BIOPOLITICAL AND NECROPOLITICAL CONSTRUCTIONS OF THE INCARCERATED TRANS BODY

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> *To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death. Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.*
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> Brown v. Plata*, 563 U.S. 493, 510 (2011).*

INTRODUCTION

Michelle Lynne Kosilek is a sixty-eight-year-old White trans[1] woman currently in-

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1 Trans people are people whose gender identity differs from the sex assigned to them at birth. Throughout this Article, I use the term trans to describe all those who self-identify in some capacity as transgender, transsexual, gender-variant, gender non-conforming, non-binary, or genderqueer, as well as to designate communities. The term transgender has gained traction as an umbrella term with increasing legal and medical recognition of trans identity and experience; thus, I use transgender specifically with reference to the ways in which (some) trans people have received such recognition in law, policy, media, medicine, and other areas of the political sphere. The term transsexual originated in medical literature that considered trans identity pathological, and has since fallen out of respectful use. Nevertheless, older generations of trans people used and continue to use the term transsexual to describe themselves. Birth-assigned sex is the sex listed on one's birth certificate, generally based on a physician's or nurse's visual designation of an infant's external genitalia as "male" or "female." Although courts and journalists liberally use "biological sex" to refer to birth-assigned sex, the two concepts are distinct. Biological sex in human beings is a construct based on chromosomal sex, gonads, hormone levels, and the anatomy of internal and external genitalia. Not all of these components align with traditional conceptions of male or female in every individual; thus, an individual's biological sex cannot in fact be known based on genitalia alone.

carcerated in the general population of Massachusetts Correctional Institution at Norfolk (MCI-Norfolk), a medium security men's prison managed by the Massachusetts Department of Corrections (DOC). Since 1992, Kosilek has been serving a life sentence without the possibility of parole.[2] From the very beginning of her incarceration, Kosilek has relentlessly sought access to gender-affirming care. In 1992, she filed a *pro se* lawsuit in the District Court of Massachusetts pursuant to 42 U.S.C. § 1983 against the DOC, seeking damages and injunctive relief, and arguing that their refusal to provide her treatment for gender identity disorder violated her Eighth Amendment right to adequate medical care.[3] Under the standard established in *Estelle v. Gamble*,[4] a plaintiff must affirmatively show (a) a serious medical need and (b) "deliberate indifference" on the part of the defendants. Kosilek's medical need was demonstrated by the diagnosis of gender identity disorder (GID; now called gender dysphoria). The second prong, the deliberate indifference standard, proved much harder to meet. Nevertheless, the DOC rescinded the "freeze-frame" policy that it had adopted in response to litigation, a policy that categorically barred trans prisoners from receiving any gender-affirming care they had not been prescribed prior to incarceration. Kosilek eventually gained access to hormone therapy and electrolysis. The battle continued, however, over access to gender-affirming genital surgery, or "sex reassignment surgery" (SRS) as it was called by the courts and the parties in this case.

Access to gender-affirming care of one's choice is crucial to the self-determination of trans people. *Gender-affirming care* refers to any regimen or procedure administered by the medical establishment that trans people may elect to receive, with the aim of modifying their bodies to match their internal sense of gender. The notion of "care" captures only a subset of gender-affirming *somatechnics*, or technologies of body modification. Many trans people may not view transness as essentially medical, but certain somatechnics are only available through a process of medical consultation and diagnosis by a licensed expert. Not all trans people seek gender-affirming care, and many who do cannot access it. The restrictions on somatechnics are governed both by the field of medicine (in defining health, illness, and care) and by legislation (licensing health care professionals who may legally prescribe or operate on patients).

In using the term "care" throughout, this Article is also implicated in the transmedicalist framework that currently structures access to gender-affirming somatechnics. *Transmedicalism* refers to the understanding of transness as an essentially medical condition.

2 Kosilek v. Spencer (*Kosilek IV*), 774 F.3d 63, 68–69 (1st Cir. 2014).

3 *Id.* at 69.

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

A critical implication of transmedicalism is the supposition that experiencing gender dysphoria is necessarily a part of being trans, which is inconsistent with the lived experiences of many trans people. A diagnosis of gender dysphoria (GD) requires "clinically significant distress" or "impairment in the functions of daily life,"[5] and such a diagnosis is a pre-requisite to receiving most forms of gender-affirming care. Although being trans is not a medical condition, transmedicalism structures access to gender-affirming substances and procedures. This has made it possible and necessary for trans prisoners to parse their needs into existing Eighth Amendment jurisprudence through *Estelle*, which established that "deliberate indifference to serious medical need" falls into the category of "cruel and unusual punishments."[6]

Kosilek is one of many trans people[7] who have sought access to gender-affirming care behind bars. Asserting their rights under the First, Fifth, Eighth, and Fourteenth Amendments,[8] trans plaintiffs built a rich repertoire of legal strategies to frame their needs in the vocabulary of a Constitution whose writers did not contemplate their existence. This Article will focus its discussion on claims under the Eighth Amendment that prison officials have improperly withheld gender-affirming care. Due to the relative scarcity of such cases and the absence of Supreme Court guidance, all circuits cite one another; therefore, this Article will discuss them together. Despite a smattering of victories that have significantly expanded trans prisoners' access to hormone replacement therapy (HRT), courts and the public at large have been far less willing to accept essentially identical arguments for access to gender-affirming genital surgery. This was also evident throughout the *Kosilek* litigation, which ultimately spanned two decades. It produced what is likely the most comprehensive judicial treatment of a transgender prisoner to date in the form of four lengthy

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5 AMERICAN PSYCHIATRIC ASSOCIATION, GENDER DYSPHORIA (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/6VYW-4KBD].

6 *Estelle*, 429 U.S. at 104.

7 There is relatively little literature on trans men in women's prisons, but many writers note that often women's prisons punish gender non-conformity especially severely. *See* Lori Girshick, *Out of Compliance: Masculine-Identified People in Women's Prisons*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 215 (Eric A. Stanley & Nat Smith eds., 2015); Sarah Pemberton, *Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes*, 39 SIGNS 151, 167 (2013).

8 *See, e.g.*, Brown v. Dep't of Health and Human Serv., 2016 WL 6637937, at *2 (D. Neb. Nov. 9, 2016) ("Plaintiff seeks to assert claims for declaratory, injunctive, and monetary relief for violations of the First, Fifth, Eighth, and Fourteenth Amendments that occurred when the defendants subjected Plaintiff to gender discrimination, cruel and unusual punishment, violation of Plaintiff's right to equal protection, and defamation of character related to her 'constitutional rights to free gender expression.'").

opinions between the Massachusetts District Court and the First Circuit Court of Appeals.[9] The opinions reveal a judicial struggle to resolve what is uncritically portrayed as the conflict between a transgender woman's medical needs and the discretionary security interests of prison management. This has resulted in an impasse[10] over what constitutes deliberate indifference that has, perhaps, obscured the meaning of "care" in the Eighth Amendment context.

This Article posits that the issue of gender-affirming genital surgery conjures competing constructions of the incarcerated trans body that reflect different conceptions of its relationship to state power. It offers a reading of this conflict as a clash between a *biopolitical* and a *necropolitical* conception of the incarcerated trans body. Biopolitics is a theory of state power that views the state as the arbiter and administrator of life and all life processes. Necropolitics, on the other hand, posits that sovereignty is defined by its power to mark out certain populations for social and literal death.

Part I explicates the concepts of biopolitics and necropolitics, drawing on the work of Michel Foucault and Achille Mbembé. In the biopolitical framework, the trans body is constructed as an object of medico-legal in(ter)vention. It is created when the subject is validated as transgender through medical diagnosis of gender dysphoria, which implies the need for health care. In the necropolitical framework, the trans body interrupts the regime of carceral subjugation, one aspect of which is gendered discipline, enforced in part through strict sex segregation. The trans body is inscribed with violence. It is imagined both as essentially inviting violence (in a men's prison) or as threatening it (in a women's prison).

Part II provides an overview of the Eighth Amendment cases brought by trans plaintiffs. It begins by reviewing the cases that develop the "deliberate indifference to serious medical need" test in the context of denial of gender-affirming care to trans prisoners. Following this background, Part II introduces the *Kosilek* case and narrates its lengthy history.

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9 *Kosilek IV*, 774 F.3d 63 (1st Cir. 2014). "[*Kosilek*] litigation has spanned more than twenty years and produced several opinions of significant length." *Kosilek IV*, 774 F.3d at 68 (citation omitted); Kosilek v. Spencer (*Kosilek III*), 740 F.3d 733, 736 (1st Cir. 2014), *rev'd en banc*; Kosilek v. Spencer (*Kosilek II*), 889 F. Supp. 2d 190 (D. Mass. 2012); Kosilek v. Maloney (*Kosilek I*), 221 F. Supp. 2d 156 (D. Mass. 2002).

10 Although the defendants ultimately prevailed in the *Kosilek* case, the judges who presided over the case were closely divided. District Judge Wolf found for the defendants in *Kosilek I* and for the plaintiff in *Kosilek II*. On appeal in the First Circuit, a three-judge panel found 2–1 for the plaintiff before being reversed 3–2 on rehearing en banc.

Part III undertakes a close reading of the *Kosilek* case, attending to the biopolitical and necropolitical logics that are mobilized by the parties and reflected in the court opinions.

Finally, Part IV will consider how courts and advocates might respond given the impasse between these two competing visions. I argue that for courts, ceding to the necropolitical logic presented by prison management in these cases abdicates their responsibility to protect prisoners' Eighth Amendment rights.

I. Biopolitical and Necropolitical Trans Bodies

This Part lays out the theoretical groundwork for the ensuing discussion of how courts (re)construct the body of the incarcerated trans person in these decisions, especially *Kosilek*. Beginning with Foucault's concept of discipline, in the first section I discuss the implications of the sex segregation of the prison space for incarcerated trans people. In the second and third sections, I outline the theories of biopolitics and necropolitics respectively and discuss how each theory produces a way of viewing the incarcerated trans subject.

A. Gender Discipline, Sex Segregation

Michel Foucault theorized that modern state power acts on subjects through discipline. Discipline molds "docile" bodies by organizing space, time, and everyday activities in institutions such as schools, hospitals, and prisons.[11] Subsequent scholars including Sarah Pemberton have extrapolated a gendered dimension from this account. Pemberton argues that gendered bodies and identities come into being through gendered disciplinary power.[12] Within institutions and in everyday interactions, "individuals are assessed against gendered norms of appearance and behavior until they become self-disciplined gendered subjects who impose these norms on themselves."[13] The imposition of gendered norms begins with sex assignment at birth and persists through legal and administrative identification of an individual as a legally gendered subject. The United States is unique in that there is no singular, unified gender-administering regime. Instead, legal gender is a composite of a multitude of federal, state, and local agencies that administer gender classification independent

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11 MICHEL FOUCAULT, DISCIPLINE AND PUNISH 138 (Alan Sheridan trans., 2d ed. 1995) [hereinafter FOUCAULT, DISCIPLINE & PUNISH].

12 Pemberton, *supra* note 7, at 152.

13 *Id.* at 157.

of one another.[14] An individual seeking to change their legal gender must apply separately at each agency for a change of gender marker on the documents published by that agency or in the database it maintains. The only possible options, with few recent exceptions,[15] are "male" and "female" or "M" and "F." Dean Spade, who has undertaken a study of the diverse requirements for gender reclassification, writes: "Every government agency and program that tracks gender has its own rule or practice (sometimes dependent on a particular clerk's opinion) of what evidence should be shown to warrant an official change in gender status in its records or on its ID."[16] The vast majority of agencies only permit a change of gender marker with medical documentation; many require the completion of SRS, though an increasing number are changing to the more liberal standard of a doctor's note indicating the presence of gender dysphoria.[17] The diversity of requirements for legal, administrative, and institutional gender reclassification illustrate that the boundary between genders is not equally permeable in all contexts.

Foucault used the term *carceral* to describe the power-knowledge regime that undergirds mass incarceration.[18] The carceral system is "the disciplinary form at its most extreme, the model in which are concentrated all the coercive technologies of behaviour."[19] The influence of the carceral extends beyond the prison space due to the "continuity of institutions": carceral discipline diffuses into hospitals, schools, the military, and shapes social norms.[20] In contemporary America, this is captured in the term *prison industrial*

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14 DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 79 (2015) [hereinafter SPADE, NORMAL LIFE]; Pemberton, *supra* note 7, at 160; Tey Meadow, *A Rose is a Rose: On Producing Legal Gender Classifications*, 24 GENDER & SOC'Y 814, 815 (2010); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 759 (2008).

15 Since 2017, some states, including Oregon, Washington, New York, California, and the District of Columbia, have begun to recognize a nonbinary gender option on various legal documents, including birth certificates. *See* Annie Tritt, *States are starting to recognize a third gender. Here's what that means for nonbinary youth*, VOX (Apr. 2, 2018), https://www.vox.com/identities/2018/3/28/17100252/trans-nonbinary-third-gender-youth-legal-recognition [https://perma.cc/F5B5-WNC5].

16 SPADE, NORMAL LIFE, *supra* note 14, at 79.

17 *Id.*

18 Michael Rembis, *The New Asylums: Madness and Mass Incarceration in the Neoliberal Era*, *in* DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 139, 140 (Liat Ben-Moshe, Chris Chapman, & Allison C. Carey eds., 2014).

19 FOUCAULT, DISCIPLINE & PUNISH, *supra* note 11, at 293.

20 *Id.* at 299.

complex.[21] At the heart of the carceral system remain the most violent, coercive, "disciplinary" technologies that dominate, subjugate, and control bodies. Carceral discipline acts directly on the bodies of the incarcerated, for example, through techniques of spatial compartmentalization: enclosure, partitioning, solitary confinement, sex segregation, and so on.[22] Additionally, carceral discipline marks prisoners out for social death and renders them unable to fully reintegrate into society even if released.[23]

Carceral discipline has a gendered dimension. Prisons are sites of legal sex segregation and among the most restrictive of gender reclassification regimes.[24] On a basic level, placement is based on visual inspection of an individual's genitals at intake, or else one's assigned sex at birth.[25] Non-normative bodies or genitals disrupt the dehumanizing process of "sexing" prisoners, which often provokes invasive and violent responses by prison staff tasked with placement.[26] Gendered discipline is harshly enforced in both men's and women's prisons. In men's prisons, Pemberton argues, sex segregation and carceral discipline produce a norm of violent hypermasculinity.[27] Individuals who do not conform to this norm, such as transfeminine people, are especially vulnerable to violence. Trans bodies threaten the stability of these preexisting, highly coercive gender norms by posing a challenge to the discourses and techniques of gendered discipline—namely, the assumptions of sex segregation.

B. Medical Biopower: Producing the Incarcerated Transfeminine Body

Biopolitics is a theory of sovereignty developed by Michel Foucault, which posits that modern state power is defined by its functions of fostering and administering life. In

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21 CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 12 (Eric A. Stanley & Nat Smith eds., 2015).

22 FOUCAULT, DISCIPLINE & PUNISH, *supra* note 11, at 141–43.

23 *Id.* at 267, 301 ("The conditions to which the free inmates are subjected necessarily condemn them to recidivism . . . . Although . . . prison punishes delinquency, delinquency is for the most part produced in and by an incarceration which, ultimately, prison perpetuates in its turn.").

24 Pemberton, *supra* note 7, at 160.

25 *Id.* at 162 ("While Dean Spade argues that most prison authorities in the United States employ recognition policies based on birth sex, most scholars state that prisons usually classify and place inmates according to their genitalia.") (citing Spade, *Documenting Gender*, *supra* note 14, at 735).

26 *Id.* at 153.

27 *Id.* at 167–69.

Foucault's genealogical account, the onset of liberal modernity is marked by the proliferation of technologies of governance aimed at "the subjugation of bodies and the control of populations."[28] These biopolitical technologies displace premodern technologies of execution and exile as the defining activity of the state, and state power becomes *biopower*: the power to regulate all life processes.[29] Biopower produces and optimizes disciplined bodies, generates norms of health, and reproduces the life of the population.[30] It operates on both the level of individual bodies and on the population as a whole.

Extrapolating from Foucault's account, Dean Spade writes that technologies of population management include "taxation, military conscription, social welfare programs . . . immigration policy and enforcement, criminal punishment systems, the Census, and identity documentation programs," all of which use "purportedly neutral criteria aimed at distributing health and security and ensuring order" and "produce clear ideas about the characteristics of the national population." In the United States, according to Spade, biopower operates through administrative systems that

> have emerged out of and been focused on [the] creation and management of racial and gender categories to establish the nation itself through gendered-racialized property regimes. Racializing and gendering are nation-making activities carried out through the creation of population-level interventions, including administrative systems and norms, that preserve and cultivate the lives of some and expose other to premature death.[31]

In other words, biopower does not foster any and all life equally, but rather "distributes life chances across populations."[32]

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28 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. I 140 (1990) [hereinafter FOUCAULT, HISTORY OF SEXUALITY].

29 The reference to state power should not imply the concentration of power in a unitary sovereign. In the contemporary United States, power is decentralized and dispersed across a multiplicity of legal, administrative, and institutional regimes, which generate and reify "practices and knowledge that coalesce in conditions and arrangements that affect everyone and that make certain populations highly vulnerable to imprisonment." SPADE, NORMAL LIFE, *supra* note 14, at 3.

30 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 28, at 139.

31 SPADE, NORMAL LIFE, *supra* note 14, at 78.

32 *Id.* at 75.

Gender is both produced and regulated by discourses and techniques of biopower.[33] In Foucault's account, "bodies are never natural or outside power but are shaped by and interpreted through discourses and techniques of power."[34] Paul Preciado has theorized gender as the sum of diverse technologies that "modify the body or . . . produce subjectivity intentionally in order to conform to a preexisting visual and biopolitical order, which [is] prescriptive for what [is] supposed to be a female or male human body."[35] Examples include gendered socialization and disciplinary norms, body modification, as well as classification and legitimation by legal and administrative institutions. These technologies work in tandem to create gendered bodies, which are viewed (or "read") through an interpretive lens that reinscribes gender norms upon them.[36]

The term *somatechnics* is used to refer to the subject's conscious modifications of their own bodily features, capacities, or appearance.[37] Somatechnics range from everyday practices (such as grooming, exercise, diet) to expressive body modifications (piercings, tattoos, cosmetic surgery, breast enhancement), to medical procedures and treatments (hormones, Viagra, contraceptives, chest surgery, genital surgery). Somatechnics, including medical somatechnics, are employed by both gender-normative and gender-variant people to affirm their gender.[38] The use of gender-affirming somatechnics is partly effected through self-discipline. However, medical somatechnics are not equally accessible to all people. As Dean Spade points out, "Medicaid provides all of the gender-confirming procedures and medications that trans people request to nontrans people and only denies them to those seeking them based on a transgender diagnostic profile."[39] In 2016, there was a brief

33 *See, e.g.*, Pemberton, *supra* note 7, at 152, 157.

34 *Id.* at 157.

35 PAUL B. PRECIADO, TESTO JUNKIE: SEX, DRUGS, AND BIOPOLITICS IN THE PHARMACOPORNOGRAPHIC ERA 100 (2013).

36 *See* Pemberton, *supra* note 7, at 157.

37 PRECIADO, *supra* note 35, at 78.

38 Pemberton, *supra* note 7, at 158–59.

39 SPADE, NORMAL LIFE, *supra* note 14, at 82 ("For example, testosterones and estrogens are frequently prescribed to nontransgender people for a variety of conditions including hypogonadism, menopause, late onset of puberty, vulvular atrophy, atrophic vaginitis, ovary problems . . . intersex conditions, breast cancer or prostate cancer, and osteoporosis prevention. Similarly, the chest surgery that transgender men often seek—removing breast tissue to create a flat chest—is regularly provided and paid for by Medicaid for nontrans men who develop . . . gynecomastia, where breast tissue grows in what are considered abnormal amounts. Nontransgender women who are diagnosed with hirsutism—where facial or body hair grows in what are considered abnormal amounts—are frequently treated for this condition through Medicaid coverage. In

period of hope that this discrimination would be corrected when the Department of Health and Human Services issued a rule implementing Section 1557 of the Affordable Care Act, prohibiting discrimination by health programs receiving federal financial assistance on the basis of sex. The rule incorporated the Title IX prohibition of sex discrimination and interpreted it to include discrimination on the basis of gender identity, which meant that a procedure available for any other diagnosis must also be available for gender dysphoria. Unfortunately, the regulations met with conservative backlash and were enjoined in *Franciscan Alliance v. Burwell*.[40]

Consequently, one way the biopolitical state regulates gender is by producing a medicalized transgender identity through a medico-legal apparatus that limits and regulates access to certain gender-affirming somatechnics. Transmedicalism, understood as a regime of restrictions on access, is a conduit for the biopolitical regulation of gender. Trans people inhabit and desire a diverse variety of bodies, but state recognition of transgender bodies is conditioned on their prescription and reinscription of the very same gender norms by only permitting access to a particular combination of gender-affirming somatechnics for individuals of each gender. In this way, the state is able to take stock of trans subjects and fold them into the liberal polity without unravelling the legal apparatus of producing and enforcing the gender binary.

The biopolitical power that creates transgender subjects as patients and transgender bodies as objects of medical intervention continues to exist behind bars. However, it differs from that in the free world in at least two respects. In prison, power acts from above with its source in a concentrated sovereign, whereas in the free world, power is diffused by market forces. Carceral biopower is totalitarian; trans prisoners like Kosilek cannot shop around for a doctor who will prescribe their preferred treatment. Secondly, as discussed in the previous section, prisons enforce gendered discipline with particular severity through sex segregation, and consequently men's prisons are sites of hypermasculinity and (often sexual) violence. The strict enforcement of sex segregation creates an anxiety centered on the genitals, which is a metonym for the sex of a body. The regime of sex segregation perceives the imagined appearance of genitals that do not conform to the norm of the (sexed) space as a disciplinary threat.

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addition, reconstruction of breasts, testicles, penises, or other tissues lost to illness or accident is routinely performed or covered.").

40 Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

As Pemberton argues, men's prisons and women's prisons each enforce exaggerated disciplinary gender norms. Laurel Westbrook and Kristen Schilt have shown that men's and women's spaces are not policed equally, and that access to women's spaces is policed with particularly heightened anxiety.[41] Westbrook and Schilt locate the source of this anxiety in "fears of unwanted (hetero)sexuality," resulting in an overwhelming fixation on genitalia. Anxiety is particularly fixated on penises and their potential to intrude/protrude into female spaces, where they signify sexual threats.[42] Consequently, the possibility of housing a trans woman in a women's prison is unthinkable if she has a penis. As sexual violence is naturalized in the carceral space, penises—which are "associated with power and danger"—represent the potential of uncontrollable heterosexual desire that is threatening to women, who are imagined as "always at (hetero)sexual risk."[43] The idea of a vagina in a men's prison presents the inverse fear, namely, that it would naturally invite penetration and therefore rape. Consequently, the incarcerated transfeminine body is the natural target of male violence at the same time that it is deeply suspect for seeming to approach, by approximating, femininity. These anxieties are centered on a genital imaginary that overwrites existing sexual violence with a narrative of heterosexist anxiety about the potential of a penis to penetrate vaginas and the potential of a vagina to be penetrated. It ignores the reality that trans women are disproportionately victims of sexual violence both in and out of prisons, regardless of their genitalia,[44] and that many cisgender men, who do not have vaginas, are nevertheless victims of prison rape.

C. Carceral Necropower: Killing the Trans Body

The theory of necropolitics, developed by Achille Mbembé in 2003, offered a corrective to biopolitics for its inability to fully account for contemporary forms of state power that are aimed at creating death, not life.[45] Necropolitics posits that sovereignty is further defined by the marking out of certain populations for social death, and that it is exercised through subjugation, domination, and violence. This leads to the creation of spatially compartmentalized "*death-worlds*, new and unique forms of social existence in which vast

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41 Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC'Y 32, 32 (2013).

42 *Id.* at 34–35.

43 *Id.* at 46.

44 *See* SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 17 (2007).

45 Achille Mbembé, *Necropolitics*, 15 PUB. CULTURE 11, 11–12 (Libby Meinties trans., 2003).

populations are subjected to conditions of life conferring upon them the status of *living dead*."[46]

Mbembé's examples draw primarily from the colonial context; in the carceral context, Jessi Lee Jackson identifies analogous "dead zones": "locations where state actors can exercise near-absolute power over life and death."[47] Death worlds or dead zones enclose entire populations that are deemed disposable and subjected to what Lauren Berlant terms "slow death."[48] It is defined as "the physical wearing out of a population and the deterioration of people in that population that is very nearly a defining condition of their experience and historical existence."[49]

Necropolitics builds on biopolitics; it theorizes that the contemporary sovereign activity of producing biopolitical subjects is intrinsically linked to the exclusion and enclosure of populations who are condemned to social and literal death. In Sarah Lamble's formulation, "necropolitics can be understood as technologies of power that (re)produce social relations of living and dying, such that some populations are ushered into the worlds of life and vitality, while others are funneled into . . . death worlds."[50] On the relationship between biopolitics and necropolitics, Jasbir Puar writes: "[Biopolitics] makes its presence known at the limits and through the excess of [necropolitics]; [necropolitics] masks the multiplicity of its relationships to death and killing in order to enable the proliferation of the latter."[51] The distinction matters, according to Puar, because:

> holding the two concepts together suggests a need to also attend to the *multiple spaces of the deflection of death*, whether it be in the service of the optimization of life or the mechanism by which sheer death is minimized. This bio-necro collaboration conceptually acknowledges biopower's direct activity in death, while remaining bound to the optimization

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46 *Id.* at 40 (emphasis in original).

47 Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS 197, 209 (2013).

48 Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency*), 33 CRITICAL INQUIRY 754, 756 (2007); Mbembé, *supra* note 45, at 11–12.

49 Berlant, *supra* note 48, at 754.

50 Sarah Lamble, *Queer Investments in Punitiveness: Sexual Citizenship, Social Movements and the Expanding Carceral State*, *in* QUEER NECROPOLITICS 151, 161 (Jin Haritaworn, Adi Kuntsman & Silvia Posocco eds., 2014).

51 JASBIR PUAR, TERRORIST ASSEMBLAGES 35 (2007).

> of life, and necropolitics' nonchalance toward death even as it seeks out killing as a primary aim.[52]

Mass incarceration is a significant example of necropolitical power within the borders of the United States. Spatially compartmentalized from the "free world," the contemporary prisons are "mass warehouses for poor, racialized and otherwise disenfranchised populations."[53] As Foucault noted, carceral discipline does not rehabilitate the subject but instead marks him out as antisocial.[54] Even after prisoners serve their sentences, the criminal record becomes an impediment to legal employment, which may result in recidivism. Prisons not only produce social death but literally subject bodies to slow dying through "the experience of 'doing time'."[55] Thus, mass incarceration inscribes social death on a population that is marked by race and class by subjecting their bodies to slow dying and living death.

Jessi Lee Jackson theorized a sexual dimension to the necropolitical violence of prisons. Prisons are rife with sexual violence and marked by racialized sexual deviancy.[56] Sexual violence is naturalized; indeed, it becomes "an institutionalized component of punishment behind prison walls."[57] Jackson writes "[u]nderstanding prison as a corporal punishment means understanding it as a sexual punishment—a form of sexual violence," as a singular dimension of the total coercion to which a body is subject. However, necropolitical power does not act evenly on all prisoners; rather, bodies are differently affected by carceral power "depending on how their bodies are socially marked as racially or sexually other."[58] The placement of a trans woman in a men's prison enacts a form of sexual violence, as it "sexes" her through bodily invasion—invasion of bodily privacy as well as the literal invasion of cavities in routine strip searches.[59] The transfeminine body is also a target of rape, a form

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52 *Id.*

53 Lamble, *supra* note 50, at 161.

54 FOUCAULT, DISCIPLINE & PUNISH, *supra* note 11, at 266 ("The prison cannot fail to produce delinquents. It does so by the very type of existence it imposes on its inmates . . .").

55 Lamble, *supra* note 50, at 161.

56 Jackson, *supra* note 47, at 197–98; *see also* Elias Vitulli, *Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons* 37, SOC. JUST. 53 (2010–11); PUAR, TERRORIST ASSEMBLAGES, *supra* note 51, at 79–113.

57 ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 77 (2013).

58 Jackson, *supra* note 47, at 208.

59 *See* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF*

of institutionally tolerated punishment for gender non-conformity. Finally, Jackson points out that prison "creates more social death for some than for others."[60] Solitary confinement, prescribed both as punishment and as "protection" for prisoners from physical violence, is the literal embodiment of maximal social death. It is suggested in *Kosilek* and other cases as the only administratively possible way to house a trans woman who has completed SRS.

II. Transmedicalism and the Eighth Amendment

This Part begins with a statement of the two-prong Eighth Amendment test established in *Estelle v. Gamble*, followed by discussion of how courts have applied each prong in cases involving trans prisoners' access to care. This Part summarizes and critiques existing judicial decisions on access to care for trans prisoners. A history of the *Kosilek* litigation will follow.

A. The Eighth Amendment Standard

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."[61] As the Supreme Court has stated repeatedly, the Amendment speaks to "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[62] Thus, the definition of cruel and unusual punishment is not a static one. Rather, the Amendment contemplates and "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."[63] In 1976, the Supreme Court held in *Estelle v. Gamble* that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."[64] *Estelle* established a two-pronged requirement for Eighth Amendment claims regarding inadequate medical care, comprising an objective and a subjective component. In order to assert a viable claim, a plaintiff must show that a) she objectively has a serious medical need, and b) the defen-

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LGBT PEOPLE IN THE UNITED STATES 101 (2011); *see also* DAVIS, *supra* note 57, at 63.

60 Jackson, *supra* note 47, at 208.

61 U.S. CONST. amend. VIII.

62 Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

63 *Id.* at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

64 *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (internal citation omitted)).

dants subjectively acted, or failed to act, with deliberate indifference to that medical need.[65]

1. (Trans)Medical Necessity

In 2013, the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) renamed gender identity disorder to gender dysphoria and declassified it as a mental disorder. This formal depathologization of transgender identity reflects a slow process of cultural destigmatization. Nevertheless, access to gender-affirming care remains strictly gatekept by the medical establishment, requiring consultation, diagnosis, and administration by licensed medical professionals. Indeed, the very notion of care takes a fundamentally transmedicalist view of altering one's hormonal makeup, secondary sex characteristics, genitalia, etc., which marks them as categorically different from other modes of body modification, such as piercings, tattoos, or cosmetic surgery.[66] So long as statutory regulation upholds medical regimes of access to gender-affirming substances and procedures, the transmedicalist paradigm is enshrined in the law and underwrites both statutory and judicial constructions of the transgender subject. In access-to-care cases, the medicalized status of transgender identity has paved a way to constitutional recognition of transgender needs and the necessity of gender-affirming care through the Eighth Amendment. Trans plaintiffs and advocates have strategically emphasized the "medical necessity" of gender-affirming care as the basis of the Eighth Amendment claim.

Medical necessity is not the only possible framing of trans needs, however, and transmedicalism may be a double-edged sword. Disidentification with one's designated-gender-at-birth and the desire to inhabit a different gender or gendered body have historically been considered evidence of psychiatric abnormality. Transmedicalism presents a narrative that is compelling in its simplicity, but it brings with it a history of reducing "transsexualism" to pathology and deviancy. Many young trans people as well as non-binary and gender non-conforming people are increasingly rejecting the transmedicalist paradigm, for a variety of reasons: the criteria for GID diagnosis fail to capture their experience of gender; it pathologizes trans identity; it creates restrictive regimes of access to gender-affirming substances and procedures.[67] Full engagement with these critiques of transmedicalism would exceed the scope of this Article, but the existence of such critiques

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65 *Id.* at 106.

66 See the discussion accompanying *supra* note 6.

67 *See, e.g.*, *A Brief Critique of Transmedicalism* (Aug. 9, 2016), https://voidwhereinhibited.wordpress.com/2016/08/09/a-brief-critique-of-transmedicalism/ [https://perma.cc/GZF4-G8NE]; Judith Butler, *Undiagnosing Gender*, *in* TRANSGENDER RIGHTS (Paisley Currah et al. eds., 2010).

cautions one from taking for granted the medicalized narratives of transgender identity offered by both plaintiffs and defendants.

American courts have generally accepted that gender dysphoria is a serious medical need.[68] "There is no reason to treat transsexualism differently than any other psychiatric disorder," the Seventh Circuit wrote in the 1987 case of *Meriwether v. Faulkner*, finding that the plaintiff's gender dysphoria constituted a "serious medical need" for Eighth Amendment purposes.[69] Thus, "a transsexual inmate is constitutionally entitled to *some* type of medical treatment."[70] However, courts have floundered in the face of competing views as to the best treatment for transgender people. They have even failed to distinguish conversion therapy—harmful pseudoscientific practices meant to "cure" gay and trans people of their non-normative sexual orientation or gender identity[71]—from medical care. In *Meriwether*, although the Seventh Circuit reversed the district court's judgment for the defendant, it took care to emphasize that the plaintiff was not "entitled" specifically to the estrogen therapy she sought, or any type of treatment in particular.[72] Characterizing gender identity disorder as "a medically recognized psychological disorder,"[73] the court discussed two prior cases in which trans prisoners sued because they were provided mental health treatment instead of the gender-affirming hormone therapy they sought.[74] In one case, a trans woman was also given testosterone replacement therapy, a disturbing and extremely harmful kind of conversion therapy.[75] Neither prevailed on their Eighth Amendment claims. The *Meriwether* court agreed with both decisions that the courts should defer to "the informed

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68 De'lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011); Allard v. Gomez, 9 F. App'x. 793, 794 (9th Cir. 2001).

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

70 *Id.* (emphasis added).

71 *See generally* Mark Potok, *Quacks: 'Conversion Therapists,' the Anti-LGBT Right, and the Demonization of Homosexuality*, S. POVERTY L. CTR. (May 25, 2016), https://www.splcenter.org/20160525/quacks-conversion-therapists-anti-lgbt-right-and-demonization-homosexuality [https://perma.cc/N4LH-QENK]; *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy [https://perma.cc/98V7-Z9KJ].

72 *Meriwether*, 821 F.2d at 413.

73 *Id.* (discussing Supre v. Ricketts, 729 F.2d 958 (10th Cir. 1987) and Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986)).

74 *Meriwether*, 821 F.2d at 413.

75 *Id.*

judgment of *prison officials* as to the appropriate form of medical treatment."[76]

Thus, while seemingly favorable to transgender prisoners, the *Meriwether* decision leaves open the chilling and very present possibility that prison officials could provide inappropriate or abusive care to fulfill their constitutional obligations. The court seems to assume that any care is better than no care, leaving the definition of such care to the discretion of "prison officials." Acknowledging the controversy over the appropriate course of treatment for gender dysphoria, the court seems uncomfortable to do more than defer to prison officials in determining what to provide to a transgender prisoner. Of course, courts do not have the expertise to make such determinations themselves, but the plaintiff in *Meriwether* had named in her complaint two physicians who had provided her hormone therapy prior to incarceration.[77] The court makes passing mention of this but declines to comment further on the availability of medical expertise. The end result is that the defendants in the Eighth Amendment case are left with full discretion to selectively deny treatment or provide inappropriate "care" to trans inmates.

2. Deliberate Indifference

The second prong of *Estelle*, the subjective standard of deliberate indifference, might be considered a check on the problem of giving prison officials so much discretion that it swallows the plaintiff's objective medical needs. Instead, however, the *Estelle* Court characterizes the subjective prong as a limitation on valid Eighth Amendment claims. "Inadvertent failure to provide adequate medical care" is not a violation of the Eighth Amendment.[78] Nor is medical malpractice, which cannot rise to the level of a constitutional violation "merely because the victim is a prisoner."[79] The plaintiff must show that the defendants exhibited *deliberate indifference* to her serious medical need, which cannot always be inferred from medical mistreatment. "It is obduracy and wantonness, not inadvertence and error in good faith that characterize the conduct prohibited by the Cruel and Unusual Punishments clause."[80]

Unfortunately, the structure of this constitutional analysis takes more interest in the de-

76 *Id.* (emphasis added).

77 *Id.*

78 Estelle v. Gamble, 429 U.S. 97, 105 (1976).

79 *Id.* at 106.

80 Whitley v. Albers, 475 U.S. 312, 319 (1986) (citing *Estelle*, 429 U.S. at 105–06).

fendants' liabilities than the plaintiff's rights. The security norm of sex segregation invades the analysis. This is clear in Judge Wolf's formulation of the standard in the first *Kosilek* opinion ("*Kosilek I*"), as he writes:

> It is conceivable that a prison official, acting reasonably and in good faith, might perceive an irreconcilable conflict between his *duty to protect safety* and his *duty to provide an inmate adequate medical care*. If so, his decision not to provide that care might not violate the Eighth Amendment because the resulting infliction of pain on the inmate would not be unnecessary or wanton. Rather, it might be *reasonable* and reasonable conduct does not violate the Eighth Amendment.[81]

Stated at this level of abstraction, the argument is hard to dispute. In reality, trans people face severe discrimination in accessing health care, and the notion of inadvertence should be especially suspect in the climate of pervasive ignorance and prejudice.[82] Judge Wolf assumes a "reasonable prison official" might "reasonably and in good faith" perceive an "*irreconcilable* conflict," but why must we accept that premise? The passage suggests that it is reasonable to assume that trans bodies threaten "safety" in a nebulous general sense. There is even the implication that the provision of gender-affirming care would *increase* rather than diminish the threat, as the flourishing of trans autonomy is directly counter to the carceral norms of sex segregation and slow death. The reasonable prison official's dilemma asks us to accept as reasonable the triumph of carceral norms over trans well-being. The denial of gender-affirming care often only creates or aggravates existing mental health issues. In its explication of the Eighth Amendment, the court reveals its refusal to intervene in the denial of trans health care when doing so serves security interests, in the absence of the defendant's specific psychological attitude ("obduracy and wantonness").

Care for trans people in any meaningful sense must be aimed at affirming gender or alleviating dysphoria—as these strategies improve the health and well-being of trans people. Yet transphobia sustains the continued existence of frequently harmful and traumatic conversion therapy and treatments premised on transness as delusional and defective. The safe haven of "inadvertence"[83] can be a convenient mask for prejudice, or any number of other improper reasons to deny appropriate care. The difficulty of proving subjective intent

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81 Kosilek v. Maloney (*Kosilek I*), 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (emphasis added).

82 Jaime M. Grant et al., *National Transgender Discrimination Survey: Report on Health and Health Care*, *in* NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE (2010).

83 Soneeya v. Spencer, 851 F. Supp. 2d 228, 242 (D. Mass. 2012); *Kosilek I,* 221 F. Supp. 2d at 161.

in court creates an additional obstacle for trans plaintiffs, who face enormous information asymmetries and must rely on discovery to obtain evidence. Their claims may not survive summary judgment or even a motion to dismiss because as a federal court plaintiff, they must plead facts sufficient to state a facially plausible claim.[84]

In the 2011 case of *Battista v. Clarke*, the First Circuit seemed to recognize the harshness of this standard and opined that "deliberate indifference" may be found even in the absence of "any established sinister motive or 'purpose' to do harm."[85] Rather, an excessive pattern of "delays, poor explanations, missteps, changes in position and rigidities," may be used to infer deliberate indifference on the part of the Department of Correction.[86] Just like the defendants in *Battista*, the DOC in *Soneeya v. Spencer* "responded to recommendations of their own medical advisers regarding treatment for GID inmates by going 'back and forth looking for an out.'" Since *Meriwether*, the opinions have emphasized that federal courts will generally defer to the "informed judgment" of prison officials as to the appropriate treatment for trans inmates, so long as there is one. The Seventh Circuit's emphasis in *Meriwether* on federal court deference to "the informed judgment of prison officials as to the appropriate form of medical treatment" is echoed in *Kosilek I* ("informed medical judgment") and then in *Soneeya* ("considered judgment").[87] However, there can be no informed judgment in the absence of an individualized medical assessment: the *Soneeya* decision, which found that the defendant was deliberately indifferent, characterized the DOC's error as "approach[ing] Ms. Soneeya's needs as a legal, rather than a medical, problem, and [failing] to offer her the type of individualized medical assessment that the law requires."[88] The interchangeable use of the terms "informed judgment of prison officials" and "individualized medical assessment" suggests that the court is conflating precisely the legal (or rather, administrative) and medical determinations of the appropriate treatment.[89] The 2010 GID policy discussed by the court in *Soneeya* includes security review of treatment possibilities.[90] Thus, the "prison officials" whose judgment determines the care pro-

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84 *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

85 Battista v. Clarke, 645 F.3d 449, 455 (1st Cir. 2011).

86 *Id.*

87 *Soneeya*, 851 F. Supp. 2d at 248; *Kosilek I*, 221 F. Supp. 2d at 186 (quoting *Meriwether*, 821 F.2d at 415).

88 *Soneeya*, 851 F. Supp. 2d at 248.

89 *Id.*

90 *Id.* at 238–40, 247; MASS. DEP'T OF CORR., 103 DOC 652 (2010).

vided to a trans prisoner includes both prison administrators and medical personnel. This reinforces the troubling ambiguity as to whose "deliberate indifference" in denying care must be shown, and therefore, what is truly driving decisions about adequate care: medical judgment, or carceral interests.

Courts also began to recognize "deliberate indifference" where there was a blanket statute or policy banning certain treatments or procedures, obviating the possibility of an "individualized medical assessment" required to provide adequate care under the Eighth Amendment.[91] In 2011, the Seventh Circuit held in *Fields v. Smith* that a state statute imposing a blanket bar on gender-affirming care (hormone treatment and SRS) for inmates was unconstitutional on Eighth Amendment grounds.[92] The following year, Katheena Soneeya prevailed in the Massachusetts District Court, which found deliberate indifference in the DOC's failure to provide her the individualized medical assessment she was entitled to under the Eighth Amendment.[93] Finally, the landmark settlement of *Diamond v. Owens* in early 2016 seemed to sound the death knell for "freeze-frame" policies and other policies categorically barring the provision of gender-affirming care in prisons.[94] Ashley Diamond, a 37-year-old woman incarcerated in a Georgia state men's correctional facility, was denied the feminizing hormones she had been taking for seventeen years and was sexually assaulted by other inmates. She brought suit in early 2015 against the Georgia Department of Corrections (GDOC), asserting violations of the Eighth Amendment for the harms she experienced from estrogen withdrawal. The GDOC had a "freeze-frame" policy that placed a blanket denial on providing gender-affirming treatment to inmates beyond what they were receiving prior to incarceration.[95] The case received significant media coverage and elicited the interest of the federal government.[96] In April 2015, the United States Department of Justice filed a Statement of Interest in *Diamond* declaring its view that "Failure to provide individualized and appropriate medical care for inmates suffering from gender dysphoria

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91 *See Soneeya*, 851 F. Supp. 2d at 242.

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

93 *Soneeya*, 851 F. Supp. 2d at 248.

94 *See* Diamond v. Owens, 131 F. Supp. 3d 1346 (M.D. Ga. 2015).

95 *Id.* at 1355. Diamond was denied access even though she had been on a hormonal regimen for a decade and a half prior to incarceration. Although the GDOC knew she was a trans woman, she was "not evaluated for gender dysphoria, referred for treatment, or given a reasonably safe or appropriate housing placement."

96 *Columbia Law Women's Association Honors LGBT Advocate Chinyere Ezie '10*, COLUMBIA LAW SCH. (Apr. 13, 2016), http://www.law.columbia.edu/media_inquiries/news_events/2016/april2016/Myra-Bradwell-Dinner-2016 [https://perma.cc/G9XL-RF4T].

violates the Eighth Amendment's prohibition on cruel and unusual punishment."[97] Shortly thereafter, the GDOC rescinded its "freeze-frame" policy. The settlement of the case in February 2016 triggered similar policy changes nationwide.[98]

Having finally arrived at a sort of consensus around the constitutional prerequisite of individualized medical assessment for adequate medical care, courts had only left to resolve the question of what penological interests may outweigh a prisoner's right to adequate medical care for gender dysphoria. Unfortunately, around the same time the DOJ announced its view that blanket denials of hormone therapy constituted a violation of the Eighth Amendment, the Supreme Court declined to grant certiorari on *Kosilek v. Spencer*, putting an end to litigation that spanned two decades.[99] *Kosilek v. Spencer* presented the novel situation in which prison officials refused to provide SRS, which had been prescribed to Kosilek by the prison's own doctors as the only form of adequate medical care.[100] This refusal was justified on the basis of the prison's security interests.

B. The *Kosilek* Litigation

In 1992, Kosilek filed a *pro se* lawsuit under 42 U.S.C. § 1983 against the Sheriff of Bristol County in the District Court of Massachusetts, alleging the denial of adequate medical care for her serious medical need in violation of her Eighth Amendment rights, seeking damages and injunctive relief.[101] The complaint was amended to seek the same relief from the DOC after she was transferred to its custody at MCI-Norfolk.[102] The case proceeded slowly through motion practice and discovery for years.[103] Defendant Michael Maloney be-

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97 Statement of Interest of the United States at 1, Diamond v. Owens, 131 F. Supp. 3d 1346 (M.D. Ga. 2015) (No. 5:15-cv-00050-MTT).

98 *Ashley Diamond v. Brian Owens, et al.*, S. POVERTY. L. CTR., https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-brian-owens-et-al [https://perma.cc/QJV3-WNYK]; *see also* Deborah Sontag, *Georgia Says It Will Allow Hormones for Transgender Inmates*, N.Y. TIMES (Apr. 9, 2015), https://www.nytimes.com/2015/04/10/us/georgia-says-it-will-allow-hormones-for-transgender-inmate.html [https://perma.cc/8QK3-3SJG].

99 Kosilek v. O'Brien, 135 S. Ct. 2059 (2015).

100 *Kosilek II*, 889 F. Supp. 2d 190, 196 (D. Mass. 2012).

101 *Kosilek IV*, 774 F.3d 63, 69 (1st Cir. 2014).

102 *Kosilek I*, 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

103 *Kosilek III*, 740 F.3d 733, 736 (1st Cir. 2014).

came the Commissioner of the DOC in 1997, and a defendant in the case in 1999.[104] As the court would point out, the Commissioner is not usually responsible for decisions relating to the administration of medical care and therefore would not usually be the appropriate defendant for a denial of adequate care claim. In 2000, Commissioner Maloney adopted a blanket freeze-frame policy in response to Kosilek's lawsuit. Since Kosilek had only taken black market hormones and never received a prescription for it, she was prohibited from accessing hormones under this policy. The policy also categorically excluded the possibility of SRS for any prisoner.[105] Maloney retained Dr. Marshall Forstein, a specialist in GID, to serve as an expert in the litigation.[106] When Dr. Forstein recommended hormones and SRS, the DOC terminated its relationship with him.[107]

In December 2000, still not having obtained any care, Kosilek filed a second lawsuit with similar claims.[108] Her first lawsuit proceeded to a non-jury trial in 2002 presided over by District Judge Wolf. The court found that Kosilek's "gender identity disorder" manifested a serious medical need within the meaning of the Eighth Amendment and accepted the Harry Benjamin Standards of Care, international guidelines for GID treatment, as authoritative.[109] However, the court also found that she failed to satisfy the second prong of *Estelle*, which required a showing that the prison officials who denied care did so with deliberate indifference.[110] Although he found for the defendants, Judge Wolf concluded his opinion with a thinly veiled reprimand: "The court expects that, educated by the trial record and this decision, [Commissioner] Maloney and his colleagues will in the future attempt to discharge properly their constitutional duties to Kosilek."[111]

After *Kosilek v. Maloney* ("*Kosilek I*") was handed down, the DOC lifted its freeze-frame policy.[112] Changes in an inmate's gender-affirming care regimen would be medically

104 *Kosilek I*, 221 F. Supp. 2d at 159.

105 *Id.* at 159–160.

106 *Kosilek II*, 889 F. Supp. 2d at 215.

107 *Id.* at 215–16.

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

109 Now the World Professional Association for Transgender Health. *History*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, https://www.wpath.org/about/history [https://perma.cc/KLD2-LT88].

110 *Kosilek I*, 221 F. Supp. 2d at 195.

111 *Id.* at 193.

112 *See Kosilek III*, 740 F.3d 733, 740 (1st Cir. 2014); *Kosilek II*, 889 F. Supp. 2d 190, 218 (D. Mass.

determined by the entity DOC contracted to provide medical services, the University of Massachusetts Correctional Health Program (UMass).[113] In February 2003, Commissioner Maloney engaged a gender dysphoria specialist, David Seil, MD, to evaluate Kosilek in consultation with Dr. Appelbaum in his role as director of the UMass Mental Health Program, as per DOC policy.[114] Dr. Seil recommended hormone therapy and electrolysis, with consideration for feminizing surgical procedures down the line. Kosilek thus began receiving hormone therapy in August, and was also provided female undergarments and makeup.[115]

In December 2003, Maloney was succeeded by his Deputy Commissioner Kathleen Dennehy.[116] As commissioner, Dennehy "was determined not to be the first prison official to provide an inmate sex reassignment surgery" and "testified that she would retire rather than obey an order from the Supreme Court to do so."[117] After Dr. Seil recommended SRS, Dennehy fired him.[118] She cut off certain treatments Kosilek and other transgender prisoners had been receiving under the pretext of reviewing their cases.[119] Although medical specialists are usually hired by DOC physicians, Dennehy had the DOC retain Cynthia Osborne as a consultant social worker. Osborne had a professional history of advising corrections departments that SRS was not appropriate for trans prisoners.[120] Osborne worked for the Johns Hopkins Center for Sexual Health and Medicine, whose Psychiatry Department leadership was outspoken about its religious and moral objections to SRS.[121]

In 2007, Dennehy was succeeded by Commissioner Harold Clarke. Clarke later testified at trial that SRS presented "insurmountable" "safety and security concerns."[122] These

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2012).

113 *Kosilek III*, 740 F.3d at 740.

114 *Id.*

115 *Kosilek II*, 889 F. Supp. 2d at 218; *Kosilek III*, 740 F.3d at 741.

116 *Kosilek III*, 740 F.3d at 741.

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

118 *Id.* at 219.

119 *Id.* at 201–02.

120 *Id.* at 202.

121 *Id.* at 221.

122 *Id.* at 228–29; *Kosilek III*, 740 F.3d 733, 755 (1st Cir. 2014).

included flight risk during transportation to surgery out of state and problems with housing Kosilek after the operation. Furthermore, he opined that providing Kosilek with surgery "in response to her threats of suicide" was contrary to correctional practice, and would be tantamount to ceding to manipulative inmate behavior.[123]

Kosilek II proceeded to a non-jury trial in 2006, also presided over by (then Chief) Judge Wolf. A parade of medical and corrections experts testified. After reviewing the voluminous record, the district court found in 2012 that the DOC's continued refusal to provide Kosilek with gender-affirming genital surgery, despite such surgery having been deemed medically necessary by the DOC's doctors, evinced deliberate indifference and thus fulfilled the second prong of the Eighth Amendment test. In particular, it found the security reasons cited by Commissioners Dennehy and Clarke as justification for why SRS could not be provided to be utterly pretextual and was unpersuaded by their assertions that their denial of SRS was not related to considerations of cost or potential public backlash. The court granted a narrowly tailored injunction ordering the DOC to provide Kosilek with surgical care as promptly as possible, reserving the question of how any genuine security issues should be resolved to the DOC's expertise.[124]

Unfortunately, corrections officials remained uncooperative. Kosilek's lawyers offered to waive the attorneys' fees they were owed if the prison would refrain from filing an appeal.[125] However, the DOC announced its appeal before the parties even met to discuss attorneys' fees.[126]

On appeal in 2014, a panel of three judges on the First Circuit initially affirmed the decision, ruling two to one for Kosilek (*Kosilek III*).[127] Reviewing the district court's decision for clear error with deference to its factual findings, the court affirmed the finding that SRS was the only adequate treatment for Kosilek and that the DOC had no valid penological

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123 *Kosilek III*, 740 F.3d at 755.

124 *Kosilek II*, 889 F. Supp. 2d at 250–51.

125 Mem. In Supp. Of Pl.'s Mot. For Award of Att'y's Fees and Costs, *Kosilek II*, 740 F.3d 733 (1st Cir. 2014) (No. 001-2455-MLW); *see also* Denise Lavoie, *Inmate Seeking Sex Change Eligible For Legal Fees*, ASSOCIATED PRESS, Sept. 17, 2012.

126 Mem. In Supp. Of Pl.'s Mot. For Award of Att'y's Fees and Costs, *Kosilek II*, 740 F.3d 733 (1st Cir. 2014) (No. 001-2455-MLW).

127 *Kosilek III,* 740 F.3d.

reason for denying it.[128] Circuit Judge Torruella filed a dissenting opinion. He disagreed with the majority's judgment that the majority of issues in the case were factual and that clear error was therefore the appropriate standard of review.[129] Judge Torruella further contended that the district court erred in its conclusions that a) the DOC's preferred treatment plan for Kosilek, not involving SRS, was not medically prudent, b) the treatment she was currently receiving was not constitutionally adequate to ameliorate her risk of suicide, and c) the DOC's security concerns were illegitimate.[130] Ultimately, Judge Torruella reprimanded the district court and the First Circuit majority for losing sight, in his view, of the limits of what the Eighth Amendment proscribes.[131]

Upon rehearing en banc, the full First Circuit reversed 3–2 (*Kosilek IV*).[132] This time, Judge Torruella wrote for the majority. Rehashing the lengthy factual record and expanding on the points made in his earlier dissent, he disagreed with the standard of review employed in *Kosilek III* and the district court's analysis of both prongs of *Estelle*. Arguing that "[t]he ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed *de novo*," he disagreed with the district court's conclusions on both prongs of the *Estelle* test. On the objective prong, although Kosilek's gender dysphoria was indisputably a serious medical need, Judge Torruella argued that the DOC's decision to not provide SRS did not run afoul of the Eighth Amendment given its provision of other forms of care, including hormone therapy, psychotherapy, and antidepressants. The opinion also argued that Kosilek had ultimately failed to show "deliberate indifference," and that the district court clearly erred in concluding that the DOC had made its determination based on "a legitimate concern for Kosilek's safety and the security of the DOC's facility."[133]

Despite rehashing essentially all the same points articulated in all prior opinions, the First Circuit reached a different conclusion. Due to "security concerns" posed by providing genital surgery that were within corrections officers' discretion, Kosilek did not demon-

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128 *Id.* at 772–73.

129 *Id.* at 776 (Torruella, J., *dissenting*).

130 *Id.*

131 *Id.*

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

133 *Id.* at 92–93.

strate deliberate indifference and could not prevail on her Eighth Amendment claim.[134]

Judge Thompson, the author of the *Kosilek III* opinion, wrote a lengthy dissent disputing the legitimacy of the en banc grant and sharply disagreeing with the majority's standard of review. She argued that the majority erred in applying a standard that afforded almost no deference to the district court's factual findings, and that deliberate indifference in the Eighth Amendment context "is a 'state-of-mind issue' that usually presents a jury question." Deference to the lower court was particularly warranted in this case given the volume of the record. Finally, echoing Kosilek's arguments, Judge Thompson criticized the majority decision for creating a de facto ban on SRS for transgender prisoners in the circuit, violating the established Eighth Amendment requirement for individualized medical assessment that does not permit blanket prohibitions on particular forms of treatment.[135]

In May 2015, the Supreme Court declined to grant certiorari on *Kosilek IV*, spelling the dismaying conclusion to two full decades of litigation. In July 2015, Kosilek filed a *pro se* complaint in Massachusetts state court, attempting once again to have her rights upheld. It was dismissed on the basis of res judicata and the dismissal was affirmed on appeal.[136]

III. Narrating Michelle Kosilek

Born in 1949 in Chicago, Illinois, Kosilek knew as early as age three that she was a girl.[137] She was abandoned by her mother at an orphanage around the age of five, where she spent most of her early childhood.[138] Kosilek would go to the girls' dorms to play with the other girls and try on their clothes—when caught, she was beaten.[139] After returning to the care of her mother, she continued to experience abuse by family members, especially

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134 *Id.* at 96.

135 *Id.* at 106–07 (Thompson, J., *dissenting*).

136 Kosilek v. McFarland, No. 16-P-879, 2017 WL 3393467, at *1 (Mass. App. Ct. Aug. 8, 2017).

137 *Kosilek I*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002); Report or Affidavit of Dr. David Seil, M.D., Kosilek v. Clarke, No. 00CV12455 (D. Mass. Feb. 23, 2003), 2003 WL 25910594.

138 Report or Affidavit of Chester W. Schmidt, Jr., M.D. at *3, Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. Nov. 23, 2005), 2005 WL 5680039; Nathaniel Penn, *Should This Inmate Get a State-Financed Sex Change Operation?*, NEW REPUBLIC, Oct. 30, 2013, https://newrepublic.com/article/115335/sex-change-prison-inmate-michelle-kosilek-should-we-pay [https://perma.cc/V2BX-HKM9].

139 Report or Affidavit of Dr. David Seil, M.D. at *2, Kosilek v. Clarke, No. 00CV12455 (D. Mass. Feb. 23, 2003), 2003 WL 25910594.

when she was caught wearing girls' clothes.[140] On one occasion, she was stabbed by her stepfather with a broken beer bottle.[141] From the age of ten she was raped weekly by her grandfather for two years.[142] By the age of twelve, Kosilek had become a child prostitute.[143]

From adolescence, she desperately sought access to feminizing hormones, sometimes at the price of further abuse: one doctor prescribed estrogen in exchange for sexual favors.[144] Kosilek struggled with substance addiction throughout adulthood.[145] Nevertheless, she obtained a college degree from New Hampshire College in psychology and counseling.[146]

Throughout adolescence and adulthood, Kosilek desperately sought feminizing hormones as she struggled with the effects of childhood trauma and substance abuse. In 1971 and 1972, Kosilek received a stable period of hormone therapy.[147] On hormones, she "felt

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140 *Id.* ("At age 13, she developed what was most likely normal gynecomastia. She commented to her mother, 'See? I really am a girl.' Her stepfather overheard the remark and assaulted her with a broken beer bottle. This began a series of running away, eventually completely leaving the home at age 15."); Penn, *supra* note 138 ("When he [*sic passim*] showed his mother that his breasts, as a result of a hormonal condition during puberty, had begun growing, her boyfriend beat him with a fiberglass fishing pole, then made him kneel on a layer of uncooked rice."); John M. Crisp, *Sex-Change Operation for Robert Kosilek Would Be Humane*, NEWSDAY (Sept. 12, 2012), https://www.newsday.com/opinion/oped/sex-change-operation-for-robert-kosilek-would-be-humane-john-m-crisp-1.3988015 [https://perma.cc/C2AX-YTXD] ("He [*sic passim*] was abused as a child. When he announced that he wanted to live as a girl, his stepfather stabbed him.").

141 Report or Affidavit of Dr. David Seil, M.D. at *2, Kosilek v. Clarke, No. 00CV12455 (D. Mass. Feb. 23, 2003), 2003 WL 25910594.

142 Report or Affidavit of Chester W. Schmidt, Jr., M.D. at *3, Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. Nov. 23, 2005), 2005 WL 5680039; Penn, *supra* note 138.

143 Penn, *supra* note 138 ("He [*sic passim*] was frequently punished for dressing as a girl, and his mother's father began raping him. Gradually, he realized he could earn more with his body than the dollar his grandfather gave him every week, and at the age of twelve, he became a child prostitute on the streets of Chicago.").

144 Crisp, *supra* note 140.

145 Penn, *supra* note 138.

146 Report or Affidavit of Chester W. Schmidt, Jr., M.D. at *3, Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. Nov. 23, 2005), 2005 WL 5680039.

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

normal" for the first time in her life.[148] Off hormones, she relapsed into substance abuse.[149]

"A brief marriage occurred in 1974," noted Dr. Seil.[150] Dr. Chester Schmidt writes: "The first marriage lasted about ½ years. The second marriage was to her therapist in her drug rehabilitation program. This marriage ended in 1990 when Kosilek strangled her spouse and was convicted of first-degree murder."[151]

In 1983, upon entering yet another drug rehabilitation facility, Kosilek expressed that the root of her substance addiction was gender dysphoria.[152] She was assigned to a drug counselor with expertise in "sexual issues." Her name was Cheryl McCaul, and she proposed a cure for Kosilek's "condition": "the love of a good woman."[153] McCaul initiated physical intimacy with her patient in subsequent counselling sessions.[154] She invited Kosilek to move in four months later and the two were married within the year.[155] John Crisp writes, bluntly, "McCaul . . . believed that she could cure [Kosilek] of [her] transexualism by marrying [her]. It didn't work."[156] The second marriage was "tumultuous."[157] One day in 1990, an argument escalated into an altercation, and the altercation led to Kosilek strangling McCaul to death.

The opinion for *Commonwealth v. Kosilek* (1996) describes an audiotape recording from a series of interviews that Kosilek had recorded and given to a television news report-

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148 *Id.*

149 *Id.* at 163–64.

150 Report or Affidavit of Dr. David Seil, M.D. at *2, Kosilek v. Clarke, No. 00CV12455 (D. Mass. Feb. 23, 2003), 2003 WL 25910594.

151 Report or Affidavit of Chester W. Schmidt, Jr., M.D. at *3, Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. Nov. 23, 2005), 2005 WL 5680039.

152 *Kosilek I*, 221 F. Supp. 2d at 164; Penn, *supra* note 138 ("'Have you heard of Christine Jorgensen? . . . I'm like her, and that's why I've been a drunk for most of my life.' Christine Jorgensen was an American actress who became famous for being one of the first people to receive SRS.").

153 *Kosilek I*, 221 F. Supp. 2d at 164.

154 *Id.*

155 *Id.*

156 Crisp, *supra* note 140.

157 Report or Affidavit of Dr. David Seil, M.D. at *2, Kosilek v. Clarke, No. 00CV12455 (D. Mass. Feb. 23, 2003), 2003 WL 25910594.

er in October 1992, which was played for the jury at her trial:

> During the interview, the defendant stated that: on the day of the murder, [she] and the victim had been in an argument; the victim threw boiling tea into the defendant's face; [s]he then knocked the victim down; she [i.e. the victim] grabbed a butcher knife and chased the defendant into another room, threatening to kill [her]; [s]he picked up a piece of wire that had been on a table; and this was all [s]he was able to recall until [s]he woke up days later in the hospital. The defendant stated in the interview that [s] he 'probably, because of the trauma of it . . . went into a black out at that moment.' . . . 'Apparently, I did take her life. It was probably in self-defense.'[158]

Some writers suggest that the altercation happened when McCaul came home to find Kosilek wearing her clothes, which enraged her.[159] In a 2013 interview, Kosilek recalled that they fought because Kosilek thought her wife "wasn't strict enough with her older son." Kosilek maintains that she acted in self-defense.[160]

Kosilek was convicted of first-degree murder and sentenced in 1992 to life in prison without parole.[161] At MCI-Norfolk, Kosilek changed her legal name to Michelle and began to present as a woman.[162]

A. Proving Life

This section discusses the biopolitical framing of Kosilek's body in the courts' discussion of whether she deserved access to gender-affirming genital surgery. Specifically, it identifies two points in the opinions that reveal the limitations of biopolitics. The first is an

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158 Commonwealth v. Kosilek, 423 Mass. 449, 452 (1996).

159 Penn, *supra* note 138 ("There are competing accounts of what happened. Did Cheryl and [Kosilek] argue because [Kosilek] had relapsed after eight years of sobriety? Because she had discovered [Kosilek] wearing her clothes?"); Crisp, *supra* note 140 ("When [McCaul] discovered Kosilek wearing her clothes in 1990, she became angry. Kosilek strangled her.").

160 Penn, *supra* note 138 ("I took my best friend's life because I was afraid that she was going to take mine.").

161 *Kosilek I*, 221 F. Supp. 2d 156, 164 (D. Mass. 2002).

162 Kosilek wears her hair long, tailors her clothing to appear feminine, uses cosmetics, and has undertaken voice feminization. *See id.*

aspect of the transmedicalist requirements for eligibility for SRS, which includes having a "real life experience" of one's gender. The second is the use of suicidality as a metric for validating Kosilek's gender dysphoria and gender identity.

The World Professional Association for Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (WPATH-SOC)[163] are non-binding protocols for the treatment of individuals with gender dysphoria. According to the version of WPATH-SOC that was current at the time of *Kosilek II*, a transgender individual diagnosed with gender dysphoria may be eligible for SRS after a period of hormone therapy and at least one year of "real life experience" living and presenting as their preferred gender.

One point of contention throughout the *Kosilek* litigation was the question of whether it was possible for Kosilek to have a "real life experience" as a woman while incarcerated. Several experts opined that she could not, and that therefore Kosilek did not meet the requirements for SRS eligibility under WPATH-SOC.[164] Kosilek's doctors responded that "[t]he point of having a [real life experience] is to provide the person with an awareness of what to expect in a different gender role."[165] Persuaded by this argument, the district court wrote in *Kosilek I* that "the evidence at trial indicated that the prison environment has provided Kosilek with an even more stringent 'real life experience' test than many transsexuals would have outside prison, because inmates are constantly under observation and any failure to live as a woman would be readily noted."[166] Yet another view is that because Kosilek has a life sentence, she is already having as much of a real life experience as she can ever have.[167]

The conditioning of SRS eligibility on "real life experience," as intimated by Kosilek's doctors, reflects a medical exercise of gendered disciplinary power. Acclimation to a normative gender role is required prior to bodily modification, so as to discipline trans bodies

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163 Formerly known as the Harry Benjamin Standards of Care, and referred to in the *Kosilek* opinions as such. THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 1 (7th ed. 2011), https://www.wpath.org/publications/soc [https://perma.cc/XF49-YEL4].

164 *Kosilek II*, 889 F. Supp. 2d 190, 233–35 (D. Mass. 2012); *Kosilek I*, 221 F. Supp. 2d at 173–74.

165 *Kosilek I*, 221 F. Supp. 2d at 235.

166 *Id.*

167 *Id.* at 232.

into fully-fledged transgender subjects. In the carceral context, this biopolitical norm is thrown into question. If, as the defendants' witnesses suggest, there can be no "real life experience" in prison, it must be because the prison is a site of social death where ordinary socialization into gender norms is dysfunctional.

There is a level of existential horror in the idea that trans people cannot have a "real life experience" of gender in prison, as though experiences in prison are somehow unreal. Indeed, it is especially ironic given the particular severity with which gender norms are enforced in carceral spaces, as discussed in Part II. The actual lived reality of trans women in prison is marred by physical and sexual violence enacted by both state and non-state actors. If anything, that experience of heightened violence is a distinguishing feature of incarceration for trans women. Thus, to suggest that trans people cannot have "real life experiences" of gender in the carceral context replaces the reality of gendered violence and sex segregation with a blank, where the empirical content of an imagined carceral gender must be filled in. This approaches the limits of the biopolitical imagination, as the contemporary prison is not primarily a biopolitical institution designed to optimize bodies. As the defendants' position suggests, there is no such thing as carceral gender in the sense that necropolitical power only reproduces gender as a marker for non-normativity that invites discipline and sexual violence.

This analysis exposes the circularity of gender as a biopolitical construct. At every stage of her interaction with medical personnel and throughout the litigation, Kosilek must prove her womanhood to achieve access to gender-affirming somatechnics, including genital surgery. Genital surgery is necessary, though perhaps not sufficient, for her to achieve legal recognition as a woman within the carceral regime of sex segregation. Thus, in the carceral context, the biopolitically produced trans body is caught in a vise. In the same way, Kosilek's suicidality is constantly noted by the opinions as evincing the seriousness of her medical need. This linking of suicidality with trans identity creates a dilemma that calls to mind the 16th and 17th century European practice of trial by drowning as a method of testing whether a woman was a witch. A successful drowning was proof of innocence, while survival made one suspect.[168] Similarly, the opinions debate whether Kosilek's suicidality is evidence of suffering or a blackmailing tactic designed to elicit a benefit from prison officials. Defendants seem to suggest that the fact that she currently survives is evidence that she is getting along well enough without gender-affirming genital surgery. The district court implicitly reinforces this logic by doubling down on suicidality as proof of the seri-

168 *See, e.g.*, *The Swimming of Witches*, THE FOXEARTH AND DIST. LOCAL HISTORY SOC'Y, http://www.foxearth.org.uk/SwimmingOfWitches.html [https://perma.cc/5V52-AY46].

ousness of her medical need. Had its opinion not been reversed, this would have created an undesirable precedent by which an Eighth Amendment entitlement to SRS might only exist where a prisoner is at imminent risk of death due to gender dysphoria.

B. Gendering Death

The implicit requirement that Kosilek's gender be proven by her existing in a state near death lies at an intersection between biopolitical and necropolitical power. Suicide marks the limits of both regimes of power. In the biopolitical framework, it "testified to the individual and private right to die, at the borders and in the interstices of power that was exercised over life."[169] In the necropolitical framework, Mbembé theorizes suicide as a potential act of resistance.[170]

In *Kosilek*, two conflicting readings of suicide clash directly in the courts' reasoning. As discussed, the biopolitical framework treats suicide as evidence of medical seriousness and necessity. In the necropolitical framework, Kosilek's suicidal ideation is read as a challenge to carceral power, as a way of blackmailing the prison into giving her a boon. At trial, Clarke testified that providing Kosilek with care in response to her "threats of suicide" would be "contrary to well-established correctional practices."[171] Luis Spencer, the Superintendent of MCI-Norfolk, stated that "his policy is not to negotiate with inmates who threaten suicide, as to do so would undermine his and the staff's authority."[172] Another corrections authority also "cautioned against giving in to an inmate's threats of suicide, likening it to opening Pandora's box."[173] In essence, the necropolitical framework reads Kosilek's suicidality as a hostage situation. She is only capable of holding her own body hostage in a carceral context, where her body is treated as the property of the state. Thus, as defendants and Judge Torruella suggest, an adequate response to the risk of suicide is heightened surveillance around the clock and lockdown. This notion of adequacy has been completely disconnected from the issue of care. While surveillance and security may be methods of preventing literal death, they are not medical care. For a trans prisoner, they compound the effects of social death from being trans and being in prison: maximizing her experience of social death.

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169 FOUCAULT, HISTORY OF SEXUALITY, *supra* note 28, at 139.

170 Mbembé, *supra* note 45, at 36.

171 *Kosilek III*, 740 F.3d 733, 755 (1st Cir. 2014).

172 *Id.* at 749.

173 *Id.* at 750.

Kosilek IV ultimately gives credit to the DOC's expertise on matters of security, holding that its decision to withhold SRS was within their discretion and did not run afoul of the Eighth Amendment. The security issues cited by the defendants that *Kosilek II* found to be pretextual excuses deserve unpacking here, as they spell out the (imagined) threat that Kosilek's post-operative, transfeminine body poses to prison administration. First, the term "security" signifies a relationship of power and control between the prison and prisoners' bodies. Its interchangeable use with the word "safety" in defendants' testimony masks the fact that bodies can be secured without being safe. In any case, the security issues spelled out in *Kosilek III* reveal the ambivalence of the trans body as both a ward of the state requiring protection and a threat that must be protected against. Setting aside the clearly pretextual issue of flight risk during transit, the other concerns raised by the DOC are the possibility that Kosilek would be raped in a male facility, that the presence of Kosilek's body would incite violence among other inmates, and that Kosilek's placement in a women's prison would pose "serious climate issues."[174] All of these issues arise from the question of how Kosilek should be housed after receiving gender-affirming genital surgery. Security issues thus arise where sex segregation is confronted by the trans(feminine) body, whose presence is viewed as threatening to carceral discipline.

The fear that Kosilek would be sexually assaulted in a male facility might seem, at first glance, to be of greater concern to Kosilek herself than the DOC, especially given the extent to which sexual violence in prison, particularly against people perceived as gender non-conforming, is normalized and tolerated. Fortunately, however, there is no record of Kosilek ever having experienced such violence at MCI-Norfolk, despite living in its general population and presenting as a woman for over two decades.[175] This fear, then, expresses the erroneous assumption that it is the vagina—the orifice embodying femininity—that presents vulnerability to rape, rather than femininity or womanhood.[176] Discussing the testimony of defendants, the *Kosilek III* court also mentions the presence of sex offenders in MCI-Norfolk. It is unclear how, combined with Kosilek's imagined post-surgical body, the presence of sex offenders would lead to violence that might injure guards. The lack of detail presented by either the defendants or the court leaves one to imagine an amorphous,

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174 *Id.* at 745.

175 *Kosilek I*, 221 F. Supp. 2d 156, 164 (D. Mass. 2002); Report or Affidavit of Chester W. Schmidt, Jr., M.D., Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. Nov. 23, 2005), 2005 WL 5680039.

176 *Kosilek III*, 740 F.3d at 749 ("[Spencer] would have 'grave concerns' putting Kosilek back in the general population with the full anatomy of a female. Spencer worried that she could be raped or assaulted and he saw no alternative but to house her in the high-security Special Management Unit.").

explosive, and sexualized violence that would threaten to erupt upon Kosilek's return.

For the most part, the opinions do not engage at length with the possibility that Kosilek might be incarcerated in a women's facility. The heightened policing of trans women's access to women's spaces is evident in defendants' dismissal of that possibility; and the "gender panic"[177] raised by that possibility fueled a great deal of media outrage.[178] *Kosilek III* discusses the testimony of Superintendent Bissonnette of MCI-Framingham, a Massachusetts woman's prison.[179] Bissonnette testified that she was of the opinion that Kosilek was not suitable for incarceration there because she would be "both a potential predator and victim within the inmate population."[180] She reasoned that Kosilek would be a potential predator because she had killed her wife, and a potential victim because the many inmates at Framingham who were victims of domestic and sexual violence might attempt to harm Kosilek, in Bisonnette's imagination.[181] On both counts, this reasoning is almost nonsensical when distanced from the justifications for sex segregation and the imputation of (presumptively hetero)sexual violence to (particularly male) inmates. Kosilek's crime of conviction is not at all unique; in fact, Bissonnette conceded on cross-examination that around forty offenders at MCI-Framingham were also serving life for murder.[182] Furthermore, Kosilek does not have a record of perpetrating sexual violence or any other kind of violence against women with the exception of her crime of conviction, which makes it unclear why she would be a "predator" or why prisoners at Framingham would target her in response to their own traumas. All of these theories are incoherent without reference to the stereotypical portrayals of trans women as sexual deviants and gleeful killers; the language of predation also feeds on this anxiety. Indeed, the media and the courts constantly name Kosilek as a "transsexual" and "wife-killer,"[183] conceptually conjoining sexual perversion

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177 *See supra* discussion in Part I § B; Laurel Westbrook and Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC'Y 32, 47–49 (2013).

178 *See infra* note 183.

179 *Kosilek III*, 740 F.3d at 751.

180 *Id.*

181 *Id.*

182 *Id.*

183 *See, e.g.*, *Federal court nixes taxpayer-funded sex change for wife killer*, FOX NEWS (Dec. 20, 2015), https://www.foxnews.com/politics/federal-court-nixes-taxpayer-funded-sex-change-for-wife-killer [https://perma.cc/U55U-NWA8]; Martin Finucane et al., *Federal appeals court upholds Mass. inmate's right to taxpayer-funded sex change surgery*, BOS. GLOBE, (Jan. 17, 2014), https://www.boston.com/news/local-

to lethal depravity.[184] "Security," in essence, is necropolitical code for keeping deviancy in check by condemning it to social exclusion and death.

Bissonnette's testimony concluded that, given the difficulties, the only possible housing for Kosilek would be in the "single cell segregation unit," or solitary confinement.[185] The court writes that Bissonnette "expressed concern" that housing Kosilek in solitary confinement for the remainder of her life sentence would have a "negative impact" on her mental health.[186] Having exhausted the necropolitical reasons for denying Kosilek gender-affirming surgery, the court's conclusion circles back to a biopolitical logic in which prison officials have a duty to provide medical care and rehabilitation for prisoners. The denial of

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news/2014/01/17/federal-appeals-court-upholds-mass-inmates-right-to-taxpayer-funded-sex-change-surgery [https://perma.cc/QJY4-BBBF] ("convicted wife killer Michelle L. Kosilek"); Candace Sutton, *Male Criminals Who Become Women Behind Bars*, ADELAIDE NOW (Apr. 11, 2013), https://www.adelaidenow.com.au/news/weird/call-me-michelle-the-killers-who-become-women-behind-bars/story-fngo0pax-1226615750377?nk=47cca477826920d05e65dbcdd3ac9e63-1538509530 [https://perma.cc/RVM9-PCE9] ("US wife killer Robert 'Michelle' Kosilek"); Alyssa Newcomb, *Transgender Inmate Michelle Kosilek Fighting for Electrolysis*, ABC NEWS (Nov. 19, 2012), https://abcnews.go.com/US/transgender-inmate-michelle-kosilek-fighting-electrolysis/story?id=17760411 [https://perma.cc/MY33-P2R6] ("A convicted wife-killer"); Rachel Quigley & Louise Boyle, *Transsexual wife killer who was granted tax-payer funded sex change should be allowed expert opinion on electrolysis hair removal, judge rules*, DAILY MAIL (Oct. 25, 2012) https://www.dailymail.co.uk/news/article-2223066/Transsexual-wife-killer-Robert-Kosilek-allowed-expert-opinion-electrolysis-hair-removal.html [perma.cc/L8WU-QKZA]; Erica Ritz, *Judge: Taxpayers Will Cover Convicted Wife-Killer's Sex Change – and Maybe His [sic] $500K in Legal Fees*, THE BLAZE (Sept. 17, 2012), https://www.theblaze.com/news/2012/09/17/judge-taxpayer-will-cover-convicted-wife-killers-sex-change-and-maybe-his-500k-in-legal-fees [https://perma.cc/9G5Q-MP5S] ("A wife-killer in Massachusetts who won the right to a taxpayer-funded sex change . . ."); Rachel Quigley, *Transsexual wife killer who was granted tax-payer funded sex change will also have his [sic] legal fees paid, judge rules*, DAILY MAIL (Sept. 17, 2012), https://www.dailymail.co.uk/news/article-2204516/Robert-Kosilek-Transsexual-wife-killer-granted-tax-payer-funded-sex-change-reimbursed-years-legal-fees.html [perma.cc/AD32-4FCN]; Wendy Kaminer, *Is Denying Treatment to Transsexual Inmates 'Cruel and Unusual'?*, THE ATLANTIC (Sept. 7, 2012), https://www.theatlantic.com/national/archive/2012/09/is-denying-treatment-to-transsexual-inmates-cruel-and-unusual/262074/ [perma.cc/NB27-N5XT] ("Convicted wife killer Michelle (née Robert) Kosilek is hardly a sympathetic figure"); Andrea Heiman, *The Picture of Innocence?: A defendant who uses clothes and other tricks to appear harmless may sway the jury, experts say.*, L.A. TIMES (Apr. 4, 1993), http://articles.latimes.com/1993-04-04/news/vw-18896_1_amy-fisher-michael-milken-jury-behavior-research/2 [https://perma.cc/8AW9-7VAE] ("the convicted wife killer, and self-proclaimed 'transsexual in transition,' Robert J. Kosilek").

184 *See* JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011).

185 *Kosilek III*, 740 F.3d at 751.

186 *Id.*

SRS, of course, also negatively impacts Kosilek's mental health. Necropolitics, however, does not allow a subject to choose how to die; it maintains the subjugated body in a state close to death, as literal death would snuff out the carceral power that is exercised over it. Thus, the carceral state would rather force Kosilek to live with its violent inscription of maleness on her body, than allow her to die as a woman inhabiting the body she desires.

IV. Resuscitating the Eighth Amendment: The Role of Courts and Advocates

The *Kosilek* litigation generated countless salacious media reports that fixated on naming Kosilek as a "transsexual" and a "wife-killer,"[187] deploying archetypes of trans people as deviant, pathological, and criminal.[188] These reports cast criminal sexual deviancy against (cis)female victimhood in order to stoke public outrage. Additionally, the media and the courts spoke directly to one another. One reporter wrote of the "obvious distastefulness of a wife killer angling to serve out his [*sic*] sentence of life without parole in a women's prison."[189] This was quoted in *Kosilek III* in the First Circuit's analysis of the influence of media opposition to Kosilek receiving SRS on the decisions of DOC officials. In *Kosilek II*, Judge Wolf quotes from a *Boston Globe* article that describes Kosilek as having made "a complete and utter fool out of an otherwise thoughtful and respected federal jurist, U.S. District Judge Mark L. Wolf."[190] More generally, the media represented the voice of a public outraged at the notion of funding a "sex change operation" (elsewhere "sex surgery") with "taxpayer dollars," for a "convicted wife-killer."[191] There is a more than creeping moralism that links the archetype of the gleeful queer (wife-)killer with the provocative and perversely imbued notion of "sex surgery" [*sic*], and with "taxpayer dollars" representing the normative citizenry with which Kosilek, as "the Other," is contrasted. This embodies what Jasbir Puar has called "queer necropolitics," a necropolitical trade-off that conditions the legal subjecthood normative, taxpaying queers on the exclusion of criminal, deviant queers. Against this backdrop of rank transphobia and heated debate, both courts and advocates have roles to play in countering the necropolitical and biopolitical logics that cut trans prisoners off from vital, gender-affirming care.

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187 *Id.* at 755.

188 *See generally* MOGUL ET AL., QUEER (IN)JUSTICE, *supra* note 184.

189 *Kosilek II*, 889 F. Supp. 2d 190, 225 (D. Mass. 2012) (citing Eileen McNamara, *When Gender Isn't Relevant*, THE BOSTON GLOBE (June 11, 2016)).

190 *Id.*

191 *Kosilek III*, 740 F.3d at 755.

A. Resuscitating the Eighth Amendment

Jon Wool argues that "restricting prison medical care litigation is bad correctional policy and bad public health policy" and calls on the judiciary to recognize the importance of their role in protecting prisoners' rights: "Because the political process disfavors prisoners and the litigation that protects their rights . . . it is critical to have access to the courts to achieve what the majoritarian branches neglect."[192] The costs of providing even minimally adequate care are enormous, and legislators and political actors are unlikely to successfully allocate funds, as healthcare in prisons is not politically popular.[193] In his opinion for *Kosilek II*, Judge Wolf takes great pains to remind both prison officials and the media that factors like Kosilek's crime of conviction, no matter how unpleasant, and the nature of her "condition," no matter how "rare," have no bearing on prison officials' duty to discharge their Eighth Amendment obligations. Nor can they take into account public censure or the costs of care, including the apparent injustice of a prisoner receiving state-funded SRS when it is not even covered by most insurers.

One journalist opined: "If [Kosilek] is at risk of suicide, [Kosilek] should be placed under constant observation. But that's sufficient."[194] This appears to be the ultimate position of the DOC, and the full First Circuit accepts it as within their administrative discretion. Yet this entirely misses the point of the Supreme Court's Eighth Amendment jurisprudence. Adequacy of care requires actual care; placing a prisoner on suicide watch may be adequate to prevent death, nevertheless it is not care in any meaningful sense. The Fourth Circuit recognized this point in *De'lonta v. Johnson*: "By analogy, imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not."[195]

In contrast to *De'lonta*, *Kosilek IV* appears to signal the triumph of the necropolitical

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192 JON WOOL, *Litigating for Better Medical Care*, *in* PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 25, 25 (Robert Greifinger ed., 2007).

193 *Id.* at 26.

194 *Kosilek II*, 889 F. Supp. 2d 190, 225 (D. Mass. 2012) (citing Eileen McNamara, *When Gender Isn't Relevant*, THE BOS. GLOBE (June 11, 2016)).

195 De'lonta v Johnson, 708 F.3d 520, 526 (4th Cir. 2013).

framework. Indeed, it sets an unfortunate precedent for ceding deference to prison officials' assessment of the security concerns that emerge from providing SRS, even where those security concerns have been shown throughout the factual record to be rife with pretext, ambiguity, and animus. However, the judges in *Kosilek* were in fact closely divided on the two linked questions, representing the two prongs of *Estelle*: whether SRS was the only form of adequate care; and whether prison officials were justified in denying SRS for security reasons. Their disagreement resulted from an impasse between the biopolitical and necropolitical framings of the trans prisoner's body—whether it presents a medical need or a security threat.

The Eighth Amendment is meant to be a judicial backstop against the state's power to punish. While courts are justified in deferring to prison officials on matters of security, to accept the judgment of their nonmedical personnel as to what constitutes adequate or appropriate medical care is to abdicate judicial responsibility to enforce the Eighth Amendment. Security considerations should not be allowed to permeate the adequacy of care analysis. Nor should courts uncritically accept, as prison officials may insist, the existence of an irreconcilable conflict in their duties.[196]

Instead of sifting for evidence of prison officials' "deliberate indifference," a nearly oxymoronic term for an enormously high standard, courts should focus on assessing the plaintiff's medical needs and the adequate care. Another factor that courts should consider in these cases is whether an agency has a history of denying certain kinds of care, or of denying care to certain groups of people. Ten years after *Kosilek I*, Judge Wolf remarked in *Kosilek II* that Eighth Amendment access-to-care suits brought by trans prisoners have "recently become more common in Massachusetts because the DOC has repeatedly denied transsexual prisoners prescribed treatment for reasons that the courts have found to be improper," citing four different cases.[197] These facts play no role in the Eighth Amendment analysis, because the "deliberate indifference" prong of *Estelle* is undertaken at the level of individual actors. But plaintiffs like Kosilek are not denied care by isolated individuals; they are denied care by the decision of the carceral institution. This institutional failing raises broader issues with sovereign immunity that are beyond the scope of this Article, but the current workaround that focuses on the subjective intent of particular individuals

196 "[A] prison official, acting reasonably and in good faith, might perceive an irreconcilable conflict between his duty to protect safety and his duty to provide adequate medical care." *Kosilek I*, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (cited in Soneeya v. Spencer, 851 F. Supp. 2d 228, 243 (D. Mass. 2012)).

197 *See* Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011); *Soneeya*, 851 F. Supp. 2d at 243; Brugliera v. Comm'r of Mass. Dep't of Corr. (D. Mass. Dec. 16, 2009); *Kosilek II*, 889 F. Supp. 2d at 196–97; *Kosilek I*, 221 F. Supp. 2d at 156.

is untenable. The result is that trans prisoners configured by a necropolitical framework experience harms that compound their marginalization and the cruelty of their punishment.

The trans prisoner has a right to be free from the cruel and unusual punishment of denying medically necessary gender-affirming care, which, more fundamentally, denies their gender identity and expression. As civil rights attorney Moira Meltzer-Cohen put it, "The issue is *not* that being trans is a mental health risk or a condition, but that the lack of access to gender affirmation can give rise to mental health problems where none would otherwise exist."[198] Even worse, such mental health problems are often then used to discredit the trans person by portraying them as psychotic, antisocial, manipulative or delusional.[199]

B. Beyond Transmedicalism

The 2002 opinion for *Kosilek v. Maloney* introduces gender identity disorder as "a rare, medically recognized, major mental illness" marked by the belief that one is "cruelly trapped" in the wrong body.[200] Unfortunately, this definition suggests an understanding of trans identity that is wrong in almost every respect. After its publication of the DSM-5, the American Psychiatric Association further clarified its decision to retire the term "gender identity disorder": "gender nonconformity is not in itself a mental disorder," and that the "critical element of gender dysphoria is the presence of clinically significant distress associated with the condition."[201] Although part of an explicit effort to move away from a medicalized understanding of trans identity, this new definition is still worded in a somewhat puzzling way, as it is unclear to what "the condition" refers. As Ulrica Engdahl explains, the "wrong body" narrative creates a false contrast between a "real" internal sense of gender and a "wrong" external gender, which produces "a reified image of both body and self as static and separate entities and thereby correlat[es] an essentialism of genital materiality that disputes the realness of transgender experience."[202] Moreover, it is simply not nearly

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198 Aviva Stahl, *Advocates Fight Texas Statute Delaying Transgender Prisoners' Ability to Change Their Names*, THE APPEAL (Apr. 12, 2018), https://theappeal.org/advocates-fight-texas-statute-delaying-transgender-prisoners-ability-to-change-their-names-3c01f242257a/ [https://perma.cc/8764-ASQ4].

199 *See, e.g.*, Report or Affidavit of Cynthia S. Osborne, M.S.W., Kosilek v. Dep't of Corr., No. 00CV12455 (D. Mass. May 20, 2005), 2005 WL 6529976.

200 *Kosilek I*, 221 F. Supp. 2d at 158.

201 AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/6VYW-4KBD].

202 Ulrica Engdal, *Wrong Body*, 1 TSQ: TRANSGENDER STUDS. Q. 267, 267 (2014).

as rare to be trans as the court seems to think.[203]

An effect of transmedicalism is that the kind of facts that courts have accepted as demonstrating serious medical need are often those that erase the agency of the trans plaintiff. In fact, this erasure of the trans person's agency or ownership of her own transness has implicitly become a necessary component of their credibility. When courts apply the *Estelle* test they only scrutinize the agency and decision-making capacity of prison officials who withhold care.

Trans plaintiffs are presented as more credible and sympathetic the less agency they are ascribed. As seen in the media reporting around *Kosilek*, ascriptions of agency create suspicions that the plaintiff might be trying to obtain an unentitled benefit to satisfy delusions born from a mental disorder or a "lifestyle choice," which is code for deviant sexuality. As Elias Vitulli has noted, courts cannot envision the trans subject as anything but robbed of autonomy and cornered by dysphoria into choosing treatment that is portrayed as ghastly.[204] Courts look to facts such as self-"mutilation," self-castration, and suicide attempts to find evidence of genuine and serious medical need.[205] In one case, a court delegitimized the trans plaintiff's claim based on the fact that she exhibited no mental health problems or suicidal ideation, writing that "GID becomes a serious medical issue when the distress is intense enough to lead to self-injury."[206] That the plaintiff did not turn to self-injury meant to the court that she did not demonstrate a serious medical need.[207] This is deeply problematic on many levels and ultimately founded upon the mistaken, transmedicalist premise that experiencing distress is an essential part of being trans.

This leads courts to only find rights for trans plaintiffs from a stance of totalizing paternalism. The courts' narratives of trans plaintiffs erase the reality that trans people have always strategically employed the transmedicalist paradigm in order to obtain gender-affirming substances and procedures. Judge Wolf found an expert witness's testimony that no

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203 *See, e.g.*, JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 139 (2007) ("The gatekeepers consistently claimed that transsexuality was a 'rare' phenomenon without acknowledging that they themselves played an active role in restricting the number of trans people who would be allowed to transition.").

204 Elias Vitulli, *Racialized Criminality and the Imprisoned Trans Body: Adjudicating Access to Gender-Related Medical Treatment in Prisons*, 37 SOC. JUST. 53, 61 (2010–11).

205 *Id.*

206 *Id.*

207 *Id.*

"heterosexual man [would] voluntarily give us his penis to get something like hormones" to be particularly persuasive.[208] This crude formulation conflates gender and sexual orientation, suggesting that Kosilek's desire for SRS might be an elective sexual perversion. At the same time, it states the obvious. Kosilek is not a man (nor is she heterosexual), and she has represented this to the world throughout her life. Yet she still bore the burden of proving the validity of her identity in court through expert testimony.

Why is Kosilek's self-identification not evidence enough that she is a woman? Why is her stated desire for SRS not, in and of itself, the best evidence that she needs it? Through the contortions of transmedicalist logic, trans needs only emerge as valid when they do not converge with wants. The suspicion that Kosilek may be trying to "game the system" by threatening suicide suggests an underlying assumption that either a person might want SRS for some reason other than being trans, or that seeking SRS is in itself suspect. Advocates must challenge such cissexist assumptions and identify them as such. In a transmedicalist culture, Kosiek's *need* for gender-affirming care is only valid or sympathetic when it is presented as emphatically not a *want*. But trans people want as much as they need gender-affirming somatechnics, and it is the biopolitical policing of gender norms that twists their needs beyond comprehension.

Gender-affirming somatechnics are material needs. They include not only "care" but also the provision, for instance, of undergarments and cosmetics. The deprivation of these needs can create debilitating mental health problems arising from gender dysphoria. Transmedicalism suggests that mental distress is innate to trans people, rather than as a response to social and material conditions.[209] Furthermore, the analogy between transness and a medical condition is limited. Whereas a physician is usually the best witness to testify as to the details of an illness, a trans person is always the best witness of their own gender. The current jurisprudence often conflates gender dysphoria and trans identity with mental illness, which defendants conveniently use to discredit trans prisoners. Advocates must beware of setting precedents that reinforce erroneous assumptions about transness.

V. Cruel and Usual

Michelle Kosilek won recognition by two courts of her right to receive gender-affirm-

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208 *Kosilek I*, 221 F. Supp. 2d 156, 165 (D. Mass. 2002).

209 *See* AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [https://perma.cc/6VYW-4KBD].

ing genital surgery.[210] At least seven experts who evaluated her recommended SRS; at least five testified at trial that it was the only form of adequate medical care for her.[211] Why, then, did she ultimately not prevail? The factual record is rife with evidence of deliberate indifference. Commissioner Dennehy made it clear that she does not care if a trans woman lives or dies.[212]

The key question of law in *Kosilek* was whether prison officials were deliberately indifferent to her medical needs. Yet the opinions reveal a judicial discourse that fixated on two representations of her transfeminine body. The defendants argued that altering a prisoner's genitals would create insurmountable "security concerns," safety risks, and administration difficulties. Kosilek's advocates emphasized that she was at risk of suicide if she could not receive SRS, thus presenting a serious medical need. The defendants then countered that there is no Eighth Amendment entitlement to the specific care of a plaintiff's choice, and that hormone therapy should be sufficient for Kosilek. Finally, they argued, suicidality can be managed with carceral technologies, such as solitary confinement or increased surveillance. The Court of Appeals for the First Circuit ultimately found this argument persuasive.

Courts must move away from transmedicalism, guided by advocates who center the voices of trans people rather than those of psychiatrists. This means reframing the current Eighth Amendment jurisprudence to recognise that trans prisoners' medical needs arise from the denial of gender affirmation, rather than from being trans. As *Kosilek* demonstrated, transmedicalism is useless when trans lives are not valued. The number of experts who argued that SRS was medically necessary did not ultimately matter to the First Circuit. The court ultimately accepted, at least as plausible, the DOC's assertions that a trans woman in her sixties could seriously threaten order in the carceral institution by having genital surgery. When trans people are discursively reduced to mere bodies, whether as dependent recipients of care or as security risks, prison officials can present the trade-off as a reasonable dilemma.

The Supreme Court stated in *Brown v. Plata* (2011) that "[a] prison's failure to provide sustenance for inmates may actually produce physical torture or a lingering death."[213]

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210 *Kosilek II*, 889 F. Supp. 2d 190 (D. Mass. 2012); Kosilek v. Spencer (*Kosilek III*), 740 F.3d 733, 736 (1st Cir. 2014).

211 *Kosilek III*, 740 F.3d at 225–27; *Kosilek II*, 889 F. Supp. 2d at 234 (including Dr. Forstein, Dr. Seil, Dr. Kaufman, Dr. Kapila of the Fenway Clinic, Dr. Brown, Dr. Applebaum, and Dr. Levin).

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

213 Brown v. Plata, 563 U.S. 493, 510 (2011).

There are many forms of cruelty; the denial of one's gender identity and expression is one that courts have yet to recognize. Perhaps it would require confronting the difficult reality that the mistreatment of trans prisoners is pervasive and severe, and that prisons may never not be an essentially violent space. Nevertheless, as long as there are trans people in prison, it remains the duty of courts to protect their Eighth Amendment rights. In educating fact-finders about the harm of denying gender-affirming care, advocates must uplift and center trans people's own narratives of gender and their experiences of incarceration. To do so is merely to respect the fundamental dignity, autonomy, and humanity of trans people.