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PRISONER DENIED SEX REASSIGNMENT SURGERY: THE FIRST CIRCUIT IGNORES MEDICAL CONSENSUS IN *KOSILEK v. SPENCER*

Abstract: On December 16, 2014, in *Kosilek v. Spencer*, the U.S. Court of Appeals for the First Circuit held that refusing to provide a transgender prisoner sex reassignment surgery did not violate the Eighth Amendment. The court reasoned that the prisoner’s claim did not amount to an Eighth Amendment violation because she received adequate treatment for gender dysphoria and prison officials were not deliberately indifferent to her medical needs. This Comment argues that the First Circuit erred by ignoring medical consensus and relying on an outlier medical opinion when determining that sex reassignment surgery was not constitutionally required. Further, the majority’s decision will have the unforeseen consequence of preventing other prisoners in the First Circuit from successfully bringing an Eighth Amendment claim for sex reassignment surgery in the future.

INTRODUCTION

In 1990, Michelle Kosilek strangled her wife to death after her wife caught Kosilek wearing her clothes.¹ Kosilek is anatomically male, self-identifies as a female, and suffers from gender dysphoria.² Kosilek was sentenced to life without parole for first-degree murder in 1992, and that same year she sued the Massachusetts Department of Correction (“DOC”) for violating her Eighth Amendment right to adequate medical care for gender dysphoria.³

¹ *Kosilek v. Spencer (Kosilek IV)*, 774 F.3d 63, 68–69 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 2059 (2015) (mem.). Kosilek met her wife at a drug rehabilitation facility and before they married, her wife told Kosilek that a “good woman” could cure her gender dysphoria. *See Kosilek v. Maloney (Kosilek I)*, 221 F. Supp. 2d 156, 164 (D. Mass. 2002).

² *See Kosilek IV*, 774 F.3d at 68. An individual is diagnosed with gender dysphoria, formerly known as gender identity disorder, when they identify with the gender opposite to that given to them at birth and experience clinically significant distress as a result of their desire to be the other gender. *See Gender Dysphoria*, AM. PSYCHIATRIC ASS’N., <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> [<http://perma.cc/EK3Y-G5SC>]. The *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-V”) diagnoses these individuals with gender dysphoria, and replaces the old name, “gender identity disorder,” in order to “better characterize the experiences of affected children, adolescents, and adults.” *Id.* Although previous litigation referred to gender identity disorder, this Comment uses gender dysphoria. *See id.*

³ *See Kosilek I*, 221 F. Supp. 2d at 159. In 2002, the district court found that the Massachusetts Department of Correction (“DOC”) was not violating Kosilek’s Eighth Amendment right because Kosilek did not prove that the DOC was aware that failing to provide her with certain treatments “might result in serious harm.” *See Kosilek IV*, 774 F.3d at 69. Nevertheless, the court required the

In 2012, in *Kosilek v. Spencer* (“*Kosilek II*”), the U.S. District Court for the District of Massachusetts held that Kosilek suffers from severe gender dysphoria and that sex reassignment surgery offers the only adequate medical care pursuant to the Eighth Amendment’s Cruel and Unusual Punishment Clause.⁴ On December 16, 2014, in *Kosilek v. Spencer* (“*Kosilek IV*”), the U.S. Court of Appeals for the First Circuit, sitting en banc, held that although Kosilek suffers from gender dysphoria, refusing to provide sex reassignment surgery did not violate Kosilek’s Eighth Amendment right to adequate medical care.⁵

This Comment argues that the First Circuit, sitting en banc, erred by ignoring the World Professional Association for Transgender Health Standards of Care (“WPATH Standards of Care”) that recommended sex reassignment surgery for Kosilek.⁶ Part I of this Comment discusses a prisoner’s right to adequate medical care and the role of consensus in the medical community when determining what constitutes adequate medical care.⁷ Part I also reviews the factual and procedural history of *Kosilek IV*.⁸ Part II examines the *Kosilek IV* en banc court’s holding and Judge Thompson’s dissent.⁹ Part III argues that the *Kosilek IV* court’s decision departs from the generally accepted practice of deferring to medical consensus when determining a prisoner’s Eighth Amendment right to adequate medical care.¹⁰ Part III concludes that the majority’s decision could have the unforeseen consequence of preventing other prisoners

DOC to implement a treatment regime moving forward. *See id.* The DOC began providing Kosilek with hormone therapy, but she sued the DOC again after being denied sex reassignment surgery. *See id.* at 69–70.

⁴ *See* U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 250 (D. Mass. 2012), *rev’d en banc*, 774 F.3d 63, *cert. denied*, 135 S. Ct. 2059. The district court was affirmed on appeal, but it was reheard and reversed en banc. *See Kosilek IV*, 774 F.3d at 68; *Kosilek v. Spencer (Kosilek III)*, 740 F.3d 733, 736 (1st Cir. 2014), *withdrawn*, 774 F.3d 63 (en banc), *cert. denied*, 135 S. Ct. 2059.

⁵ *See Kosilek IV*, 774 F.3d at 96 (holding that Kosilek’s current treatment regime was constitutionally adequate).

⁶ *See infra* notes 83–93 and accompanying text. The World Professional Association for Transgender Health is an international professional association devoted to transgender health and publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (“WPATH Standards of Care”). *See* Brief for the World Prof’l Ass’n for Transgender Health as Amicus Curiae Supporting Petitioner at 1, *Kosilek*, 135 S. Ct. 2059 (No. 14-1120) [hereinafter WPATH Brief]. Professionals in the United States use the WPATH Standards of Care to treat individuals with gender dysphoria. *See Kosilek II*, 889 F. Supp. 2d at 197. Depending on the individual, medically necessary treatment may involve a combination of psychotherapy, hormone treatment, and sex reassignment surgery. *See id.*

⁷ *See infra* notes 16–36 and accompanying text.

⁸ *See infra* notes 37–54 and accompanying text.

⁹ *See infra* notes 55–82 and accompanying text.

¹⁰ *See infra* notes 83–93 and accompanying text.

in the First Circuit from successfully bringing an Eighth Amendment claim for sex reassignment surgery in the future.¹¹

I. ADEQUATE MEDICAL CARE: RELYING ON MEDICAL CONSENSUS TO PROTECT PRISONERS' EIGHTH AMENDMENT RIGHTS

Although prisoners have lost their liberty while incarcerated for past crimes, they are still entitled to certain rights, including adequate medical care.¹² Section A discusses a prisoner's right to adequate medical care under the Eighth Amendment.¹³ Section B reviews how courts have relied on medical consensus when weighing scientific and medical evidence in Eighth Amendment cases.¹⁴ Section C reviews the facts and procedural posture of *Kosilek IV*.¹⁵

A. Prisoners' Eighth Amendment Right to Adequate Medical Care

The Eighth Amendment guarantees prisoners humane treatment, including the right to adequate medical care.¹⁶ Because prisoners are dependent on the government for their medical needs while incarcerated, the government's failure to provide adequate medical care could constitute cruel and unusual punishment amounting to an Eighth Amendment violation.¹⁷ To prove an Eighth Amendment violation based on the denial of adequate medical care, a prisoner must demonstrate (1) an objectively serious medical need, and (2) that

¹¹ See *infra* notes 94–97 and accompanying text.

¹² See *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (stating that the Eighth Amendment's guiding principle of human dignity obligates the government to provide medical care for prisoners); see also *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979) (“Eighth amendment protections are not forfeited by one’s prior acts.”). The Eighth Amendment also obligates prison officials to provide adequate food, clothing, shelter, and safety. See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

¹³ See *infra* notes 16–28 and accompanying text.

¹⁴ See *infra* notes 29–36 and accompanying text.

¹⁵ See *infra* notes 37–54 and accompanying text.

¹⁶ See U.S. CONST. amend. VIII (establishing that a prisoner cannot be subjected to “cruel and unusual punishments”); *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (noting that prisoners do not forfeit human dignity as a result of being incarcerated and that respecting this dignity is central to the Eighth Amendment’s prohibition against cruel and unusual punishment); *Farmer*, 511 U.S. at 832 (noting that prison officials must provide humane conditions because to do otherwise would inflict cruel and unusual punishment on prisoners); *Kosilek II*, 889 F. Supp. 2d at 204 (stating that it is understandable that murderers, like *Kosilek*, are unsympathetic candidates for humane treatment, but that it is this same reasoning that necessitates Eighth Amendment protections and its enforcement by courts).

¹⁷ See *Brown*, 131 S. Ct. at 1928 (denying medical care could lead to suffering or death, and is therefore “incompatible with the concept of human dignity”); see also *Farmer*, 511 U.S. at 832 (stating that Eighth Amendment protection does not guarantee comfortable prisons, but rather humane conditions which include adequate medical care).

prison officials were subjectively aware of and deliberately indifferent to that need.¹⁸

An objectively serious medical need can be mental or physical and exists when inadequate medical care results in a substantial risk of serious harm to a prisoner.¹⁹ Additionally, it is one that is diagnosed by a doctor as requiring treatment or is so obvious that a layperson would assume treatment is necessary.²⁰ The medical community and courts recognize gender dysphoria as a serious medical need.²¹ When a prisoner has a serious medical need, the Eighth Amendment establishes an affirmative duty upon prison officials to provide medical care that is adequate.²² Adequate medical care does not mean the most

¹⁸ See *Farmer*, 511 U.S. at 837 (defining “deliberate indifference” as a prison official’s subjective awareness of the risk to a prisoner’s health and safety); *Estelle*, 429 U.S. at 106 (“[A] prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend evolving standards of decency in violation of the Eighth Amendment.”); *Kosilek IV*, 774 F.3d at 82 (acknowledging the two requirements). Over the past decade, transgender prisoners suffering from varying degrees of gender dysphoria have successfully gained access to medical care under the Eighth Amendment. See, e.g., *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that a state statute prohibiting hormone therapy and sex reassignment surgery for prisoners violated the Eighth Amendment because it constituted deliberate indifference to a prisoner’s serious medical need); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015) (granting a prisoner with gender dysphoria a preliminary injunction for sex reassignment surgery); *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 800–01 (W.D. Mich. 1990) (ordering prison officials to reinstate hormone therapy for a transgender prisoner), *aff’d*, 932 F.2d 969 (6th Cir. 1991).

¹⁹ See *Farmer*, 511 U.S. at 834 (stating that a prisoner must show “conditions posing a substantial risk of serious harm” to prove an objectively serious medical need); *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) (noting that the Eighth Amendment protects both physical and mental health needs); *Kosilek II*, 889 F. Supp. 2d at 207.

²⁰ See *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (holding that a prisoner who appeared bruised with visible abrasions did not present a serious medical need); *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (“The seriousness of an inmate’s medical need may also be determined by reference to the effect of denying the particular treatment.”).

²¹ See *Kosilek IV*, 774 F.3d at 86 (acknowledging that gender dysphoria is a serious medical condition that requires treatment); *Norsworthy*, 87 F. Supp. 3d at 1195 (recognizing a prisoner’s gender dysphoria as requiring adequate medical care, including sex reassignment surgery); *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010), *aff’d*, 653 F.3d 550 (acknowledging that gender dysphoria constitutes a serious medical need); *FAQ on Access to Transition-Related Care*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> [<http://perma.cc/D9SS-YJEZ>] (noting that the DSM-V recognizes gender dysphoria as a medical diagnosis, and that the American Medical Association recognizes gender dysphoria as a serious medical condition).

²² *Farmer*, 511 U.S. at 832 (holding that prison officials have an Eighth Amendment duty to “ensure that inmates receive adequate food, clothing, shelter, and medical care”); *Estelle*, 429 U.S. at 103 (establishing that the government has an obligation “to provide medical care for those whom it is punishing by incarceration”); Joel H. Thompson, *Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 638 (2010) (noting that the Eighth Amendment provides prisoners the right to adequate medical care for their serious medical needs).

sophisticated care or care of a prisoner's choosing.²³ Rather, adequate care must meet prudent professional standards.²⁴

Once a prisoner demonstrates a serious medical need, an Eighth Amendment claim is only viable if prison officials are subjectively aware of and deliberately indifferent to that need.²⁵ Prison officials are deliberately indifferent if they purposefully fail to treat the medical need by denying, delaying, or interfering with prescribed care.²⁶ Deliberate indifference to a prisoner's need is balanced against security concerns.²⁷ If denying a prisoner certain medical treatment is made in good faith and is based on a reasonable safety concern, the denial may not amount to an Eighth Amendment violation.²⁸

B. Courts Refer to and Rely on Professional Consensus When Determining the Validity of Medical Testimony

Courts routinely refer to and rely on a consensus of experts when weighing scientific and medical evidence in their decision-making.²⁹ In the Eighth Amendment context, the U.S. Supreme Court has relied on experts, whose opinions were grounded in professional consensus, because to do otherwise

²³ *United States v. DeCologero*, 821 F.2d 39, 42–43 (1st Cir. 1987).

²⁴ *Id.* at 43 (stating that medical care must be “at a level reasonably commensurate with modern medical science and of a quality within prudent professional standards”).

²⁵ *See Farmer*, 511 U.S. at 828–29 (holding that deliberate indifference requires proof that prison officials are “subjectively aware” of “a substantial risk of serious harm” to a prisoner). Prison officials must be aware of this risk through inference, and they must actually draw the inference. *Id.* at 837.

²⁶ *See Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011) (explaining that subjective intent does not require deliberate intent to harm); *see also Estelle*, 429 U.S. at 104–05 (noting that deliberate indifference to a prisoner's serious medical need can be “manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed”).

²⁷ *See Kosilek IV*, 774 F.3d at 83 (recognizing that security considerations inherent in operating a prison must be considered when evaluating whether prison officials are deliberately indifferent to a prisoner's needs); Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 *GEO. J. GENDER & L.* 585, 595 (2014) (arguing that judges afford deference to how prison officials decide to maintain security so long as decisions are made for legitimate purposes and in good faith).

²⁸ *See Kosilek IV*, 774 F.3d at 83 (stating that denying care may not violate the Eighth Amendment if decisions are based on legitimate prisoner safety and security concerns); *Battista*, 645 F.3d at 454 (noting that decisions made in good faith would excuse a prison official from being found deliberately indifferent); Etheridge, *supra* note 27, at 595 (observing that prison officials successfully argue that sex reassignment surgery should not be provided because a post-operative prisoner would face a heightened risk of assault and lack of safe housing options).

²⁹ *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593–94 (1993) (noting that Rule 702 of the Federal Rules of Evidence restricts expert testimony to scientific knowledge, and describing “scientific knowledge” as a theory or technique grounded in professional consensus such as peer review and publication); *see also* Rebecca Haw, *Delay and Its Benefits for Judicial Rulemaking Under Scientific Uncertainty*, 55 *B.C. L. REV.* 331, 367 (2014) (highlighting the type of expert testimony allowed after the *Daubert* decision).

could result in an individual being subjected to cruel and unusual punishment.³⁰ For example, in 2002, in *Atkins v. Virginia*, the U.S. Supreme Court concluded that executing intellectually disabled persons violated the Eighth Amendment based on a professional consensus among mental health experts that intellectually disabled people often act on impulse and thus are less mentally culpable than those without intellectual disabilities.³¹ Similarly, in 2005 in *Roper v. Simmons*, the Court held that executing juveniles violated the Eighth Amendment, relying on a consensus in scientific and sociological studies that demonstrated how juveniles lack maturity, act on impulse, are susceptible to negative influences, and lack character development when compared to adults.³²

In an Eighth Amendment claim for adequate medical care specifically, a judge's decision to give credibility to peer-supported medical evidence is critical because a misstep could result in a court condoning cruel and unusual punishment.³³ In order to ensure that prisoners receive adequate care, medical recommendations must be of a quality acceptable within prudent professional standards.³⁴ Where a consensus exists, outlier medical opinions may still meet the prudent professional standard if they demonstrate a credible basis for ig-

³⁰ See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317–18 (2002).

³¹ See *Atkins*, 536 U.S. at 317–18 (relying on established research and citing “clinical definitions of mental retardation” as defined by the American Association on Mental Retardation and the American Psychiatric Association); see also *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (noting that Florida’s IQ threshold for death penalty eligibility was unconstitutional because it did not accurately measure intellectual disability, and thereby could lead to an intellectually disabled person’s execution in violation of *Atkins*). Similar to the Court’s reliance on professional consensus in *Atkins*, the Court in *Hall v. Florida* relied on medical consensus when determining how to measure intellectual disability rather than Florida’s rule that ignored “established medical practice.” See *Hall*, 134 S. Ct. at 1993–94; *Baze v. Rees*, 553 U.S. 35, 67 (2008) (Alito, J., concurring) (“[A]n inmate challenging a method of execution should point to a well-established scientific consensus.”).

³² See *Roper*, 543 U.S. at 569–70; see also *Graham v. Florida*, 560 U.S. 48, 68, 82 (2010) (referring to similar scientific and sociological studies as *Roper* and holding both that juveniles are less culpable and that a life without parole sentence for a juvenile offender who did not commit a homicide is unconstitutional). See generally Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 560–61 (2015) (discussing the categorical limits the Eighth Amendment places on sentencing juveniles and attributing these limits to developmental differences between juveniles and adults).

³³ See *Kosilek IV*, 774 F.3d at 90 (explaining that choosing a treatment plan “commensurate with the medical standards of prudent professionals . . . is a decision that does not violate the Eighth Amendment”); WPATH Brief, *supra* note 6, at 5 (advocating the importance of referring to professional consensus because it provides an objective and reliable authority to weigh competing views); Esinam Agbemenu, *Medical Transgressions in America’s Prisons: Defending Transgender Prisoners’ Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1, 18 (2015) (arguing that courts should rely on the consensus of the medical community when determining whether transgender prisoners have a serious medical need requiring adequate medical care).

³⁴ See *DeCologero*, 821 F.2d at 42–43 (stating that medical care must be “at a level reasonably commensurate with modern medical science and of a quality within prudent professional standards,” and need not be the most sophisticated or of a prisoner’s choosing).

noring the consensus.³⁵ Nevertheless, if a doctor's outlier medical opinion in an Eighth Amendment case departs significantly from peer consensus, the doctor's treatment recommendations may be found imprudent and constitutionally inadequate.³⁶

C. District Court Holds That Sex Reassignment Surgery Is Constitutionally Required

Michelle Kosilek was sentenced to life without the possibility of parole for killing her wife in 1992, and sued the DOC that same year for violating her Eighth Amendment right to adequate medical care.³⁷ In 2002, in *Kosilek v. Maloney* (“*Kosilek I*”), the U.S. District Court for the District of Massachusetts recognized that she had a serious medical need, and in 2003 the DOC began providing her with hormonal treatment, female clothing, electrolysis, and continued mental health treatment.³⁸ Dr. David Seil, the gender identity specialist who prescribed this treatment, also suggested that Kosilek be considered for sex reassignment surgery after a year of hormone therapy.³⁹ His recommendation was consistent with the WPATH Standards of Care, which recommends

³⁵ See *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (“A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.”); *Kosilek IV*, 774 F.3d at 90 (holding that when there are two courses of treatment that meet prudent professional standards, prison officials can follow either treatment plan for a prisoner).

³⁶ *See Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (noting that a treatment decision that is “so far afield of accepted professional standards” could lead to an Eighth Amendment violation); see also *Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015) (“[I]n cases where some medical care is provided, a plaintiff ‘is entitled to prove his case by establishing [the] course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference.’” (quoting *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir.1990))); *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (stating that “a substantial departure from accepted professional judgment, practice, or standards” could amount to constitutionally inadequate medical care); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (noting that to prove an Eighth Amendment violation, a prisoner “must show that the course of treatment the doctors chose was medically unacceptable under the circumstances”).

³⁷ See *Kosilek I*, 221 F. Supp. 2d at 159 (noting that Kosilek was not receiving adequate treatment for gender dysphoria until she brought suit).

³⁸ *Kosilek IV*, 774 F.3d at 69–70 (noting that the DOC provided a number of treatments for Kosilek’s serious medical need except for sex reassignment surgery); *Kosilek I*, 221 F. Supp. 2d at 184.

³⁹ *Kosilek II*, 889 F. Supp. 2d at 218 (noting that Dr. Seil recommended a future assessment of Kosilek by a gender specialist to determine whether sex reassignment surgery would be required as a final step to treat Kosilek); see WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 54–55 (7th ed. 2012) [hereinafter WPATH STANDARDS OF CARE] (recognizing that sex reassignment surgery is recommended only for those for whom “relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity”).

sex reassignment surgery for a small fraction of patients with severe gender dysphoria.⁴⁰

In 2004, the DOC consulted Fenway Community Health Center about treatment for Kosilek.⁴¹ Dr. Kevin Kapila and Dr. Randi Kaufman of Fenway Community Health Center evaluated Kosilek and recommended sex reassignment surgery as the only adequate treatment.⁴² The DOC then retained Cynthia Osborne, a gender identity specialist, and Dr. Chester Schmidt, a psychiatrist, to review Dr. Kapila and Dr. Kaufman's recommendation.⁴³ Ms. Osborne and Dr. Schmidt disagreed with the recommendation of sex reassignment surgery, concluded that the surgery was not medically necessary, and emphasized that the WPATH Standards of Care were merely guidelines.⁴⁴ Finally, the DOC issued a report focused on the security and housing concerns that would arise if Kosilek were given the surgery.⁴⁵ When the DOC subsequently denied sex reassignment surgery, Kosilek requested an injunction ordering the DOC to provide her with the surgery.⁴⁶

On September 4, 2012, the U.S. District Court for the District of Massachusetts held in *Kosilek II* that Kosilek suffered from severe gender dysphoria and that sex reassignment surgery offered the only adequate medical treatment pursuant to the Eighth Amendment.⁴⁷ The *Kosilek II* court found that Dr. Schmidt's recommendation against the surgery did not meet prudent profes-

⁴⁰ *Kosilek II*, 889 F. Supp. 2d at 218. The WPATH Standards of Care establishes a triadic treatment sequence, requiring an individual to first go through hormone therapy and have a real-life experience of living as a member of the opposite sex before having sex reassignment surgery. See WPATH STANDARDS OF CARE, *supra* note 39, at 60.

⁴¹ *Kosilek IV*, 774 F.3d at 70–71.

⁴² *Id.* Although Dr. Kapila and Dr. Kaufman found that Kosilek was responding positively to hormone treatment, electrolysis, female clothing, and mental health care, they recognized that Kosilek was still distressed by her male genitalia and that it was likely that she would attempt suicide again if not provided with the surgery. *See id.* at 71. Kosilek attempted suicide twice and self-castration once while awaiting trial for murdering her wife. *See id.* at 69. The University of Massachusetts Correctional Health Program (“UMass CHP”), the DOC's health services provider, reviewed and affirmed Fenway Community Health Center's recommendation. *See id.* at 71. Dr. Kapila, Dr. Kaufman, and a clinician at UMass CHP testified at trial that sex reassignment surgery was medically necessary and the only adequate treatment to ameliorate Kosilek's severe gender dysphoria. *See Kosilek II*, 889 F. Supp. 2d at 233.

⁴³ *See Kosilek IV*, 774 F.3d at 71, 76–77.

⁴⁴ *See id.* at 76–77 (highlighting Dr. Schmidt's view that the WPATH Standards of Care are not authoritative because a number of gender dysphoria specialists disagree with them and recommend alternative treatment plans). Instead, Dr. Schmidt recommended antidepressants and psychotherapy to manage Kosilek's distress and potential suicide state upon denial of the surgery. *See Kosilek II*, 889 F. Supp. 2d. at 233.

⁴⁵ *Kosilek IV*, 774 F.3d at 74. The report suggested that post-surgery, Kosilek would be targeted for assault if she remained at MCI-Norfolk, an all-male prison, and she would cause mental distress to female prisoners if transferred to an all-female prison. *See id.*

⁴⁶ *Kosilek II*, 889 F. Supp. 2d at 196.

⁴⁷ *Id.* at 250–51 (issuing an injunction requiring the DOC to provide Kosilek with sex reassignment surgery).

sional standards because his recommendation departed from the WPATH Standards of Care and was based on a categorical approach opposing the surgery altogether.⁴⁸ The court reasoned that, when balanced against security concerns, the denial of sex reassignment surgery was not made in good faith and was not based on reasonable safety concerns.⁴⁹ The *Kosilek II* court also determined that security concerns were a pretext for avoiding public and political backlash.⁵⁰

In 2014, in *Kosilek v. Spencer* (“*Kosilek III*”), a panel of the U.S. Court of Appeals for the First Circuit upheld the *Kosilek II* court’s decision to grant Kosilek sex reassignment surgery.⁵¹ The *Kosilek III* panel held that the *Kosilek II* court did not clearly err in finding that sex reassignment surgery was required because Kosilek’s current treatment of receiving hormones, female clothing, electrolysis, and mental health care was constitutionally inadequate.⁵² The *Kosilek III* panel also held that the *Kosilek II* court did not clearly err in rejecting the DOC’s safety concerns and concluding that DOC officials were deliberately indifferent to Kosilek’s medical needs.⁵³

⁴⁸ See *id.* at 235–36. Dr. Schmidt also believed that Kosilek could not meet the second part of the WPATH Standards of Care treatment sequence because Kosilek did not have real-life experience living as a female. See *id.* at 235. In response, Dr. Kapila and Dr. Kaufman argued that the purpose of the real-life experience requirement was to ensure that a person knew what to expect in a different gender role. See *id.* They believed Kosilek fulfilled this requirement by living as a woman in an all-male prison. See *id.*

⁴⁹ See *id.* at 238–47. Although one of the security concerns for housing Kosilek at an all-male prison was that she would be targeted for assault, Kosilek had not been assaulted for many years, even while dressed as a female, wearing make-up, and having long hair. See *id.* at 243–44. The DOC also feared that housing Kosilek at an all-female prison would cause mental trauma to women prisoners who have suffered domestic violence. See *Kosilek III*, 740 F.3d at 745. There was, however, conflicting testimony as to whether Kosilek would actually disrupt the climate of the prison. See *Kosilek II*, 889 F. Supp. 2d at 244.

⁵⁰ See *Kosilek II*, 889 F. Supp. 2d at 247. The Deputy Commissioner of the DOC at the time of Kosilek’s first suit served under a Lieutenant Governor and State Senator who expressed opposition to the surgery. See *id.* at 246. When a new Deputy Commissioner was hired, Senators and State Representatives wrote to him opposing public funds going toward a prisoner’s sex reassignment surgery. See *id.*

⁵¹ *Kosilek III*, 740 F.3d at 772–73 (holding that the trial judge did not clearly err when finding that Kosilek had a serious medical need requiring surgery and that the DOC was deliberately indifferent to that need); see also *id.* at 761 (noting that on appeal, findings of fact are reviewed only for clear error).

⁵² See *id.* at 766 (holding that the district court’s decision was supported by ample evidence including “three eminently qualified doctors [who] testified without objection, in accord with widely accepted, published standards”).

⁵³ See *id.* at 768–71 (agreeing with the district court’s finding that safety concerns “followed hasty, results-driven evaluations,” and deferring to the lower court’s finding that public disapproval played a role in denying the surgery).

After the *Kosilek III* panel upheld the *Kosilek II* court's decision to grant an injunction requiring the DOC to provide Kosilek with sex reassignment surgery, the decision was granted en banc review.⁵⁴

II. THE FIRST CIRCUIT'S DECISION TO DENY SEX REASSIGNMENT SURGERY AND JUDGE THOMPSON'S DISSENT

On December 16, 2014, in *Kosilek v. Spencer* ("*Kosilek IV*"), the U.S. Court of Appeals for the First Circuit, sitting en banc, reversed the First Circuit panel's decision in *Kosilek v. Spencer* ("*Kosilek III*").⁵⁵ The *Kosilek IV* en banc court held in a 3–2 decision that Kosilek did not meet the two requirements needed to demonstrate an Eighth Amendment violation for the denial of adequate medical care.⁵⁶ The court reasoned that Kosilek did not prove either that she received inadequate treatment for her gender dysphoria or that the Massachusetts DOC was deliberately indifferent to her serious medical need.⁵⁷ Section A reviews the majority's holding.⁵⁸ Section B discusses Judge Thompson's dissent.⁵⁹

A. First Circuit Reverses and Holds That Sex Reassignment Surgery Is Not Constitutionally Required

The majority in *Kosilek IV* agreed with the U.S. District Court for the District of Massachusetts's finding in *Kosilek v. Spencer* ("*Kosilek II*") that Kosilek's gender dysphoria is a serious medical need requiring treatment.⁶⁰ But the *Kosilek IV* en banc court disagreed with the *Kosilek II* court and the *Kosilek III* panel as to the form of adequate medical care.⁶¹ The *Kosilek IV* majority

⁵⁴ *Kosilek IV*, 774 F.3d at 63.

⁵⁵ *Kosilek v. Spencer* (*Kosilek IV*), 774 F.3d 63, 68 (1st Cir. 2014), cert. denied, 135 S. Ct. 2059 (2015) (mem.).

⁵⁶ See *id.* at 96 (holding that Kosilek's current regime of care is constitutionally adequate); *id.* at 104 (Thompson, J., dissenting) (rejecting the majority's decision to reverse the *Kosilek II* court's finding that Kosilek satisfied the objective and subjective requirements); *id.* at 114 (Kayatta, J., dissenting) (criticizing the majority for inappropriately taking on the role of a trial court).

⁵⁷ See *id.* at 96 (majority opinion) (determining that Kosilek's current treatment of hormones, female clothing, electrolysis, and access to mental health treatment was adequate and that the denial of treatment was based on reasonable safety concerns).

⁵⁸ See *infra* notes 60–72 and accompanying text.

⁵⁹ See *infra* notes 73–82 and accompanying text.

⁶⁰ *Kosilek IV*, 774 F.3d at 86 (recognizing that Kosilek has a serious medical need that mandates treatment); *Kosilek v. Spencer* (*Kosilek II*), 889 F. Supp. 2d 190, 229 (D. Mass. 2012) (finding that Kosilek has a serious medical need and that she is at risk of serious harm without adequate treatment), *rev'd en banc*, 774 F.3d 63, cert. denied, 135 S. Ct. 2059.

⁶¹ *Kosilek IV*, 774 F.3d at 90 (holding that sex reassignment surgery is not constitutionally required). The *Kosilek IV* court disagreed with the *Kosilek II* court and *Kosilek III* panel that both found sex reassignment surgery to be the only adequate treatment for Kosilek's severe gender dysphoria. *Id.*;

held that when there are two courses of treatment that meet prudent professional standards, either treatment plan is considered adequate.⁶² The *Kosilek IV* court agreed with experts from the DOC who argued that withholding sex reassignment surgery from Kosilek did not breach the DOC's constitutional duty to provide Kosilek with adequate care.⁶³

The *Kosilek IV* majority explained that the *Kosilek II* court made several errors by concluding that Dr. Schmidt's recommendation against surgery was imprudent.⁶⁴ Although Dr. Schmidt's medical opinion departed from the WPATH Standards of Care, the majority noted that the WPATH Standards of Care are flexible guidelines rather than requirements.⁶⁵ Additionally, the *Kosilek IV* en banc court adopted Dr. Schmidt's recommendation that antidepressants and psychotherapy could manage Kosilek's potentially depressed state upon learning she would not receive surgery.⁶⁶ The en banc court also rejected the district court's finding that Dr. Schmidt was imprudent for concluding prisoners could not have a real-life experience as required by the second phase of the WPATH Standards of Care's triadic treatment sequence.⁶⁷ Because the *Kosilek IV* majority held that the current treatment regime was

Kosilek v. Spencer (*Kosilek III*), 740 F.3d 733, 736 (1st Cir. 2014), *withdrawn*, 774 F.3d 63 (en banc), *cert. denied*, 135 S. Ct. 2059; *Kosilek II*, 889 F. Supp. 2d at 236.

⁶² See *Kosilek IV*, 774 F.3d at 90 (noting that where there are two treatment plans commensurate with prudent professional standards, the Massachusetts DOC need not adopt the one seen as more compassionate). See generally Ryan Dischinger, *Adequate Care for a Serious Medical Need: Kosilek v. Spencer Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria*, 22 TUL. J.L. & SEXUALITY 169, 174–75 (2013) (discussing how the First Circuit is guided by the medical community when determining the adequacy of care, and noting that the care must be acceptable within prudent professional standards).

⁶³ See *Kosilek IV*, 774 F.3d at 90 (holding that receiving hormones, female clothing, electrolysis, and mental health care met prudent professional standards).

⁶⁴ See *id.* at 87–89.

⁶⁵ See *id.* at 87 (reasoning that the WPATH Standards of Care are clinical guidelines and are intended to be flexible). But see WPATH STANDARDS OF CARE, *supra* note 39, at 2 (attributing the Standards' flexibility to individualized care).

⁶⁶ See *Kosilek IV*, 774 F.3d at 88. Kosilek argued that denying her surgery would result in a substantial risk of serious harm to her well-being because her dysphoria would escalate and potentially result in another suicide attempt. See *id.* at 86. When Kosilek was convicted of murder and awaiting trial, she attempted suicide twice and self-castration once; however, since incarceration, she has not tried to harm herself. See *id.* at 69. The en banc court noted that Kosilek's current treatment plan that includes hormone therapy has led to feminization, contributing to a stabilized mental state. See *id.* at 90. Furthermore, the majority agreed that antidepressants and psychotherapy could mitigate potential self-harming behavior. See *id.*

⁶⁷ See *id.* at 88. Because Kosilek is imprisoned, Dr. Schmidt believed that Kosilek could not have a real-life experience living as a member of the opposite gender because she would not face the daily societal stresses of living as a woman. See *id.* The en banc court stated that the district court made an inferential leap that Kosilek could still have a real-life experience in prison. See *id.* According to the WPATH Standards of Care, the rationale for a real-life experience is so that patients will socially adjust to their desired gender roles before an irreversible surgery. See WPATH STANDARDS OF CARE, *supra* note 39, at 60–61.

adequate, Kosilek failed to meet the first requirement of her Eighth Amendment claim.⁶⁸

Even if Kosilek could have proven that sex reassignment surgery was medically necessary, the *Kosilek IV* majority held that she would still not have an Eighth Amendment claim because she did not prove that prison officials were subjectively aware of and deliberately indifferent to her needs.⁶⁹ The DOC argued that they could not have purposefully failed to treat Kosilek's gender dysphoria because experts provided two treatment plans that were both medically adequate.⁷⁰ The *Kosilek IV* majority also rejected the district court's finding that security concerns were a pretext for avoiding public and political backlash, and instead held that the DOC's security concerns were reasonable.⁷¹ Finally, the majority agreed with the DOC's argument that it was important to discourage a belief that threats of suicide would result in prisoner demands being granted.⁷²

B. Judge Thompson's Dissent: Majority's Decision Supports an Imprudent Medical Opinion and Unreasonable Safety Concerns

Judge Thompson argued in dissent in *Kosilek IV* that ample evidence supported the *Kosilek II* court's decision that Dr. Schmidt was imprudent in his recommendation against sex reassignment surgery.⁷³ Like the *Kosilek II* court, the dissent rejected Dr. Schmidt's opinion that Kosilek could not have a real-

⁶⁸ See *Kosilek IV*, 774 F.3d at 90–91 (holding that Kosilek did not prove that the denial of sex reassignment surgery was constitutionally inadequate).

⁶⁹ See *id.* at 91–92.

⁷⁰ See *id.* (“The choice of a medical option that, although disfavored by some in the field, is presented by competent professionals does not exhibit a level of inattention or callousness to a prisoner’s needs rising to a constitutional violation.”).

⁷¹ See *id.* at 93–94. The *Kosilek IV* majority focused on the security concerns around housing a post-operative male-to-female transsexual in an all-male prison or an all-female prison. See *id.* at 93. The DOC argued that because the security concerns were reasonable, the denial of care did not amount to an Eighth Amendment violation. See *id.* The *Kosilek IV* court held that the record did not support the *Kosilek II* court’s conclusion that security concerns were a pretext for public and political criticism. See *id.* at 94–96. Although the Deputy Commissioner of the DOC at the time of Kosilek’s first suit served under a Lieutenant Governor and State Senator who expressed opposition to the surgery, the Commissioner consistently testified that denying the surgery was based on security concerns. See *id.* at 94. Unlike the *Kosilek II* court, the *Kosilek IV* court did not reject this testimony, and noted that even if the Commissioner was motivated by security and non-security concerns, it would not make the DOC’s security concerns completely pretextual. See *id.* The *Kosilek IV* court also rejected the *Kosilek II* court’s finding that the Commissioner’s views influenced future Commissioners. See *id.* at 95.

⁷² See *id.* at 94. The DOC feared that providing Kosilek with the surgery would cause an increased demand from prisoners for benefits to mitigate suicidal ideations. See *id.*

⁷³ See *id.* at 104 (Thompson, J., dissenting) (arguing that Dr. Schmidt’s departure from the WPATH Standards of Care and the medical evidence supports the *Kosilek II* court’s finding that his treatment plan was imprudent).

life experience as a female because she is in prison.⁷⁴ The dissent also discredited Dr. Schmidt's recommendation of antidepressants and psychotherapy if Kosilek were to become suicidal.⁷⁵ The dissent noted that Dr. Schmidt's recommendation against surgery departed from the WPATH Standards of Care, the authoritative standard for treating patients with gender dysphoria.⁷⁶ Although the majority held that the WPATH Standards of Care provide flexible guidelines rather than requirements, the dissent attributed the flexibility to individualized care rather than flexibility in applying the Standards altogether.⁷⁷

Unlike the *Kosilek IV* majority, the dissent concluded that the DOC's opposition to surgery was based on unreasonable safety concerns.⁷⁸ The dissent agreed with the *Kosilek II* court's finding that the DOC's security report did not provide enough evidence to prove Kosilek's surgery would result in reasonable security risks.⁷⁹ Judge Thompson further argued that ample evidence proved that prison officials were deliberately indifferent to Kosilek's serious medical need.⁸⁰ The dissent rejected the notion that conflicting medical opinions automatically shield the DOC from being deliberately indifferent.⁸¹ In-

⁷⁴ See *id.* at 103 (agreeing with the *Kosilek II* court that found Dr. Schmidt imprudent because ample evidence supported the fact that a person could have a real-life experience in prison). Judge Thompson agreed with the *Kosilek II* court and noted that given that the purpose for requiring a real-life experience is for someone to socially adjust to his or her new gender role, Kosilek met this purpose by identifying herself as a woman in an all-male prison. See *id.*

⁷⁵ See *id.* at 104. Judge Thompson noted that rather than treating Kosilek's underlying illness, antidepressants and psychotherapy treated the illness's symptoms. See *id.* at 106.

⁷⁶ See *id.* at 102.

⁷⁷ See *id.* Departure from the WPATH Standards of Care may be attributed to a patient's individualized situation or to the evolution and development of the gender dysphoria field. See WPATH STANDARDS OF CARE, *supra* note 39, at 2. The dissent argued that Dr. Schmidt's departure from the WPATH Standards of Care was based on a categorical approach opposing sex reassignment surgery altogether. See *Kosilek IV*, 774 F.3d at 103 (Thompson, J., dissenting).

⁷⁸ See *Kosilek IV*, 774 F.3d at 109, 113 (Thompson, J., dissenting). Judge Thompson noted that after each doctor recommended sex reassignment surgery for Kosilek, the Commissioners delayed the surgery by finding another specialist to review Kosilek's treatment plan. See *id.* at 109. Furthermore, the dissent explained that the security report presented by the DOC was "rushed and results-driven." See *id.* at 110. The dissent highlighted how the DOC met to discuss security concerns a week before a report was due in court, that the DOC's attorneys mostly wrote the report, and that at trial the DOC's security experts were not prepared. See *id.*

⁷⁹ See *id.* at 110 (criticizing the majority for supporting a security report that took a "throw-it-up-and-see-what-sticks approach"); see also *Kosilek II*, 889 F. Supp. 2d at 243 (finding the DOC's security concerns as pretext for not providing Kosilek with the surgery).

⁸⁰ See *Kosilek IV*, 774 F.3d at 113 (Thompson, J., dissenting) (stating that prison officials were deliberately indifferent by delaying recommended medical treatment, seeking out a medical opinion favorable to the DOC, presenting a rushed and results-driven security report, providing unsubstantiated security concerns, and denying surgery out of fear of political and public backlash).

⁸¹ See *id.* at 107–08. The dissent noted that based on that reasoning, the DOC could avoid providing medically necessary treatment if it could find an expert with a differing opinion. See *id.* at 108; see also *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (stating that treatment decisions are not left unchecked and that they must meet prudent professional standards).

stead, the dissent argued that sex reassignment surgery was supported by the majority of experts, the WPATH Standards of Care, and by Kosilek herself.⁸²

III. IGNORING MEDICAL CONSENSUS AND RELYING ON AN OUTLIER MEDICAL OPINION SHOULD AMOUNT TO AN EIGHTH AMENDMENT VIOLATION

The U.S. Court of Appeals for the First Circuit's 2014 en banc decision in *Kosilek v. Spencer* ("*Kosilek IV*") is problematic because it ignored a medical consensus on adequate medical care, thereby departing from established U.S. Supreme Court precedent and Eighth Amendment jurisprudence.⁸³ The *Kosilek IV* en banc court relied on an outlier medical opinion, and thus condoned an Eighth Amendment violation by the Massachusetts DOC.⁸⁴ If a medical expert's opinion departs significantly from professional standards, as was the case in *Kosilek IV*, his or her treatment recommendation should be found imprudent and constitutionally inadequate.⁸⁵ The outlier medical opinion in *Kosilek IV* not only contradicted the WPATH Standards of Care, but also the

⁸² See *Kosilek IV*, 774 F.3d at 106 (Thompson, J., dissenting). For example, after Kosilek's first suit in 2002, Dr. Seil, a gender identity specialist, recommended sex reassignment surgery following a year of hormonal treatment. *Id.* at 70 (majority opinion). In 2004, the two Fenway Community Health Center doctors, Dr. Kapila and Dr. Kaufman, also recommended the surgery. *Id.* at 71. Their recommendations were also reviewed and accepted by the DOC's health-service provider, University of Massachusetts Correctional Health Program. *Id.*; see also *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 271, 273 (2014) (noting that when courts determine who qualifies as intellectually disabled and how they should be treated "the medical community's opinions" are consulted). See generally *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014) (striking down Florida's IQ threshold for death penalty eligibility because the IQ test disregarded "established medical practice").

⁸³ See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (relying on a consensus in "scientific and sociological studies"); *Atkins v. Virginia*, 536 U.S. 304, 317–18 (2002) (relying on established research and citing "clinical definitions of mental retardation" as defined by the American Association on Mental Retardation and the American Psychiatric Association); *Kosilek v. Spencer (Kosilek IV)*, 774 F.3d 63, 102 (1st Cir. 2014), cert. denied, 135 S. Ct. 2059 (2015) (mem.) (Thompson, J., dissenting) (noting that a number of courts have relied on the WPATH Standards of Care).

⁸⁴ See *Kosilek IV*, 774 F.3d at 104 (Thompson, J., dissenting) (agreeing with the *Kosilek II* court's finding that the outlier medical opinion provided by Dr. Schmidt did not meet prudent professional standards). In 2012, in *Kosilek v. Spencer (Kosilek II)*, the district court relied on the WPATH Standards of Care to ensure the prudence of expert opinions arguing that sex reassignment surgery was medically necessary for treating gender dysphoria. See *Kosilek v. Spencer (Kosilek II)*, 889 F. Supp. 2d 190, 231 (D. Mass. 2012) ("[T]he Standards of Care continue to describe the quality of care acceptable to prudent professionals who treat individuals suffering from gender identity disorders."), rev'd en banc, 774 F.3d 63, cert. denied, 135 S. Ct. 2059. The *Kosilek II* court criticized Dr. Schmidt's treatment plan as imprudent. See *id.* at 236.

⁸⁵ See *Kosilek IV*, 774 F.3d at 90 (majority opinion) (explaining that choosing a treatment plan "commensurate with the medical standards of prudent professionals . . . is a decision that does not violate the Eighth Amendment"). But see *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (noting that a treatment decision that is "so far afield of accepted professional standards" could amount to an Eighth Amendment violation).

majority of experts in *Kosilek IV* and other cases that have relied on the Standards.⁸⁶

Nothing other than following the WPATH Standards of Care qualifies as adequate medical care for treating patients with gender dysphoria.⁸⁷ Accordingly, the *Kosilek IV* court should have relied on the WPATH Standards of Care and reaffirmed the U.S. District Court for the District of Massachusetts's 2012 decision in *Kosilek v. Spencer* (“*Kosilek IP*”) that found sex reassignment surgery as the only adequate treatment for *Kosilek*.⁸⁸ Courts routinely give deference to consensus in the medical community over outlier opinions.⁸⁹ For example, the U.S. Supreme Court's decision in *Atkins v. Virginia*, in 2002, referred to a consensus of medical experts to determine that executing intellectu-

⁸⁶ See *Kosilek v. Spencer (Kosilek III)*, 740 F.3d 733, 764 (1st Cir. 2014), *withdrawn*, 774 F.3d 63 (en banc), *cert. denied*, 135 S. Ct. 2059; *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 70 (2010) (relying on the WPATH Standards of Care, the U.S. Tax Court held in 2010 that sex reassignment surgery for those suffering from severe gender dysphoria is medically necessary and is not a cosmetic procedure). Dr. Schmidt was also the outlier medical opinion in *O'Donnabhain v. Commissioner of Internal Revenue*, and in 2010 the United States Tax Court rejected his approach as “idiosyncratic and unduly restrictive.” See *O'Donnabhain*, 134 T.C. at 75.

⁸⁷ See *De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013) (describing the WPATH Standards of Care as “generally accepted protocols” for treating gender dysphoria); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1170 (N.D. Cal. 2015) (noting that the WPATH Standards of Care “are recognized as authoritative standards of care by the American Medical Association, the American Psychiatric Association, and the American Psychological Association”); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) (highlighting that the WPATH Standards of Care are “generally followed in the community”). Relying on the WPATH Standards of Care, the Tax Court in *O'Donnabhain* held that sex reassignment surgery for those suffering from severe gender dysphoria is medically necessary and is not a cosmetic procedure. See *O'Donnabhain*, 134 T.C. at 70; see also *Agbemenu, supra* note 33, at 8 (stating that the WPATH Standards of Care are “the preeminent authority on treatment of those suffering with gender dysphoria”). The organization that publishes the WPATH Standards of Care includes “more than 600 physicians, psychologists, social scientists, and legal professionals dedicated to the treatment of gender identity disorders.” WPATH Brief, *supra* note 6, at 1.

⁸⁸ See *Kosilek IV*, 774 F.3d at 102 (Thompson, J., dissenting) (highlighting a number of courts that have relied on the WPATH Standards of Care); *Kosilek II*, 889 F. Supp. 2d at 236 (finding sex reassignment surgery the only adequate treatment).

⁸⁹ See *Arnett*, 658 F.3d at 751 (noting that a treatment decision that is “so far afield of accepted professional standards” could lead to an Eighth Amendment violation); see also *Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015) (“[I]n cases where some medical care is provided, a plaintiff ‘is entitled to prove his case by establishing [the] course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference.’” (quoting *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990))); *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (stating that “a substantial departure from accepted professional judgment, practice, or standards” could amount to constitutionally inadequate medical care); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (noting that to prove an Eighth Amendment violation, a prisoner “must show that the course of treatment the doctors chose was medically unacceptable under the circumstances”); *Agbemenu, supra* note 33, at 18 (advocating that courts should rely on the consensus of the medical community when determining whether transgender prisoners have a serious medical need requiring adequate medical care); WPATH Brief, *supra* note 6, at 5 (“[P]rofessional consensus provides an objective anchor for the court’s decisions and a reliable benchmark against which factfinders can judge the merits of competing views.”).

ally disabled persons was cruel and unusual.⁹⁰ Similarly, the Court in *Roper v. Simmons*, in 2005, deferred to professional consensus to ensure the scientific validity of expert opinions arguing that juveniles should be treated differently than adults.⁹¹ Furthermore, in 2015, the U.S. District Court for the Northern District of California granted a prisoner with gender dysphoria a preliminary injunction for sex reassignment surgery, relying on the WPATH Standards of Care to weigh and reject an outlier medical opinion.⁹² Consistent with these cases, the *Kosilek II* court also relied on the WPATH Standards of Care to ensure the prudence of expert opinions arguing that sex reassignment surgery was the only adequate treatment for Kosilek.⁹³

Granting deference to an outlier medical opinion forecloses all future arguments transgender prisoners in the First Circuit could make that denying sex reassignment surgery constitutes inadequate medical care in violation of the Eighth Amendment.⁹⁴ The *Kosilek IV* majority disagreed that their decision would create a “de facto ban” against the surgery because this and future decisions are individualized.⁹⁵ Given the majority’s decision to allow prison officials to choose between treatment plans, however, it is difficult to imagine a prisoner who could successfully bring an Eighth Amendment claim for surgery.⁹⁶ In a future case, the DOC could simply find an expert opposed to the

⁹⁰ See *Atkins*, 536 U.S. at 318 (relying on established research and citing “clinical definitions of mental retardation” as defined by the American Association on Mental Retardation and the American Psychiatric Association).

⁹¹ See *Roper*, 543 U.S. at 569–70 (relying on a consensus in “scientific and sociological studies”).

⁹² See *Norsworthy*, 87 F. Supp. 3d at 1188 (rejecting the expert opposing the surgery because he “misrepresent[ed]” the WPATH Standards of Care, made “illogical inferences,” and “generaliz[ed]” the experience of prisoners with gender dysphoria). Prison officials appealed the decision in *Norsworthy v. Beard*, but prior to oral arguments the prisoner was paroled, so the U.S. Court of Appeals for the Ninth Circuit dismissed the appeal as moot. See 802 F.3d 1090, 1091–92 (9th Cir. 2015). Since *Norsworthy*, and as a result of another transgender prisoner case that was settled, California has adopted a policy to provide sex reassignment surgery for some prisoners. See Richard Pérez-Peña, *California Is First State to Adopt Sex Reassignment Surgery Policy for Prisoners*, N.Y. TIMES, Oct. 22, 2015, at A15.

⁹³ See *Kosilek II*, 889 F. Supp. 2d at 250; Agbemenu, *supra* note 33, at 18 (arguing that “courts should . . . rely heavily on well-established knowledge of the medical community” when determining whether transgender prisoners have a serious medical need requiring adequate medical care).

⁹⁴ See *Kosilek IV*, 774 F.3d at 106–07 (Thompson, J., dissenting) (arguing that the majority’s decision “creates a de facto ban on sex reassignment surgery for inmates in this circuit”); *id.* at 115 (Kayatta, J., dissenting) (criticizing the majority for “lock[ing] in an answer that binds all trial courts in the circuit: no prison may be required to provide [sex reassignment surgery] to a prisoner who suffers from gender dysphoria as long as a prison official calls up Ms. Osborne or Dr. Schmidt.”).

⁹⁵ See *id.* at 90–91 (majority opinion); see also *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) (noting that prison officials cannot have blanket policies for prisoners with medical needs, and must instead make individualized assessments).

⁹⁶ See *Kosilek IV*, 774 F.3d at 106–07 (Thompson, J., dissenting) (“[I]f Kosilek—who was time and again diagnosed as suffering from severe gender identity disorder, and who was uniformly thought by qualified medical professionals to require surgery—is not an appropriate candidate for surgery, what inmate is?”).

surgery, because in following the majority's opinion, prison officials can choose among treatment plans regardless of a plan's support throughout the medical community.⁹⁷

CONCLUSION

In *Kosilek v. Spencer*, the U.S. Court of Appeals for the First Circuit, sitting en banc, ignored the WPATH Standards of Care, which prescribe the appropriate course of treatment for gender dysphoria. Instead of relying on the WPATH Standards of Care, which were strongly supported by expert testimony backed by medical consensus as well as other courts, the First Circuit accepted an outlier medical opinion when deciding what constituted adequate medical care for Kosilek. The decision may lead to Kosilek being subjected to cruel and unusual punishment, and it could have the unforeseen consequence of preventing any prisoner suffering from severe gender dysphoria in the First Circuit from successfully bringing an Eighth Amendment claim for sex reassignment surgery in the future.

HANA CHURCH

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⁹⁷ See *id.* at 107–08.