* at 220–23.

181. *Id.* at 224.

182. *See* Marissa Luchs, Note, *Transgender Inmates' Right to Gender Confirmation*

Amendment relief for any plaintiff seeking medical care in prison who cannot show a medical procedure’s “universal acceptance.”¹⁸³ Further, states contesting Eighth Amendment GCS claims under *Gibson* do not need to call their own experts, *Gibson*’s analysis suggests that merely citing testimony given by doctors ten or more years ago in out-of-circuit cases is a sufficient to defeat a deliberate indifference claim.¹⁸⁴

II. RETHINKING THE EIGHTH AMENDMENT LITIGATION STRATEGY

The current Eighth Amendment litigation strategy seeking state-funded GCS for incarcerated individuals legitimizes and expands the criminal punishment system that targets and inflicts state violence upon trans people.¹⁸⁵ This Comment proposes applying an abolitionist framework as a transformative approach to evaluating litigation strategies and legal reforms aimed at securing gender self-determination, including GCS, for incarcerated people.¹⁸⁶ To be clear, this Comment is not meant to diminish the importance of Eighth Amendment litigation in this area.¹⁸⁷ Ending the practice of torturing incarcerated trans people by denying their medical treatment must remain a high-priority political, legal, and social issue.¹⁸⁸ Abolitionists must treat prison like a “social cancer: we should fight to eradicate it but never stop treating those affected by it.”¹⁸⁹ During this fight, however, attorneys should consider whether the legal strategies they pursue increase the scope of the criminal punishment system, inadvertently building up a system that targets transgender people for violence, and which must ultimately be torn down.¹⁹⁰

This section will first describe abolition and propose an abolitionist framework for evaluating legal strategies and reforms.¹⁹¹

Surgery, 89 *FORDHAM L. REV.* 2809, 2826–27 (2021) (explaining “the importance of considering evolving standards of decency when determining which punishments are cruel and unusual”).

183. *Gibson*, 920 F.3d at 220.

184. *See id.* at 220–23.

185. *See* Lindsey Ruff, Note, *Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who Are Transgender and Incarcerated*, 28 *CORNELL J. L. & PUB. POL’Y* 127, 136 (2018) (“the legal system’s reliance on a medical model of gender contributes to the stigmatization of the transgender community”).

186. *See* discussion, *infra* Part II.

187. *See* discussion, *supra* Part I.

188. *See* Ruff, *supra* note 185, at 136.

189. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 118 (2019) (quoting Angel E. Sanchez, *In Spite of Prison, in Developments in the Law—Prison Abolition*, 132 *HARV. L. REV.* 1650, 1652 (2019)).

190. *See, e.g., Unjust: How the Broken Criminal Justice System Fails Transgender People*, CTR. FOR AM. PROGRESS (May 2016), <https://www.lgbtmap.org/criminal-justice-trans> [<https://perma.cc/GB8B-AGTD>].

191. *See* discussion, *infra* Section II.A.

Next, this section will examine the current litigation strategy to secure GCS under the Eighth Amendment using an abolitionist framework and explore some of the strategy's other inherent limitations.¹⁹² Finally, this section will evaluate decriminalizing sex work and defunding the police and determine whether they diminish, rather than expand, the oppressive systems that direct state-violence against transgender people.¹⁹³

A. Abolition and Abolitionist Legal Reforms

1. Abolitionist Understanding of the Criminal Punishment System

Abolition is the movement to dismantle the criminal punishment system by radically altering society's conceptions of "justice" and "criminality."¹⁹⁴ Abolitionists seek to achieve this goal not only through direct challenges to the criminal punishment system, but also by transforming our society into one where the logic that justifies criminalization and incarceration is no longer tenable.¹⁹⁵

The abolitionist critique of the criminal punishment system begins with a historical analysis that draws a direct connection between today's sprawling prison-industrial complex and the sprawling expanse of chattel slavery and the plantation system in the antebellum South.¹⁹⁶ In *Are Prisons Obsolete?*, Angela Davis writes that state-sanctioned anti-Black violence reemerged after the collapse of chattel slavery, manifesting itself in new institutions and forms: post-slavery Black codes, widespread lynching, and Jim Crow-era segregation.¹⁹⁷ Simultaneously, then-existing penitentiaries transformed into the institutions of racialized control familiar to us now as prisons;¹⁹⁸ they adopted structures, rules, and punishments that replicated nearly identically those that chattel slavery and the plantation system used to dominate Black people.¹⁹⁹ These newly transformed institutions exploded in popularity as their populations swelled with Black people after the South abandoned Reconstruction and former

192. See discussion, *infra* Section II.B.

193. See discussion, *infra* Section II.C.

194. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1575–76 (2019).

195. See ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?*, 20–21 (2003) (“The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.”).

196. See *id.* at 22–39.

197. *Id.*

198. *Id.* at 23–24, 28.

199. *Id.* at 22–39 (“in the United States, race has always played a central role in constructing presumptions of criminality.”).

slaves were left with no resources to confront capitalism and white supremacist violence.²⁰⁰ Because of the Thirteenth Amendment's exception to the ban on forced labor for those convicted of crimes, prisons engaged in convict-leasing and functioned for more than half a century as neo-plantations, subjecting incarcerated individuals to forced labor administered by state.²⁰¹ Although the institutions that inflict anti-Black, state-sanctioned violence have undergone modest reforms since their inception and attempts for reform are still being made,²⁰² their function in society remains the same.²⁰³ Prisons are the direct descendants of chattel slavery and exist to perpetuate state-sanctioned, anti-Black violence and maintain a racialized caste system in the United States.²⁰⁴

Today's criminal punishment system is unimaginably vast.²⁰⁵ The system's components include traditional sites of incarceration: state and federal prisons, municipal, city, and regional jails, juvenile detention facilities, immigration detention facilities, Indian Country jails, military prisons, civil commitment centers, and state psychiatric hospitals.²⁰⁶ The system also includes structures that the Prison Policy Initiative calls "correctional control"²⁰⁷: systems like probation, community supervision, and parole.²⁰⁸ 2.3 million people in the United States are currently incarcerated in prison or jail and another 4.5 million people are under correctional control, bringing the total number of people currently subject to criminal punishment to 6.7 million.²⁰⁹

200. "[T]he end of the Civil War . . . triggered the nation's first prison boom when the number of [B]lack Americans arrested and incarcerated surged." Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race, and Prison*, VERA INST. JUST. (Oct. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/M72U-FBA3>].

201. See, e.g., MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS*, 12–14 (2013) ("After slavery was abolished, incarceration was quickly deployed as a way to continue enslaving people legally.").

202. The Thirteenth Amendment's exception has been proposed for elimination, for example. See, e.g., Brakkton Booker, *Democrats Push 'Abolition Amendment' To Fully Erase Slavery From U.S. Constitution*, NPR (Dec. 30, 2020, 6:43 PM), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution> [<https://perma.cc/R8AG-J3Z3>].

203. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/B83E-EMSJ>] (summarizing and challenging myths about incarceration in the United States).

204. DAVIS, *supra* note 195, at 22–39; SCHENWAR & LAW, *supra* note 201, at 12–14.

205. See, e.g., Sawyer & Wagner, *supra* note 203 (summarizing the scope of the criminal punishment system).

206. *Id.*

207. Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POLY INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctional-control2018.html> [<https://perma.cc/3CXE-9P6Z>].

208. *Id.*

209. *E.g., id.*

Individuals who have disentangled themselves from the criminal punishment system face further consequences when they re-enter American society.²¹⁰ Housing, education, and employment opportunities may all be conditioned on the absence of a criminal record.²¹¹ Voting rights may be stripped from people who have been convicted of certain crimes.²¹² People often become disabled in prison because of abuse, medical neglect, or the inherent trauma of spending long periods of time locked in a cage.²¹³ An additional 4.9 million people are formerly incarcerated, 19 million people have been convicted of a felony, 77 million people have a criminal record, and 113 million people have an immediate family member who has been to prison or jail.²¹⁴

Envisioning the end of the current criminal punishment system requires reimagining the concepts of justice and criminality.²¹⁵ Current prevailing conceptions of justice cast judges in the role of justice dispensers, imposing prison sentences and restitution to restore balance and safety to the community.²¹⁶ Abolitionist justice movements, like transformative and restorative justice, envision a justice system that is responsive to victims' needs, holds harm-doers accountable, and attacks the root causes of interpersonal harm.²¹⁷

2. *Trans Abolition*

Like racial justice, transgender justice cannot be attained until the criminal punishment system is abolished.²¹⁸ The criminal punishment system has always enforced the racialized boundaries of

210. See, e.g., Jamie Dimon, *If You Paid Your Debt to Society, You Should Be Allowed to Work*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/04/opinion/clean-slate-incarceration-work.html> [<https://perma.cc/7V97-EGZV>].

211. See *id.*

212. Upwards of five million people “are disenfranchised due to a felony conviction.” See, e.g., Christopher Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/XVV7-WRDF>].

213. See, e.g., Timothy Williams, *Inside a Private Prison: Blood, Suicide and Poorly Paid Guards*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html> [<https://perma.cc/XJ9X-4B3S>].

214. See Sawyer & Wagner, *supra* note 203.

215. See DAVIS, *supra* note 195, at 21.

216. The sentences judges impose are not free from bias or prejudice. See Adam Liptak, *Black Defendants Get Longer Sentences from Republican-Appointed Judges, Study Finds*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/us/politics/black-defendants-women-prison-terms-study.html> [<https://perma.cc/V2R5-62SX>].

217. See Ejeris Dixon, *Building Community Safety: Practical Steps Towards Liberatory Transformation*, TRUTHOUT (Aug. 25, 2015), <https://truthout.org/articles/building-community-safety-practical-steps-toward-liberatory-transformation> [<https://perma.cc/5987-XBRX>].

218. See Nwanne, *supra* note 6 (“Abolition and queerness are intrinsically linked”).

gender, especially targeting Black women who deviate from racialized perceptions of gender—like Black women who do not fit the prevailing “mammy” archetype—with harassment, violence, and arrest.²¹⁹ In *Invisible No More: Police Violence Against Black Women and Women of Color*, Angela Ritchie writes that “[g]ender represents a central axis around which policing takes place . . . gender policing . . . operates in conjunction with, and furthers policing of race, class, and nation.”²²⁰ Laws enforcing the boundaries of gender date back to the early colonial period; Massachusetts adopted a statute banning cross-dressing in 1696.²²¹ Anti-prostitution laws, anti-cross-dressing laws, anti-sodomy laws, and laws against lewd conduct, vagrancy, and homelessness all serve to institutionalize “the normative citizen as white, heterosexual, able-bodied, and male.”²²²

Given the gendered nature of policing, it is not surprising that transgender people are disproportionately impacted by the criminal punishment system.²²³ Transgender people are disproportionately likely to be incarcerated.²²⁴ Sixteen percent of transgender adults have been to prison or jail compared to just under 3% of all adults.²²⁵ Transgender women report even higher rates of incarceration; up to one in five transgender women reported having been to prison or jail.²²⁶ These disparities extend into immigration detention facilities as well.²²⁷ A 2017 report found that transgender people in Immigration and Customs Enforcement (ICE) custody spent an average of ninety-nine days in detention, more than double the 43.7-day average for all detainees.²²⁸

Transgender people who are incarcerated endure harsher conditions while incarcerated than cisgender people for several

219. See, e.g., ANGELA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR*, 58–59, 158–59 (2017).

220. *Id.* at 127.

221. *Id.* at 40.

222. Elias Vitulli, *Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons*, 37 SOC. JUST. 53, 54 (2011).

223. See, e.g., JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163* (2011) [hereinafter *INJUSTICE AT EVERY TURN*].

224. *Id.*

225. *Id.*

226. *Id.*; see also Jae Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 INT’L J. PRISONER HEALTH 32, 33 (2017).

227. See Sharita Gruberg, *ICE’s Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, CTR. FOR AM. PROGRESS (May 30, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse> [https://perma.cc/L4UA-6YGV].

228. *Id.*

reasons.²²⁹ First, transgender people challenge the basic assumptions about binary gender upon which incarceration is premised.²³⁰ American prisons are almost universally segregated by binary gender.²³¹ Prison staff make housing classification determinations primarily according to an individual's genitals, regardless of an individual's gender.²³² Prison officials who oversee housing classifications often house transgender people in "protective" solitary confinement for the entire length of their prison sentences.²³³ Transgender people also face heightened rates of sexual victimization in prison.²³⁴ Official statistics from the Bureau of Justice Statistics show that 35% of transgender inmates in prisons reported experiencing one or more incidents of sexual victimization in the last year.²³⁵ Some studies place that number as high as 58.5%.²³⁶ Housing classification made solely on the basis of an individual's genitals place transgender people at even higher risk of sexual victimization.²³⁷ Finally, transgender people face significant disparities obtaining health care and favorable health outcomes in prison when compared to cisgender people.²³⁸

3. An Abolitionist Framework: Abolitionist Reforms versus Reformist Reforms

Abolition rejects the notion that prisons can be reformed "to become more humane" or to meet the needs of impacted communities or the needs of incarcerated people.²³⁹ Many popular progressive reforms, focused on curbing the criminal punishment system's most scandalous and shocking abuses, are unlikely to transform these institutions into ones that no longer direct state-sanctioned racialized,

229. For instance, "transgender people are nearly ten times more likely to be sexually assaulted than the general prison population." See, e.g., *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NAT'L CTR. TRANSGENDER EQUAL., 6 (2018).

230. See *id.* (noting that most prisons "house transgender people strictly according to their genital anatomy . . . often increasing their vulnerability to abuse").

231. *Id.*; Ruff, *supra* note 185, at 138.

232. Ruff, *supra* note 185, at 138.

233. *Id.* at 152 (quoting Gabriel Akers, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 9 *DUKEMINIER AWARDS J.* 343, 374 (2009)).

234. E.g., *id.* at 149.

235. BUREAU OF JUST. STAT., *PREA Data Collection Activities* (2015), NCJ 248824, <https://www.bjs.gov/content/pub/pdf/pdca15.pdf> [<http://perma.cc/C8GM-ZWEZ>].

236. Valerie Jenness, Lori Sexton & Jennifer Sumner, *Sexual Victimization Against Transgender Women in Prison: Consent and Coercion in Context*, 57 *CRIMINOLOGY* 603, 617 (2019).

237. See, e.g., Ruff, *supra* note 185, at 139.

238. See Sevelius & Jenness, *supra* note 226, at 33.

239. See SCHENWAR & LAW, *supra* note 201, at 21.

gendered, cissexist, and ableist violence at marginalized people.²⁴⁰ Prisons themselves began as a reform, early penitentiaries were designed to replace earlier, more brutal punishment methods.²⁴¹ Religious reformers who designed early penitentiaries theorized that the brutal torture of long-term solitary confinement or silent forced labor would lead guilty souls down a path towards religious “penitent” redemption.²⁴² Prisons continue to function as they were designed—although absent their original theorists’ pious ambitions—they break people by caging them and brutalizing them.²⁴³ Tinkering around the edges of these institutions that are built on centuries of white supremacist violence will not stop them from imposing violence and will not stop them from targeting the populations they were designed to dominate.²⁴⁴

But well-intentioned reforms that fail to address the existence of prisons themselves are more than just foundationally ineffective; they often legitimize the criminal punishment system and bolster the logic that underlies incarceration in the first place.²⁴⁵ By adopting popular reforms, the criminal punishment system reduces the urgency of social movements that seek its dismantling and preserves its position in America’s social and government structures.²⁴⁶ Popular progressive prison reforms have led to prison expansion and “gender-responsive, gay-affirmative, and accessible types of incarceration[,]” however, by narrowly focusing on conditions inside the prison, these tactics “reinforce the system and its logic, so that positive change in the daily lives of those incarcerated actually perpetuates the power structure that keeps [prisons] legitimate and benign.”²⁴⁷

History provides many examples of this dynamic at work.²⁴⁸ Women’s prisons, for example, arose out of a popular progressive demand for change.²⁴⁹ Before states constructed women’s prisons, the few women who were incarcerated regularly suffered severe gender-based sexual violence in carceral settings.²⁵⁰ Reformers fought for separate, safe prisons for women.²⁵¹ By their own measure, the

240. *See id.* at 11–12 (“Reforms that supposedly improve the current system run the risk of entrenching dangerous, violent, racist, classist, ableist, oppressive institutions”).

241. *Id.* at 12.

242. *Id.*

243. *See id.* at 8.

244. *See id.* at 13–14 (summarizing the evolution from slavery to mass incarceration).

245. *See* SCHENWAR & LAW, *supra* note 201, at 5–6.

246. *See id.* at 11–12.

247. LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 266 (2020).

248. *Id.* at 245–46 (explaining the “mixed blessing” of prison reform).

249. DAVIS, *supra* note 195, at 69.

250. *Id.* at 68–69.

251. *Id.*

reformers succeeded; states began to construct separate prisons to cage women.²⁵² Today, instead of numbering only a few, the United States incarcerates hundreds of thousands of women and girls.²⁵³

Another reformist reform, the 1984 Sentencing Reform Act, attempted to reduce racial disparities in sentencing by imposing mandatory minimum sentences and ending parole at the federal level.²⁵⁴ The progressive reformers who supported the act argued—correctly—that judges and parole boards were racist and that by eliminating their discretion, the Act would reduce racial disparities in the criminal punishment system.²⁵⁵ Of course, the Act did not achieve this lofty goal; prisons are abound with racial, gender, social, and economic disparities.²⁵⁶ The people this reformist measure intended to protect now must endure longer sentences because of the introduction of minimum mandatory sentences, without the benefit of parole.²⁵⁷

Abolitionists have devised numerous frameworks for evaluating proposed reforms and strategies to avoid becoming co-conspirators in the construction of the ever-expanding and increasingly oppressive criminal punishment system.²⁵⁸ One framework divides proposed actions into “abolitionist steps” that chip away at the criminal punishment system, and “reformist reforms” that continue to expand the criminal punishment system.²⁵⁹ The essential question when evaluating proposed actions is whether those actions expand or reduce the power, reach, and legitimacy of the criminal punishment system.²⁶⁰ The abolitionist organization Critical Resistance proposed

252. “[W]omen’s prisons [are] as strongly anchored to the social landscape as men’s prisons[.]” *Id.* at 71–73.

253. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INST. (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/6XQD-CPSH>].

254. See SCHENWAR & LAW, *supra* note 201, at 17; see also Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3559.

255. See SCHENWAR & LAW, *supra* note 201, at 17.

256. See *id.*; see also DAVIS, *supra* note 195, at 16–17.

257. See SCHENWAR & LAW, *supra* note 201, at 17; see also DAVIS, *supra* note 195, at 16–17.

258. For an example of an abolitionist framework, see CRITICAL RESISTANCE, *What is PIC? What is Abolition?* [hereinafter *PIC and Abolition*], <http://criticalresistance.org/wp-content/uploads/2021/07/PIC-Abolition-Concentric-Circles-front-back-handout.pdf> [<https://perma.cc/E6Y9-DX7R>].

259. See, e.g., CRITICAL RESISTANCE, *Reformist Reforms vs. Abolitionist Steps in Policing* [hereinafter *CRITICAL RESISTANCE Chart*], https://static1.squarespace.com/static/59ead8f9692ebee25b72f17ft/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [<http://perma.cc/28A2-XADW>].

260. See, e.g., *id.*; CRITICAL RESISTANCE, *Abolitionist Responses to Jail Expansion and Reform* [hereinafter *Abolitionist Responses*], <https://criticalresistance.org/wp-content/uploads/2018/02/jail-reform-chart.pdf> [<http://perma.cc/8ELD-9WV7>]; SCHENWAR & LAW, *supra* note 201, at 22; DAVIS, *supra* note 195, at 40–59.

a four-question evaluation to determine whether proposed actions expand or reduce the criminal punishment system's scope: (1) Does this action reduce the system's funding? (2) Does this action "challenge the notion that the system increases public safety?" (3) Does this action reduce the tools, tactics, and technology available to the criminal punishment system? And (4) does this action reduce the scale of the criminal punishment system?²⁶¹ Abolitionist steps affirmatively answer each one of these questions, and reformist reforms do not.²⁶² Of course, there is a spectrum between abolitionist steps and reformist reforms, and not every abolitionist agrees about the proper classification of every proposed action.²⁶³ However, this framework is a useful tool for evaluating whether proposed actions adhere to abolitionist principles.²⁶⁴

Under this framework, the problems with the 1984 Sentencing Reform Act are clear.²⁶⁵ The Act increased prison budgets by dramatically increasing the lengths of prison sentences.²⁶⁶ The Act reinforced the notion that prisons increase safety by implicitly endorsing the central logic of prison: that individuals who commit certain crimes are so dangerous they must be caged for long periods of time.²⁶⁷ The Act increased the tools available to judges by creating a sweeping new system of mandatory minimum sentences.²⁶⁸ Finally, the Act increased the scale of prisons.²⁶⁹ Since the Act passed in 1984, prison populations have risen dramatically, and incarcerated people serve drastically longer sentences.²⁷⁰

B. Applying Abolitionist Principles to Current Eighth Amendment GCS Litigation

The current Eighth Amendment litigation strategy to secure GCS for incarcerated people can be conceived of as a single proposed

261. CRITICAL RESISTANCE *Chart*, *supra* note 259 (although this chart was designed specifically to address police abolition, it can be applied generally to all aspects of the criminal punishment system).

262. *Id.* (reforms in red, whereas abolitionist steps are in green to indicate affirmative responses to framework).

263. *See Abolitionist Responses*, *supra* note 260.

264. *See CRITICAL RESISTANCE Chart*, *supra* note 259.

265. *See* discussion, *supra* Section II.A.3; *see also* CRITICAL RESISTANCE *Chart*, *supra* note 259.

266. *See* CRITICAL RESISTANCE *Chart*, *supra* note 259 (one can apply this framework generally to the criminal punishment system); *see also* SCHENWAR & LAW, *supra* note 201, at 17.

267. *See* SCHENWAR & LAW, *supra* note 201, at 11.

268. Many sentencing reforms were promoted "as a tool to eliminate judicial racial bias." *See id.* at 17.

269. *See id.*

270. *See id.*

action: proponents of the strategy propose that prisons must provide GCS for incarcerated transgender people who meet the WPATH standards for the procedure.²⁷¹ Accepting this conception, the resulting proposed action fails to satisfy the Critical Resistance evaluation and is a dangerous reformist reform that expands, rather than chips away, at the criminal punishment system and the carceral state.

First, prison budgets will increase as a result of this litigation strategy.²⁷² GCS can be a costly procedure,²⁷³ and prison medical budgets will increase to accommodate the growing number of transgender people in prison who are eligible for the treatment.²⁷⁴ Additionally, ideologically anti-transgender prison officials, state and local politicians, and private organizations²⁷⁵ will likely also continue to pursue protracted legal challenges against state provision of GCS, and prison legal budgets will have to expand to compensate the attendant attorneys and experts employed in this litigation.²⁷⁶

Second, the Eighth Amendment legal strategy does not challenge the notion that the criminal punishment system provides public safety.²⁷⁷ In fact, the strategy strengthens that notion in four important ways. First, the litigation strategy explicitly fails to advance any critique of the criminal punishment system and offers no solution to the system's targeted violence against transgender people.²⁷⁸ Under even the most generous interpretation of the proposed reform, the criminal punishment system retains its power and its purpose—to violently enforce a racial caste system and cissexist gender norms—regardless of whether certain plaintiffs may advance successful individual lawsuits.²⁷⁹

Second, the strategy legitimizes prisons as an institution; as Liat Ben-Moshe argues in *Decarcerating Disability*, when one injustice is eliminated from an institution, the public perceives the remaining institution as more just.²⁸⁰ As more transgender plaintiffs

271. See discussion, *supra* Section I.C; see also WPATH STANDARDS, *supra* note 3, at 1.

272. See discussion, *supra* Part II.

273. See, e.g., Emmarie Huettman, *Bill of the Month: A Plan for Affordable Gender-Confirmation Surgery Goes Awry*, NPR (July 26, 2018, 12:04 PM), <https://www.npr.org/sections/health-shots/2018/07/26/630619038/bill-of-the-month-a-plan-for-affordable-gender-confirmation-surgery-goes-awry> [<http://perma.cc/56PU-UDC8>].

274. See Stephanie S. Rudolph, *A Comparative Analysis of the Treatment of Transgender Prisoners: What the United States Can Learn from Canada and the United Kingdom*, 35 EMORY INT'L L. REV. 95, 128–29 (2021).

275. See, e.g., *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 238–50 (D. Mass. 2021) (holding that prison officials stated security concerns were a pretext to deny Kosilek GCS for political purposes).

276. See Rudolph, *supra* note 274, at 129.

277. See Ruff, *supra* note 185, at 146.

278. See discussion, *supra* Section I.C; see also Vitulli, *supra* note 222, at 54.

279. See discussion, *supra* Section I.D.1.

280. See BEN-MOSHE, *supra* note 247, at 266.

secure GCS through individual Eighth Amendment suits, the institutional provision of GCS may become one facet of a conception of prisons as a place for care, a dangerous misconception that casts sites of violent state oppression as compassionate.²⁸¹

Third, the Eighth Amendment litigation strategy increases the tools, tactics, and technology available to the criminal punishment system.²⁸² If the strategy is successful in establishing a right to GCS for incarcerated people, prisons will establish new medical policies and procedures and employ or contract with more specialists.²⁸³

Finally, the Eighth Amendment litigation strategy increases the scale of prisons.²⁸⁴ Judges and juries who feel that prisons are safe for transgender people may convict transgender people at higher rates and sentence them to longer terms.²⁸⁵ Housing is also implicated in a successful outcome.²⁸⁶ As described in Section II.A.2, prison housing assignments for transgender people are based largely on incarcerated people's genitalia.²⁸⁷ A successful outcome would likely lead to a large increase in the number of trans women with genitals that do not match those of the cisgender males with whom they are imprisoned in men's prisons.²⁸⁸ Although some trans women may be able to transfer to women's prisons, others, like Kosilek, will inevitably be deemed too high risk by prison officials, based either on their physical appearance or past crimes, to enter women's prisons, even under the Ninth Circuit's interpretation of the Eighth Amendment.²⁸⁹ In this case, given the alarming rates of sexual violence directed towards trans women in men's prisons²⁹⁰ and the cruelty and impracticability of condemning trans women who have received GCS to long-term isolation in segregated housing, prison officials may drastically alter prison housing and establish transgender units or entire facilities to house transgender people.²⁹¹ This

281. See discussion, *supra* Section II.B.

282. See discussion, *supra* Part II.

283. See ERIN FITZGERALD, SARAH ELSPETH PATTERSON, DARBY HICKEY, CHERNO BIKO & HARPER JEAN TOBIN, *MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE*, 28 (Dec. 2015) [hereinafter *MEANINGFUL WORK*].

284. See, e.g., *CRITICAL RESISTANCE Chart*, *supra* note 259 (this framework can be applied to the criminal punishment system generally).

285. See SCHENWAR & LAW, *supra* note 201, at 17 (where 1984 Sentencing Reform Act lengthened prison sentences).

286. See Ruff, *supra* note 185, at 140.

287. *Id.* at 138.

288. *Id.* at 140.

289. See *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 238–50 (D. Mass. 2012).

290. Jenness, Sexton & Sumner, *supra* note 236, at 617–18.

291. See Ruff, *supra* note 185, at 140. Although this action would likely violate PREA standards 115.42(c), (e) and 115.43, PREA standards are fungible and subject to change according to prison officials' needs.

possibility closely tracks the development of women's prisons and, like the explosion in women's prison population, risks trans imprisonment's dramatic expansion.²⁹²

In addition to being a dangerous reformist reform, the Eighth Amendment litigation strategy is seriously flawed because it relies on the medical model of transgender deviance.²⁹³ To be successful, plaintiffs in Eighth Amendment § 1983 suits must show that prison officials were (1) deliberately indifferent to their (2) objectively serious medical need.²⁹⁴ If the Ninth Circuit's interpretation of "serious medical need" in *Edmo* is upheld, then future Eighth Amendment suits will turn on a medical determination of whether transgender individuals meet the WPATH criteria for GCS.²⁹⁵ This medical model has been criticized by many writers and on numerous grounds.²⁹⁶ First, it casts variance from established gender binary as a "deviation" and a "deficit[.]" and pathologizes gender variance as "gender dysphoria."²⁹⁷ Next, it allows doctors and courts to define individuals' gender rather than allowing them to determine their own gender—"gender self-determination[.]"²⁹⁸ Third, it only recognizes individuals who wish to switch, full-time, from one end of the gender spectrum to the other, completely disregarding the experience of gender nonconforming, non-binary, or genderqueer people.²⁹⁹ Finally, it effectively divides transgender people into deserving and undeserving categories.³⁰⁰

Although the Eighth Amendment litigation strategy has been successful in some cases, the vast majority of transgender people in prison will continue to be denied care regardless of whether the Supreme Court resolves the *Edmo* circuit split favorably.³⁰¹ Individual transgender plaintiffs seeking GCS should continue to pursue

292. See, e.g., DAVIS, *supra* note 195, at 73; see also *supra* Section II.A.3.

293. See, e.g., Raechel Tiffe, *Interrogating the Industries of Violence: Queering the Labor Movement to Challenge Police Brutality and the Prison Industrial Complex*, 2,1 QED: A JOURNAL IN GLBTQ WORLDMAKING 1 (2015); Ruff, *supra* note 185, at 127; Sevelius & Jenness, *supra* note 226, at 33; see Vitulli, *supra* note 222, at 61.

294. See, e.g., Lizzie Bright, Comment, *Now You See Me: Problems and Strategies for Introducing Gender Self-Determination into the Eighth Amendment for Gender Nonconforming Prisoners*, 108 CRIM. L. & CRIMINOLOGY 137, 145 (2018).

295. *Id.* at 150–51; see also *Edmo v. Corizon, Inc.*, 949 F.3d 489, 490 (9th Cir. 2020).

296. See, e.g., Bright, *supra* note 294, at 149.

297. Vitulli, *supra* note 222, at 59; DSM-V, *supra* note 59, at 451.

298. See Bright, *supra* note 294, at 143.

299. *Id.* at 149.

300. See *id.* at 152 (courts look at "institutional medical opinion[s] of when gender identity deserves treatment").

301. See Ruff, *supra* note 185, at 146 (the success of Eighth Amendment litigation can depend on the medical expertise of "private physicians who are willing to advocate on [transgender people's] behalf").

Eighth Amendment claims if they believe it is their best strategy for alleviating their suffering and securing the care they need and deserve.³⁰² However, the broader movement for transgender justice should prioritize abolitionist legal strategies.³⁰³

C. Grassroots Abolitionist Strategies

Abolition is a long-term goal whose ultimate realization may not occur for generations.³⁰⁴ Prioritizing abolitionist strategies does not mean abandoning the fight for medical care for transgender people in prison until the criminal punishment system is completely dismantled.³⁰⁵ However, activists, organizers, and advocates should avoid losing sight of the larger vision for trans liberation by focusing on narrow efforts to improve prison conditions.³⁰⁶ Abolitionists must pursue truly transformative legal, political, and social strategies that reduce the size and scope of the criminal punishment system in ways that center the needs of individuals who are most impacted by the system.³⁰⁷ This section proposes grassroots abolitionist strategies to reduce trans criminalization and imprisonment and build a society where trans people are no longer imprisoned and can receive the medical care they need.³⁰⁸ First, this section will propose decriminalizing sex work and poverty-related crimes to protect transgender people from harmful interactions with police and the criminal punishment system.³⁰⁹ Next, this section will propose defunding the police and reinvesting in communities to begin to create a society where trans people can thrive.³¹⁰

*1. Protect Transgender People from Police Violence by Decriminalizing Sex Work*³¹¹

Activists, organizers, and attorneys fighting for trans justice should focus their attention on decriminalizing sex work to protect

302. *See id.* at 148.

303. *See* CRITICAL RESISTANCE *Chart*, *supra* note 259.

304. *See PIC and Abolition*, *supra* note 258.

305. *See* discussion, *supra* Introduction.

306. *See* discussion, *supra* Section II.A.3.

307. *See* SCHENWAR & LAW, *supra* note 201, at 21.

308. *See* discussion, *supra* Section II.C.

309. *See* discussion, *supra* Section II.C.1.

310. *See* discussion, *supra* Section II.C.2.

311. This Comment uses the term “sex work” and related constructions both as a non-stigmatizing term for “prostitution,” which is often used and received as a slur, but also to describe exchanges of sex and sexual activity. *See* MEANINGFUL WORK, *supra* note 283, at 8.

trans people by reducing their interactions with the police.³¹² The policing of sex work and laws against prostitution, solicitation, sex trafficking, and loitering are some of the primary ways that police target transgender people for state violence.³¹³ Police target trans women they suspect are involved with the sex trade with profiling so severe that many impacted trans women describe that their repeated interactions with police and arrests are the result of “walking while trans.”³¹⁴ In high-enforcement “prostitution free zones,” police routinely classify trans women as “known prostitutes” and issue “stay away orders” from those areas.³¹⁵ These classifications and orders render legitimate activity in certain neighborhoods criminal simply because police have associated that area with a presumption of criminal activity.³¹⁶

A 2016 report by the Solutions Not Punishment Coalition (SNaP Co) revealed that a stunning 80% of the trans women of color surveyed in the Atlanta area reported having been stopped by police in the last year, and 46% of those stopped reported being profiled as sex workers.³¹⁷ One outreach worker with Helping Individual Prostitutes Survive (HIPS) in Washington, D.C., reported that police in certain areas of the city arrest “all trans women” in the area on sight on suspicion of prostitution.³¹⁸ In addition to being profiled, transgender people, especially trans women of color, are subjected to shocking levels of sexual violence during their interactions with police.³¹⁹ In SNaP Co’s 2016 report, 8% of the trans women surveyed had been forced to engage in sexual activity or experienced unwanted sexual contact from Atlanta Police officers in the last year.³²⁰

Decriminalizing sex work would protect trans people from police interactions at a higher rate than cisgender people because trans people are far more likely to engage in sex work than cisgender people.³²¹ A national study in the United States estimated that trans

312. See CRITICAL RESISTANCE *Chart*, *supra* note 259 (abolitionist steps involve police abolition and decreased contact).

313. MEANINGFUL WORK, *supra* note 283, at 9–10.

314. RITCHIE, *supra* note 219, at 149.

315. MEANINGFUL WORK, *supra* note 283, at 9–10.

316. See *id.* at 9.

317. SOLUTIONS NOT PUNISHMENT COALITION (SNAP CO), “*The Most Dangerous Thing Out Here Is The Police: Trans Voices on Police Abuse and Profiling in Atlanta*,” 4 (2016) [hereinafter SNaP Co REPORT], <https://static1.squarespace.com/static/5c8fc2dea56827f5c3c806c2/t/5d30785ad82a7c0001152f06/1563457633519/Report+Executive+Summary+.pdf> [<https://perma.cc/RWT3-LGP5>].

318. RITCHIE, *supra* note 219, at 149.

319. MEANINGFUL WORK, *supra* note 283, at 10.

320. SNaP Co REPORT, *supra* note 317, at 3.

321. See INJUSTICE AT EVERY TURN, *supra* note 223, at 22.

people engage in sex work at a rate ten times that of cisgender women.³²² In a 2009 study, 14.9% of trans women reported participation in sex work.³²³ Although sex work is legitimate work, and sex workers deserve autonomy and dignity, participation in sex work is highly stigmatized, and that stigmatization tracks closely with other forms of oppression.³²⁴ For example, participation in sex work correlates closely to race.³²⁵ In the 2009 National Transgender Discrimination Study (NTDS), only 6.3% of white trans women reported participating in sex work, whereas 44.1% of Black trans women reported participation.³²⁶ Participation in sex work also tracks closely with poverty and housing insecurity.³²⁷ For example, 50% of the Black and mixed-race NTDS respondents who had participated in sex work earned less than \$10,000 in the previous year.³²⁸ Of the NTDS respondents who were unhoused at the time of the study, 54.6% had been involved in the sex trade.³²⁹ Laws and ordinances that criminalize sex work disproportionately impact trans people, especially trans people who experience other intersectional forms of oppression.³³⁰

Since 2000, federal and state governments have greatly increased their criminalization of sex work in the name of combatting human trafficking.³³¹ Laws like the Trafficking Victims Act of 2000, later expanded under the 2013 Violence Against Women Reauthorization Act, grant state and local police departments millions of dollars for participating in federal anti-trafficking programs.³³² These federal programs aimed at “end[ing] demand” for “sex trafficking” purport to combat “commercial sex . . . induced by force, fraud, or coercion.”³³³ However, enforcement efforts do not distinguish between sex trafficking and consensual sex work, an omission that ensnares many transgender people involved in consensual sex work.³³⁴ Another federal law meant to combat human trafficking, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017—commonly known by the House and Senate bill names, SESTA/FOSTA—made

322. *See id.* (finding that all of the 11% of transgender respondents who report working in the “underground economy” have engaged in sex work, compared to only 1% of cisgender women).

323. MEANINGFUL WORK, *supra* note 283, at 13, Chart 1.

324. *See id.* at 7.

325. *See id.* at 11.

326. *Id.* at 14, Chart 2.

327. *Id.* at 16–17.

328. *Id.* at 16.

329. MEANINGFUL WORK, *supra* note 283, at 17.

330. *Id.* at 5.

331. *Id.* at 8.

332. *Id.*

333. *Id.* at 8 (quotations omitted).

334. *See id.*

sex work much more dangerous by pushing sex workers off of safe, online platforms.³³⁵ Although the bill did not directly criminalize sex workers, it made sex workers less safe by forcing them to return to working “outdoors” and exposing them to abusive clients who they can no longer screen before meeting.³³⁶

Immediately ending the criminalization of sex work will make trans people safer everywhere by reducing their interactions with police and the criminal punishment system.³³⁷ Decriminalizing sex work is an abolitionist step, and not a reformist reform, because decriminalization reduces criminal punishment system’s power and scope and challenges the notion that the police provide safety.³³⁸

Decriminalization will reduce the criminal punishment system’s funding, tools, tactics, and scale in many important ways.³³⁹ First, decriminalizing sex work will end the funding, training, and maintenance of “vice” squads and other police organizations that target sex workers.³⁴⁰ Next, decriminalizing sex work gives the police one less tool to use to target transgender people.³⁴¹ Finally, decriminalizing sex work will end the multimillion-dollar federal grants that states receive for participating in federal anti-trafficking programs.³⁴²

Decriminalizing sex work will also challenge the notion that police provide safety.³⁴³ Sex worker mutual aid and community-defense organizations, like the Migrant Sex Workers Project, Toronto Sex Worker Action Project, People Of Color Sex Workers Outreach Project (POC SWOP), and many others, directly confront police-oriented visions of community safety.³⁴⁴ These organizations protect sex workers by collecting and sharing information about aggressive clients, conducting self-defense trainings, organizing neighborhood

335. See *The Impact of SESTA/FOSTA: For Workers*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/the-impact-of-sesta-fosta> [<https://perma.cc/M759-ZKVG>] (last visited Dec. 6, 2021).

336. See Amy Zimmerman, *The New Law That Puts Transgender Sex Workers in Danger*, DAILY BEAST (Apr. 16, 2018, 11:46 AM), <https://www.thedailybeast.com/the-new-law-that-puts-transgender-sex-workers-in-danger> [<https://perma.cc/5ZYE-2VJ4>].

337. MEANINGFUL WORK, *supra* note 283, at 26–28.

338. See *id.*

339. See *id.*; see also Jared Trujillo, *To Decriminalize Sex Work, NYC Must First Defund NYPD’s Vice Squad*, NYCLU (May 5, 2021, 3:15 PM), <https://www.nyclu.org/en/news/decriminalize-sex-work-nyc-must-first-defund-nypds-vice-squad> [<https://perma.cc/B2DB-98RC>].

340. Trujillo, *supra* note 339.

341. See, e.g., *id.*; MEANINGFUL WORK, *supra* note 283, at 26–28.

342. MEANINGFUL WORK, *supra* note 283, at 27.

343. See, e.g., Trujillo, *supra* note 339; MEANINGFUL WORK, *supra* note 283, at 26–28.

344. See Chanelle Gallant, *When Your Money Counts On It: Sex Work and Transformative Justice*, in BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 192–93, 198–99 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).

sex-worker protection networks, and providing health care and mental health support.³⁴⁵ By focusing on their communities' needs instead of on punishment and surveillance, these sex worker-led organizations provide the safety, prevention, healing, and justice sex workers need that police cannot or are unwilling to provide.³⁴⁶

On June 22, 2020, the Seattle City Council voted unanimously to remove the crime of prostitution loitering from the City's criminal code.³⁴⁷ The legislation acknowledged that the crime of prostitution loitering targets populations that are already "at high risk of trafficking, abuse, and exploitation" and has shown to have "a disproportionate impact on women of color, both cis- and transgender."³⁴⁸ The council must go further than decriminalizing prostitution loitering. As long as sex work itself is criminalized, police will use the remaining laws to profile, harass, extort, and abuse sex workers, especially sex workers who are trans women of color.³⁴⁹ Abolitionists must fight to repeal all laws that criminalize sex work, as well as laws and ordinances that criminalize survival.

2. Defund the Police and Reinvest in Community

Dismantling the criminal punishment system without investing in trans communities will not lead to true justice and liberation for trans people. The criminal justice system's overfunding as well as decades of neoliberal disinvestment have created communities where a wide range of people's basic needs are unmet.³⁵⁰ Transgender people, particularly transgender people who experience other forms of oppression, are particularly vulnerable to community disinvestment.³⁵¹ The 2015 United States Transgender Survey (USTS) found that respondents were unemployed at three times the rate of the overall U.S. population and were twice as likely to be living in poverty.³⁵² To

345. *Id.* at 192–96.

346. *Id.* at 198–99.

347. Kate Walters, *Seattle City Council Votes to Repeal 2 Loitering Laws*, KUOW (June 22, 2020, 6:32 PM), <https://www.kuow.org/stories/seattle-city-council-votes-to-repeal-two-loitering-laws> [<https://perma.cc/5FK4-2Z27>].

348. Seattle, Wash., Ordinance 126099 (June 22, 2020).

349. MEANINGFUL WORK, *supra* note 283, at 9.

350. *See, e.g., Why Divest From Policing*, DECRIMINALIZE SEATTLE, <https://decriminalizesattle.com/whydivest> [<https://perma.cc/66KE-Y7PM>] (last visited Dec. 6, 2021).

351. *Id.*

352. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 3 (Dec. 2016) [hereinafter 2015 USTS], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf> [<https://perma.cc/E9PK-J487>].

address these unmet needs, local, city, and state governments must defund the police by at least 50% and reinvest in community.³⁵³

Adree Edmo was not alone when IDOC and Corizon medical staff denied her requests for gender-affirming health care; health care is one of the most urgent unmet needs in the trans community.³⁵⁴ A poll conducted by NPR in 2017 found that 31% of transgender people in the United States lacked regular access to health care.³⁵⁵ The 2015 USTS found that transgender people are routinely denied gender-affirming care, even when they carry health insurance.³⁵⁶ In that survey, 55% of the respondents who sought GCS in the last year reported that their insurance companies denied coverage.³⁵⁷ 25% who sought HRT in the last year were denied coverage as well.³⁵⁸ 33% of respondents reported having a negative health care experience related to being transgender in the last year.³⁵⁹ Trans people's experience with the American health care system can be so traumatic that many people forego treatment altogether.³⁶⁰ In the 2015 USTS, 23% of respondents reported that they did not see a doctor to treat a medical condition because they feared being mistreated as a transgender person.³⁶¹

Defunding the police will allow cities to invest in public health organizations and community-based healthcare providers that can provide actual health and safety for the trans community.³⁶² Police departments are extremely expensive to operate.³⁶³ A study by the

353. See Sean Collins, *The Financial Case for Defunding The Police*, VOX (Sep. 23, 2020, 7:16 AM), <https://www.vox.com/the-highlight/21430892/defund-the-police-funding-abolish-george-floyd-breonna-taylor-daniel-prude> [<https://perma.cc/89RZ-XCGK>] (arguing that, due to the extremely oversized police budgets and lawsuit payments due to police misconduct, police funding should be cut by a large amount and reinvested in other programs and services).

354. See discussion, *supra* Section I.D.1; see also *Discrimination in America: Experiences and Views of LGBTQ Americans*, NPR (2017), <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf> [<https://perma.cc/N5WA-JP62>] (demonstrating that the healthcare needs of the trans community are not anecdotal or individual; the issue is widespread).

355. See, e.g., Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR (Nov. 21, 2017, 4:29 PM), <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans> [<https://perma.cc/H9CD-JW4V>].

356. 2015 USTS, *supra* note 352, at 8.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. See Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer> [<https://perma.cc/4V87-53HH>].

363. See *id.* (explaining that a significant portion of a city budget often goes to funding police departments).

Vera Institute found that police cost city governments \$115 billion per year.³⁶⁴ Outsized police funding robs funding from other vitally important government entities and community services, including investments in public health.³⁶⁵ This discrepancy is not only misguided, but also deadly, especially during the COVID-19 pandemic and amid an ongoing epidemic of police violence.³⁶⁶ One analysis found that the United States' ten largest cities will spend 3.6 times more in 2021 on policing than they will on public health.³⁶⁷ Houston, Texas, will have spent ten times as much on policing in 2021 than on public health.³⁶⁸ This pattern is not unique to large cities; another study found that “[n]early two-thirds of Americans live in counties that spend more than twice as much on policing as they spend on nonhospital healthcare. . . .”³⁶⁹ An in-depth analysis of state, local, and county budgets in New York found that the state spent \$18.2 billion in 2019 on the criminal punishment system compared to \$6.2 billion spent on mental health services, public health, youth programs, recreation, and elder services combined.³⁷⁰ By divesting from criminal punishment and policing, state and local governments can invest in community health and people’s well-being.³⁷¹

CONCLUSION

The Eighth Amendment litigation strategy to secure GCS can be implemented successfully in limited, individual instances where

364. *What Policing Costs: A Look at Spending In America’s Biggest Cities*, VERA INST. JUST. (June 2020), <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities> [https://perma.cc/N2PK-WDDB].

365. See Fernandez, *supra* note 362.

366. See Collins, *supra* note 353.

367. Ella Fassler, *10 Largest US Cities Will Spend More On Police Than Public Health This Year*, TRUTHOUT (Feb. 24, 2021), <https://truthout.org/articles/10-largest-us-cities-will-spend-more-on-police-than-public-health-this-year> [https://perma.cc/QYU9-Q82F].

368. *Id.*

369. Lauren Weber, Laura Ungar, Michelle R. Smith, Hannah Rech, & Anna Maria Barry-Jester, *Hollowed-Out Public Health System Faces More Cuts Amid Virus*, KAISER HEALTH NEWS (Aug. 24, 2020), <https://khn.org/news/us-public-health-system-underfunded-under-threat-faces-more-cuts-amid-covid-pandemic> [https://perma.cc/D24L-5V4D].

370. Katie Schaffer & Robert Callahan, *Carceral Cash: An Analysis of New York Local, County and State Budgets in 2019*, CTR. FOR CMTY. ALTS. (2021), <https://www.communityalternatives.org/wp-content/uploads/2021/02/cca-carceral-cash-report.pdf> [https://perma.cc/8V5X-8KVP].

371. See, e.g., Sam Levin, *These US Cities Defunded Police: ‘We’re transferring money to the community’*, THE GUARDIAN (Mar. 11, 2021, 11:03 AM), <https://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> [https://perma.cc/29RQ-WCZE] (explaining how cities around the U.S., like Austin, Texas, defunded police budgets and reinvested the money into programs to help the community as a whole).

a transgender person in prison needs acute care. However, the limited success the strategy achieved in *Edmo* must be balanced against its failures: the criminal punishment system's expansion and further legitimization. As *Kosilek* and *Gibson* demonstrate, the Eighth Amendment litigation strategy is also dangerously flawed and may not succeed in future litigation outside of the Ninth Circuit.

True trans liberation requires envisioning transformative abolitionist strategies that address the chronic race- and gender-based violence imposed by the criminal punishment system and avoid building up carceral structures that need to be torn down. The current criminal punishment system does not provide safety for individuals or communities and can never be made safe for trans people. Transgender people will only be healthy and safe in our communities when the criminal punishment system is completely abolished.